IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	**No. 08 CR 846**
	)	**Honorable Joan H. Lefkow**
JON BURGE	)	

DEFENDANT'S RESPONSE TO CONSOLIDATED MOTIONS *IN LIMINE*

The government's consolidated motion *in limine* often resorts to requests not specifically tailored for this case. The defense attorneys in this case are experienced, and are familiar with proper courtroom procedures and the rules of evidence. We thus are surprised at some of the matters raised in the government's motion.

Pretrial motions *in limine*, raising issues akin to some raised by the government here, have not always been accepted with favor. In *United States v. Lowrance*, No. 89 CR 945 (April 10, 1991), Judge Kocoras stated:

> Now, the government has filed a motion *in limine*, which I think, mildly put, [defense counsel] found offensive because part of that motion is as if no one has ever tried a case around here and no one is familiar with the rules of evidence.
>
> I am going to deny the government's motion in full essentially based on the responses we got. Everybody knows the rules of evidence here. We may all disagree with their application from time to time, but there is no point in me giving you a blueprint on things that may or may not take place in this case, and there is no occasion to do that. So, as matters come up, I will rule in accordance with the rules of evidence.

Tr. 6. Likewise, in *United States v. Marcy*, 90 CR 1045 (N.D. Ill.), Judge Aspen opted not to issue a pretrial ruling on a similar government motion *in limine*.

The same course is appropriate here. Many of the matters in the government's motion simply cannot be viewed outside the pulse of the trial. *United States v. Caputo*, 313 F. Supp.2d 764, 767-68 (N.D. Ill. 2004); see *Kelly v. Boeing Petroleum Services,*

Inc., 61 F.3d 350, 357 (5th Cir. 1995) ("[w]e agree with other circuits that have cautioned that an appellate court should carefully examine blanket pre-trial evidentiary rulings").

1. Penalties

On one hand, the government argues that the defendant should be precluded from making arguments or introducing evidence regarding the penalties the defendant faces if convicted, including pension loss. On the other hand, the government states, "[t]he matters may of course be relevant cross-examination as to bias if the defendant chooses to testify." Motion, p. 1 n. 1.

Absent the defendant testifying, we do not intend to affirmatively adduce evidence or make arguments about the penalties *he* faces in the event of a conviction. We do not read the government's motion as seeking to bar cross-examination of government witnesses regarding penalties they faced. As the government concedes, this is legitimate cross-examination.

2. Jury Nullification

We do not intend to argue that "the government has met its burden of proof," but the jury should acquit anyway. Motion, p. 3.

The government seeks to preclude the defense from noting that the government has condoned "torture." The defendant does not intend to introduce pertinent government memos as evidence. If circumstances develop in which we would seek to advance an argument along these lines, we will front the matter.

We do not intend to argue that the government's witnesses were/are bad people who deserved to be "tortured." We do intend to cross-examine government witnesses fully in accordance with the Sixth Amendment and the Rules of Evidence.

3. Lawful Behavior

A. Awards and Commendations The government seeks to preclude evidence of the defendant's awards and commendations. It is difficult to address this request at the pre-trial stage. See *EEOC v. Smok'n Joe's Tobacco Shop, Inc*., 2007 WL 2461745 (E.D. Pa. 2007); see also *United States v. Brown*, 503 F.Supp.2d 239, 240 (D. D.C. 2007) (setting out general framework for character evidence, but declining to make specific rulings "as such evidentiary decisions are not yet ripe"); cf. *Charles v. Cotter*, 867 F.Supp. 648, 660 (N.D. Ill. 1994) (granting motion *in limine* in a civil case with leave to reopen if evidence from officer's disciplinary file was introduced).

Evidence of awards and commendation received by the defendant, and witnesses' knowledge of them, may become relevant depending on context. Cf. *Brown*, 503 F.Supp.2d at 243-44 (noting that commendations may be relevant to the case as a whole or the defense, and comparing commendations to specific instances of conduct). For example, evidence of awards and commendations may rebut testimony of government witnesses who testify about workplace conditions. See Gov't Motion *in Limine* Regarding Racial Animus, pp. 6-7. In addition, to the extent awards and commendations show the defendant's diligence, they are admissible to show that criminal defendants/arrestees had a motive/vendetta to fabricate allegations against him.

Further, if the defendant testifies, he is entitled to give a brief recitation of his background, including a synopsis of any awards or commendations:

> Witnesses in this Courthouse typically offer various limited background information at the beginning of their respective testimonies. This process is subject to reasonable limits concerning the length and substance of such testimony. Thus, a witness is invariably allowed to testify, if he or she chooses, that he or she is married, went to college, has children, has been promoted during their career, etc. -- even if those issues are not really

> being litigated in the case-as part of a brief, general, introduction to his or her testimony.
>
> In the setting of this case, this practice would allow Officer Banks to testify, if he chooses, about such general topics. He can explain that, if it is true, he was promoted from a trainee position, that he is married, and so forth. In this regard, it is common practice for law enforcement witnesses to briefly relate (i.e., in response to a question or two) whether they have received commendations during their career.
>
> Plaintiff has offered no convincing basis to deviate from that long-standing standard practice in this case. Such evidence is not character evidence, per se; it is simply general background information. Moreover, whether a person has ever received a commendation is not hearsay, any more than is testimony concerning whether the person is married or testimony that the person has graduated from medical school, or is employed as a police officer and so on.
>
> That said, the Court does not suggest that Officer Banks will be permitted to engage in an extended exegesis concerning the list of any commendations he has received. Nor will he be allowed to relate the details of incidents that led to such commendations, or the written substance of any awards he received (that would be hearsay).

Carlson v. Banks, 2007 WL 5711692 (N.D. Ill. 2007).

B. Evidence of Lack of Torture The government attempts to put a square peg into a round whole in seeking to preclude evidence "regarding interrogations, arrests, or other police functions where the defendant did not torture or abuse suspects." Motion, p. 4. Rather than address the particulars of this case, the government offers boilerplate.

The threshold question is whether the interrogations are relevant within the meaning of Rule 401. As stated in *United States v. Burke*, 781 F.3d 1234, 1243 (7th Cir. 1985): "[T]he question in each case is whether prior conduct makes more or less likely the existence of some fact that matters … It is therefore difficult to frame general statements. The pertinence of prior conduct is a question of more or less, not of yes or no." See *United States v. Santos*, 201 F.3d 953, 960 (7th Cir. 2000) (district court erred in excluding defense evidence on grounds "it was merely evidence of 'good acts'"; the

purpose of the proffered evidence must be examined; defendant is entitled to admit evidence of transactions dispelling the government's theory); see also *United States v. Posner*, 1987 WL 17150 (N.D. Ill. 1987) ("prior lawful conduct can be relevant to questions of intent or other issues besides mere conformity with prior conduct").

Relevancy must be measured by looking to the particulars of the charged offenses. In this case, the defendant is charged with obstruction of justice and perjury based on alleged written interrogatory answers to the following questions:

> QUESTION # 13: State whether you have ever used methods, procedures or techniques involving any form of verbal or physical coercion of suspects while in detention or during interrogation, such as deprivation of sleep, quiet, food, drink, bathroom facilities, or contact with legal counsel and/or family members; the use of verbal and/or physical threats or intimidation; physical beatings, or hangings; the use of racial slurs or profanity; the use of physical restraints, such as handcuffs; the use of photographs or polygraph testing; and the use of physical objects to inflict pain, suffering or fear, such as firearms, telephone books, typewriter covers, radiators, or machines that delivery electric shock …
>
> QUESTION # 14: State whether you were aware of any Chicago Police Officer, including but not limited to officers under your command, ever using methods, procedures or techniques involving any form of verbal or physical coercion of suspects while in detention or during interrogation, such as deprivation of sleep, quiet, food, drink, bathroom facilities, or contact with legal counsel and/or family members; the use of verbal and/or physical threats or intimidation; physical beatings, or hangings; the use of racial slurs or profanity; the use of physical restraints, such as handcuffs; the use of photographs or polygraph testing; and the use of physical objects to inflict pain, suffering or fear, such as firearms, telephone books, typewriter covers, radiators, or machines that delivery electric shock …
>
> QUESTION # 3: Is the manner in which Madison Hobley claims he was physically abused and/or tortured as described in Plaintiff's Complaint (including, for example, the allegations of "bagging" with a typewriter cover) consistent with any other examples of physical abuse and/or torture on the part of Chicago Police officers at Area 2 which you observed or have knowledge of? …

As can be seen, these questions did not limit themselves to the interrogations/ cases on the government's list *de jure*. Nor did the grand jury that returned the indictment limit the relevant interrogations/cases. The questions quoted in the indictment asked whether the defendant had "*ever used* methods, procedures or techniques …"; and whether he was aware of "*any* Chicago Police Officer … *ever using* methods, procedures or techniques …" The interrogatories framed the relevant universe of interrogations. The government cannot rewrite the questions by way of a motion *in limine*, and the government's decision to pursue charges based on broad and ambiguous questions cannot result in curtailment of the defense. Under the circumstances, "interrogations, arrests, or other police functions where the defendant did not torture or abuse suspects" are relevant to establish the truth of the defendant's alleged answers (essential elements of the offenses), and to negate criminal intent. See *United States v. Manos*, 848 F.3d 1427, 1430 (7th Cir. 1988) (city inspector charged with accepting bribes from restaurant owners was ultimately permitted "to elicit testimony regarding honest interactions" with restaurant owners).

In addition, the government's motion cannot be read to prevent the introduction of habit evidence. See Fed.R.Evid. 406. There can be no dispute that the universe of persons questioned at Area Two during the relevant time-frame is exceedingly large, and perhaps unquantifiable. If he so chooses, the defendant is entitled to show that his "regular response" to a repeated specific situation was to use proper interrogation techniques. Cf. *United States v. Warner*, 498 F.3d 666, 692-93 (7th Cir. 2007).

The government cites Second Circuit cases and a Fifth Circuit case that did not involve fact patterns resembling those before the Court.[1] Moreover, as noted, the Seventh Circuit addresses the admissibility of prior acts as a question of relevance, which, in turn, depends on purpose for which the evidence is offered. See *Santos*, 201 F.3d at 960; *Burke*, 781 F.3d at 1243; see also *United States v. Cunningham,* 103 F.3d 553, 556 (7th Cir. 1996) ("evidence of prior conduct may be introduced (subject to the judge's power to exclude it under Rule 403 as unduly prejudicial, confusing, or merely cumulative) for other purposes").[2] There is no categorical prohibition against the admission of evidence in this circuit simply because the government has resorted to "good acts" rhetoric.

Here, evidence of the defendant's use or non-use of the "methods, procedures or techniques" described in the interrogatory is directly relevant, notwithstanding the particular cases about which the government seeks to admit proof. The same is true of the defendant's lack of awareness of other officers' conduct. Evidence that the defendant did not use improper coercion methods, procedures and techniques in any instance, and

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[1] *United States v. Scarpa*, 897 F.2d 63, 70 (2nd Cir. 1990), involved a discovery issue, rather than an evidentiary ruling. *United States v. Beno,* 324 F.2d 582 (2nd Cir. 1963), preceded the Federal Rules of Evidence, and actually reversed the defendant's conviction on grounds that his improper introduction of character evidence did not open door to all instances of alleged improper conduct by the defendant. In *United States v. Grimm,* 568 F.2d 1136, 1138 (5th Cir. 1978), the government's witness testified about other instances of conduct (submission of drafts to purchase vehicles); the court of appeals found that the district court did not abuse its discretion in not admitting evidence of 75 drafts on grounds that such evidence was cumulative, complicated and confusing.

[2] Although not cited by the government, *United States v. Hill,* 40 F.3d 164, 169 (7th Cir. 1994), upheld the exclusion of subsequent good act evidence, *inter alia*, on grounds it was "only tangentially relevant" to earlier embezzlement.

his lack of knowledge of such conduct by other officers is relevant to counter the indictment.

Precluding the defense from showing the government's failure to prove the falsity of the answers to the charged questions would impinge the defendant's constitutional right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006); *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Rock v. Arkansas*, 483 U.S. 44, 58 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). For this reason as well, the government's motion *in limine* ought to be denied, or, alternatively, deferred until trial.

4. Prosecutorial Decisions

A. We do not intend to introduce evidence that the government waited until near the expiration of the statute of limitations to seek an indictment. If this changes, we shall provide notice.

B. We do not intend to admit evidence that the State failed to charge the defendant with a substantive offense. The Cook County State's Attorneys investigation into police treatment of Andrew Wilson, however, may become relevant. The point of such evidence would not be to show that the defendant wasn't charged with a crime, but to show that the allegations were unfounded because Wilson refused to cooperate.

C. Defendant does not intend to admit evidence of the government's motives in failing to charge others. Defendant moves to preclude any evidence of argument of any pending grand jury investigations. See Renewed Motion to Change Venue.

5. Alibi

Rule 12.1 of the Federal Rules of Criminal Procedure requires notice of "each specific place where the defendant claims to have been at the time of the *alleged offense*." Here, the indictment alleges that Count One occurred on November 12, 2003, and that Counts Two and Three occurred on November 25, 2003.

It is unclear whether the government is contending that the defendant must disclose notice of alibi with respect to the particular interrogations it deems relevant. If that's the position, these are not "alleged offenses" within the meaning of Rule 12.1. Cf. *United States v. Ducran*, 639 F.Supp.2d 127 (D. Mass 2009) (notice of alibi provision applies only to offenses charged in the indictment and not uncharged conduct); *United States v. Gilbert*, 188 F.R.D. 176 (D. Mass. 1999) (same). If the Court's interpretation of Rule 12.1 differs from ours, then we respectfully move the Court to set a reasonable date for the filing of alibi notices.[3]

6. Discovery Requests

This request is unnecessary. If the government has provided all discovery, mid-trial discovery requests will not ensue. If the Court opts to enter an order on this subject, it should be made applicable to both sides.

7. Convictions In Excess of 10 Years

On March 24, 2010, the government added names to the list of interrogations about which it intends to adduce evidence. On or about March 31, 2010, the defense

[3] The government recently *added* interrogations to its list of relevant cases. Defendant is in the process of investigating these interrogations (which occurred more than 25 years ago). Further, the defendant has previously adduced evidence of his whereabouts for certain times on the day of Andrew Wilson's arrest, and may do so in this case. Defendant's witness list contains names of the relevant witnesses.

received the government's 3500 material, which includes "rap sheets." On April 1, 2010, the government filed its witness list. As the government notes, some government witnesses have been convicted of criminal offenses.

The government requests that the defense provide written notice of intent to use convictions that are more than 10 years old within the meaning of Rule 609 at least two weeks before trial. Defendant does not object to the setting of a date for written notice of intent to use convictions pursuant to Rule 609(b).

8. Details of Convictions

A. In General Details of witness conduct are not automatically precluded because the conduct also formed the basis of a conviction. See, *e.g., Davis v. Alaska*, 415 U.S. 308, 316-317 (1974) (noting the distinction between impeachment with a prior conviction, and a "more particularized attack on witness credibility"); *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1158-60 (9th Cir. 1977) (discussing Supreme Court cases). For example, in instances in which a government witness confessed to a crime, the details of the *confession* are relevant to show the totality of the interrogation circumstances. When a witness contends that he confessed because he was "tortured," evidence that the witness confessed, not because he was "tortured," but because he in fact committed the acts to which he admitted, has probative value. In such instances, the circumstances of the interrogation – including what the witness may have said – will be offered to rebut the government's case, and cast doubt on the witness' testimony. Cf. *United States v. Mayer*, 556 F.2d 245, 248 (5th Cir. 1977) ("[c]ross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope") (citations omitted); *United*

States v. Callahan, 551 F.3d 773 (6th Cir. 1977) (district court erred in precluding defense from cross-examining witness about alternative explanation).

In addition, a witness' conduct for which he was also convicted may be relevant to show bias, interest and motive for the witness' allegations against the defendant. For example, a witness on parole at the time of an arrest would have a clear motive to fabricate "torture" allegations in order to avoid conviction on the new case, and parole revocation. Cross-examination along these lines does not delve into exposing the details of a prior conviction simply for the sake of sullying the witness. Rather, such cross-examination probes the witness' motive to fabricate. Exploration of a witness' bias, interest and motive for making allegations against the defendant is plainly permitted under the Confrontation Clause. See *Davis,* 415 U.S. at 315-317; see also *United States v. Abel*, 469 U.S. 45, 52 (1984) ("[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony"); *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79 (1986) ("exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination"); *Alford v. United States*, 282 U.S. 687 (1931) (permissible cross-examination purposes include the identification of the witness in his environment and discrediting facts).

The government requests that the defendant front intent to question a witness about the details of his prior convictions before the witnesses' testimony. In *Alford*, the Supreme Court stated: "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason, it is necessarily exploratory, and the

rule that the examiner must indicate the purpose of his inquiry does not in general apply." *Id*. at 692; see also *United States v. Vargas*, 933 F.2d 701, 709 (9th Cir. 1991) ("Trial attorneys cannot prepare their cross-examinations entirely in advance. As our system of trial procedure has evolved, the opportunity for effective cross-examination depends on attorney's ability to adjust their questioning as they constantly reassess the jurors' reactions to the witness and the previous questions."). Keeping in mind that the government recently added to the list of interrogations, filed its witness list and tendered 3500 material, issues relating to cross-examination about conduct that also formed the basis for a conviction are best addressed at trial, rather then through issuance of a blanket pre-trial ruling.

B. Andrew Wilson Based on *Wilson v. City of Chicago*, 6 F.3d 1233, 1236 (7th Cir. 1993), the government moves to preclude "cross-examination" about Andrew Wilson's crimes. The government has not specifically identified any questions.

The parties have not reached an agreement regarding the format of Wilson's prior testimony. As proponent of the evidence, the government must satisfy the Rules of Evidence. Defendant does not intend to stipulate to a "summary" of Wilson's testimony, and believes that the prior testimony must be presented in a manner that attempts to replicate his live testimony (although that is impossible). If the government deems particular questions in Wilson's prior cross-examination objectionable, then objections to those questions should be made, so the defense may respond and the Court may rule.

9. Arrests

Without pointing to anything specific, the government moves to preclude evidence of prior arrests. An arrest does not necessarily insulate a witness from cross-

examination on relevant matters relating to bias, interest, motive and credibility. See *United States v. Alexius*, 76 F.3d 642 (5th Cir. 1996) (cross-examination should have been permitted on pending charges); *United States v. Anderson*, 881 F.2d 1128 (D.C. Cir. 1989) (district court erred in not allowing cross-examination about dismissed murder charge); *United States v. Bulman*, 667 F.2d 1374 (11th Cir. 1982) (arrests that had been dropped would be admissible); *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1158-60 (9th Cir. 1977).

The government acknowledges that conduct underlying an arrest may be admissible under Rule 608(b). Defendant agrees, but conduct relating to truthfulness is not the *only* catalyst for permitting cross-examination when an arrest is in the mix.

The government's motion overlooks the circumstances of this case. The interrogations about which the government intends to present evidence were preceded by arrests. The totality of the circumstances surrounding the interrogations at issue cannot be sanitized by removing the fact of arrest.

Concerning arrests for other offenses, the government, again, offers nothing specific. Issues relating to cross-examination about conduct that also formed the basis for an arrest are best addressed at trial.

10. Pre-Cross-Examination Disclosure of Bad Acts

Citing no authority, the government maintains that the "defendant should identify prior to each witness's examination any prior bad act about which they intend to cross-examine a witness and demonstrate how that conduct is probative of truthfulness." Motion, p. 13.

The government's attempt to secure a preview of cross-examination should be denied. Unlike Rule 404(b), Rule 608 does not contain a notice provision. There is no authority for requiring a party to disclose Rule 608(b) material in advance of trial. *E.g.*, *United States v. Bryant*, 420 F.Supp.2d 873 (N.D. Ill. 2006); *United States v. Balogun*, 971 F.Supp. 1215 (N.D. Ill. 1997); *United States v. Schoeneman*, 893 F.Supp. 820 (N.D. Ill. 1995). If the government deems a particular question objectionable, it can object and the Court may then rule.[4]

11. Police Witness Misconduct

On March 31, 2010, one of the defense lawyers received a letter from the government in which it disclosed possession of a multitude of complaint register ("CR") files for three witnesses who were formerly employed by the Chicago Police Department: three files for Witness A; ten files for Witness B; and eleven files for Witness B. (The government did not tender the actual files, and we have recently requested them.) The government has not disclosed the witnesses' present responses to the CR complaints, *e.g.,* did the witness lie to OPS investigators *etc*.?

Obviously, more time is needed for the defense to investigate these matters. Defendant cannot effectively stake out a position absent examining the CR files, including any statements of the witnesses. Accordingly, we respectfully move the Court to take up issues relating to the complaints filed against police witnesses at trial.

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[4] The government argues that gang membership and tattoos are not "bad acts" and are not admissible "absent some other relevance." Defendant does not contend that gang allegiance is a Rule 608(b) bad act. But gang membership will have relevance to the circumstances of certain interrogations, and the theory of defense, *i.e.,* that gangs had an edict to manufacture "torture" allegations against the defendant and other officers.

In its motion *in limine*, the government moves to preclude cross-examination on the subjects of the CR files because the complaints were not sustained, or did not involve untruthfulness. Concerning the failure to sustain allegations, the government argues, "If the bare fact of an accusation provided a good faith basis for cross-examination, defendants could 'manufacture' impeachment evidence by simply making complaints." Motion, p. 14. Here, however, there is no evidence that the defendant was ever the complainant Moreover, the government cites no authority for the proposition that a complaint must be sustained as a prerequisite for cross-examination. What is necessary is a good faith basis. See *Oostendorp v. Khanna*, 937 F.2d 1117 (7th Cir. 1991) ("[c]ross-examiners must have a good faith basis for their questions … but do not have an affirmative duty to introduce the factual predicate for impeachment"). In *United States v. Holt*, 817 F.2d 1264, 1274 (7th Cir. 1987), the court found that a good faith basis was shown by a third-party's statement to an investigating agent.

The existence of an internal investigation does not render the underlying line of cross-examination taboo. See *United States v. Hitchmon*, 609 F.3d 1098 (5th Cir. 1979); *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976). As argued above, the defense must be given wide latitude in cross-examining on the subjects of bias, interest and motive to curry favor with the prosecution. Furthermore, if the subject matter of inquiry relates to the witness' credibility, it is fair game for cross-examination. Hence, the witness' claimed false statements to investigators are fodder for cross-examination, as are thefts, *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (*en banc*). (Our preliminary review has disclosed the existence of both circumstances with respect to a critical government witness.)

Respectfully submitted,

*/s/ Marc W. Martin*__________

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United States District Court,
E.D. Pennsylvania.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
Kari Wasylak, Intervenor,
v.
SMOKIN' JOE'S TOBACCO SHOP, INC., Defendant.
Civil Action No. 06-01758.

Aug. 22, 2007.

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MEMORANDUM

STENGEL, J.

***1** This is a sexual harassment and retaliation case. Plaintiff/intervenor Kari Wasylak alleges that her supervisor, Darryl Wormuth, sexually harassed her and created a hostile work environment. Wasylak further alleges that Smokin' Joe's terminated her in retaliation for lodging a sexual harassment complaint. Defendant maintains that Wasylak did not experience sexual harassment and that she abandoned her job and was eventually terminated for refusing to cooperate in the sexual harassment investigation several weeks after she stopped showing up for work. In preparation for the upcoming trial, the court held a hearing on the parties motions in limine. After considering the parties' motions and hearing argument, I will rule on the motions as discussed below.

I. Plaintiff's Motions

A. Amended Motion in Limine to Exclude Evidence of Darryl Wormuth's Awards and Commendations

Plaintiff moves to exclude evidence of awards, recommendations and training Mr. Wormuth received as a volunteer fireman, for his military training, discharge or awards. Plaintiff argues that this evidence is irrelevant under Rule 402, is inadmissible character evidence under Rule 404, and would be prejudicial to plaintiff under Rule 403.

Defendant responds that this evidence is admissible under Rule 608(a) to rebut plaintiff's expected attack on Mr. Wormuth's character and his credibility. Rule 608(a) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." FED.R.EVID. 608.

Prior to trial, it is not possible to determine

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if plaintiff will attack Mr. Wormuth's character and make it necessary for defendant to introduce evidence of Mr. Wormuth's character for truthfulness. Therefore, I will deny this motion and make rulings on the admissibility of Mr. Wormuth's awards and commendations at trial depending on the evidence presented in plaintiff's case.

B. Motion in Limine to Exclude Evidence of Accelerated Rehabilitative Disposition

As plaintiff's motion is unopposed, the court will grant plaintiff's motion.

C. Motion in Limine to Exclude Evidence of Sexual History and Marital Status and Defendant's Cross Motion Pursuant to Rule 412

In order to prevail on a sex discrimination hostile environment claim, a plaintiff must prove five elements: "(1) she suffered intentional discrimination because of her [sex]; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected her; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability is present." *Jensen v. Potter,* 435 F.3d 444, 449 (3d Cir.2006). The Supreme Court has stated that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris v. Forklift Sys.,* 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Therefore, a plaintiff's sexual conduct at work is relevant to the issue of whether she was offended when others engaged in similar conduct at work. *Flick v. Aurora Equipment Co., Inc.,* No. 03-2508, 2004 U.S. Dist. LEXIS 4304, *6 (E.D.Pa. Jan. 15, 2004) (citing *Meritor Sav. Bnk, v. Vinson,* 477 U.S. 57, 69, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). This is still true even if the alleged harasser did not observe plaintiff's conduct because plaintiff's actions are evidence that she was not offended by the sexual conduct of others in the workplace. *Id.* Courts in the Third Circuit follow this view. *See Flick,* 2004 U.S. Dist. LEXIS 4304 at *6-7 (finding that evidence of plaintiff's sexual conduct at work was relevant to the issue of whether plaintiff was offended when other co-workers engaged in similar conduct); *Fedio v. Circuit City Stores, Inc.,* No. 97-5851, 1998 U.S. Dist. LEXIS 21144, *6 (E.D.Pa. Nov. 4, 1998) (holding that even if plaintiff engaged in sexual conduct outside the workplace, the fact that plaintiff boasted about the conduct at the workplace made the actions relevant to her hostile work environment claim); *Sublette v. The Glidden Co.,* No. 97-5047, 1998 U.S. Dist. LEXIS 15692, *6-9 (E.D.Pa. Oct. 1, 1998) (holding that plaintiff's sexually provocative speech and dress at work were highly relevant to her hostile work environment claim).

***2** Once the evidence is deemed relevant, a court must determine whether it is admissible under Rule 412, which states that evidence in a civil case offered to prove a victim's sexual predisposition or behavior is not admissible unless the evidence "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 al-

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leged victim's reputation is admissible only if it has been placed in controversy by the alleged victim." FED.R.EVID. 412. Under subdivision (c) of Rule 412, a party intending to offer this evidence must file a written motion fourteen days before trial, which defendant has done, and the court must hold a hearing and in camera review.

Plaintiff requests a motion in limine to exclude evidence of her sexual history, marital status, and the illegitimacy of her child under Rule 412. Defendant has filed a cross-motion to introduce the following evidence about plaintiff's sexual conduct and marital status at trial: that plaintiff was unmarried when she worked at Smokin' Joe's; that she called Mr. Wormuth "peaches" and "big daddy," that she flirted with Mr. Wormuth, that she dated a co-worker, Lucas Gelatko, and that she spoke about her sexual relationship with Gelatko with other co-workers in the workplace.

Plaintiff contends that the allegations in the case do not involve the sexual behavior of any employee at Smokin' Joe's except for Mr. Wormuth and therefore plaintiff's own conduct is irrelevant. Plaintiff also suggests that the evidence should be excluded because she disclosed details of her sexual conduct to two other female employees in a private conversation. This position is unavailing under the caselaw described above. Plaintiff's discussion in the workplace of her sexual conduct outside the workplace is clearly relevant to defendant's theory that because plaintiff was single, dating a co-worker, and talked about her sex in the workplace, she may not have been offended by Mr. Wormuth's comments and inquiries. Plaintiff's conversation with her co-workers was not privileged and shows that plaintiff felt comfortable enough to have this conversation in a small work environment. Plaintiff also argues that there is a risk that her character will be tarnished if the jury realizes that she had a child out of wedlock. As defendant only seeks to introduce evidence that plaintiff was unmarried while employed at Smokin' Joe's, there is no risk of this occurring.

After considering the parties' motions and holding a sealed hearing on this issue, I will deny plaintiff's motion and grant defendant's cross motion to introduce plaintiff's sexual conduct at work and her marital status at the time she was employed at Smokin' Joe's.

D. Motion in Limine to Exclude Evidence of Alleged Drug Use

In 2004, Wasylak had a positive blood test showing the presence of marijuana. Wasylak seeks to exclude this evidence from trial, along with any suggestion that plaintiff used prescription drugs recreationally, since drug use outside of work does not violate any of Smokin' Joe's procedures and would be unduly prejudicial and confuse the issues for the jury under Rule 403.

***3** Defendant does not intend to introduce evidence regarding plaintiff's use of illegal substances or her recreational use of prescription drugs but does intend to introduce plaintiff's use of prescription medication drugs for her mental health before and after her employment at Smokin' Joe's. Plaintiff's medical records show that she has taken prescriptions for anxiety and depression since July 2002. Since plaintiff is claiming emotional damages and claims that she is required to take medication because of her experience in the workplace, these medications are highly relevant and should not be excluded. Therefore, I will

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permit defendant to introduce evidence of plaintiff's prescription drug use but not evidence of her alleged use of illegal drugs.

E. Motion in Limine to Prevent Defendant from Introducing Evidence of the Settlement of Erin Murphy's Claims

This suit was originally instituted by the EEOC on behalf of Erin Murphy, another employee of Smokin' Joe's, and Kari Wasylak. During the course of discovery, the EEOC entered into a consent decree disposing of its claims against defendant. Ms. Murphy also settled her claims for $6,000. The consent decree is not binding on plaintiff. While the parties have attempted to stipulate as to how to address the EEOC's involvement in the case, they have been able to do so.

Rule 408 prohibits evidence of compromises or offers to compromise "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction." FED.R.EVID. 408. The rule does not prohibit settlements offered for another purpose, including "proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution." *Id.*

Plaintiff wrongly asserts that Rule 408 bars the introduction of the settlement agreement. She further argues that defendants intend to introduce the settlement paid to Ms. Murphy and suggest that it is a reasonable award for plaintiff, which would be prejudicial to plaintiff's claims. Plaintiff further asks that defendant be precluded from making statements such as plaintiff's case demonstrates "the worst intentions of a private litigant to coattail into a completely undeserved monetary windfall." Defendant responds that plaintiff intends for Ms. Murphy to testify about her former claims. If so, it will need to introduce evidence of the consent decree and her settlement to prove Ms. Murphy's bias and prejudice. Defendant also requests that the court strike the EEOC from the caption because it would be prejudiced if it could not explain that the EEOC was no longer a party after entering into the consent decree.

I will grant plaintiff's motion to preclude defendant from introducing evidence of Ms. Murphy's settlement. Additionally, I will instruct the parties that Ms. Murphy's testimony should be limited to her own observations of the workplace while she was employed at Smokin' Joe's. I will also grant defendant's request to remove the EEOC from the caption on all documents published to the jury.

F. Motion in Limine to Exclude Testimony, Evidence, Argument, or Comment Inconsistent with 30(b)(6) testimony of Richard Prezelski

***4** At the oral argument, the parties started discussions to resolve the issues in this motion in limine on their own. Therefore, I will not rule on this motion at this time.

G. Motion for Spoliation Charge

Wasylak requests a charge that the jury can infer that the spoliation of an employee termination report [FN1] would show that Mr. Wormuth terminated Wasylak on March 3, 2005. Wasylak made the same argument in her motion for summary judgment and the court declined to grant her motion at that time, noting that it would reconsider the issue at trial.

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FN1. This is the document prepared by plaintiff's supervisor, Darryl Wormuth, on Thursday, March 3, 2005. According to Mr. Wormuth, the resignation paper said "that [Wasylak] had failed to show up to her scheduled shifts on the above dates" and assumed that she had resigned. Wormuth Dep. p. 137. Mr. Wormuth turned over the draft resignation report, along with other undelivered employee warnings and paperwork, to his supervisory replacement William Lowry. Smokin' Joe's has attempted to locate the draft report without success.

Spoliation is the destruction or alteration of evidence or the failure to otherwise preserve evidence for another party's use in pending or reasonably foreseeable litigation. *MOSAID Techs. Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332, 335 (D.N.J.2004). A court can impose sanctions for spoliation including "dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; and attorneys' fees and costs. *Id.* Spoliation sanctions "serve a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation ... [and] serve a punitive function, by punishing the spoliator for its actions, and a deterrent function ...". *Id.*

In considering whether to give the jury a spoliation charge, the court must consider the following factors: (1) whether the evidence in question was within the party's control; (2) whether the party actually suppressed or withheld evidence; (3) whether the destroyed evidence was relevant; (4) whether it was reasonably foreseeable that the destroyed evidence would be discoverable in subsequent litigation. *MOSAID Techs. Inc.,* 348 F.Supp.2d at 336. The first factor is satisfied because Smokin' Joe's had control over the resignation report. The fourth factor is also met because it was reasonably foreseeable that any employment records concerning plaintiff would be discoverable. In fact, this litigation itself was foreseeable because plaintiff informed Smokin' Joe's on March 1, 2005, before Mr. Wormuth even drafted the report, that she had retained an attorney and intended to sue. The second and fourth factors are less clear.

As to the second factor, there is some dispute in this Circuit as to what constitutes "actual suppression." "Some courts in the Third Circuit have construed 'actual suppression' to mean that the evidence must be intentionally or knowingly destroyed or withheld, as opposed to lost, accidentally destroyed or otherwise properly accounted for. Others have used a more flexible approach that defies being labeled as requiring intentional or knowing destruction ." *MOSAID Techs. Inc.,* 348 F.Supp.2d at 338 (internal citations omitted).

There is also a factual dispute between the parties concerning whether defendant actually suppressed the report. Mr. Wormuth testified that it was common practice to draft a resignation report if an employee did not show up for work and that he did not tell anyone else at Smokin' Joe's that he had filled out such a report. Mr. Lowry testified that he never received Ms. Wasylak's termination report from Mr. Wormuth when he turned over documents after being relieved of his managerial responsibilities. Plaintiff contends that the termination report was handed to Mr. Lowry on March 4th and defendant has proffered no

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explanation for the disappearance of the document.

***5** As to the fourth factor, the parties dispute the relevance of the termination report. Defendant contends that the missing draft report is not material because it does not intend to rely on the document. Instead, defendant will likely argue that it plaintiff abandoned her job and it terminated plaintiff on March 21, 2005 for failing to cooperate with a company investigation. Plaintiff argues that the missing report is relevant because it would give an earlier date for the termination of March 3, 2005; give the reason for the termination; and disclose whether there was an ongoing investigation at the time into an incident involving Ms. Murphy and plaintiff.

I will deny plaintiff's request for a spoliation charge at this junction because there is a factual dispute concerning whether the defendant actually suppressed the report. Depending on the facts developed in evidence, I will consider an appropriate jury charge [FN2] for the termination report if defendant does not produce the report at trial.

FN2. In addition to a spoliation charge, I will also consider charging the jury that if a party fails to produce a piece of evidence that is under its control, the jury can infer that the evidence is unfavorable to the party who could have produced it and did not.

II. Defendant's Motions

A. Motion in Limine to Exclude at Trial Any Evidence of the EEOC's Determination

Defendant moves for exclusion of the EEOC determination because it was not issued in accordance with EEOC regulations and is hearsay. Plaintiff counters that the report is admissible as a hearsay exception.

Rule 803(8) excludes the following items from the hearsay bar:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED.R.EVID. 803(8). It is widely held that “prior administrative findings made with respect to an employment discrimination claim may be admitted” pursuant to Rule 803(8)(C). *Coleman v. Home Depot, Inc.,* 306 F.3d 1333, 1341 (3d Cir.2002) (citing *Chandler v. Roudebush,* 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976)). To rebut this presumption of admissibility; the opposing party must establish enough negative factors to persuade a court that the report should not be admitted. *In re Nautilus Motor Tanker Co.,* 85 F.3d 105, 113 (3d Cir.1996).

The principal basis for excluding government reports under Rule 803(8)(C) is untrustworthiness. *Coleman,* 306 F.3d at 1341-42. In the Third Circuit, a court should evaluate the report using the following factors [FN3] to make this determination:

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FN3. The court also cited the following additional factors: "(1) The finality of the agency findings, i.e., the state of the proceedings at which the findings were made (whether they are subject to subsequent proceedings or de novo review), and the likelihood of modification or reversal of the findings. (2) The extent to which the agency findings are based upon or are the product of proceedings pervaded by receipts of substantial amounts of material which would not be admissible in evidence (e.g., hearsay, confidential communications, ex parte evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding. (3) If the findings are products of hearings, the extent to which appropriate safeguards were used (Administrative Procedure Act, Due Process), and the extent to which the investigation complied with all applicable agency regulations and procedures. (4) The extent to which there is an ascertainable record on which the findings are based. (5) The extent to which the findings are a function of an executive, administrative, or legislative policy judgment (as opposed to a factual adjudication) or represent an implementation of policy. (6) The extent to which the findings are based upon findings of another investigative body or tribunal which is itself vulnerable as a result of trustworthiness evaluation. (7) Where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in a particular field. *Coleman,* 306 F.3d at 1342 (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.,* 505 F.Supp. 1125, 1147 (E.D.Pa.1980).

(1) the timeliness of the investigation;

(2) the special skill or experience of the official;

(3) whether a hearing was held and the level at which conducted;

***6** (4) possible motivation problems.

Id. at 1342 (citing Fed.R.Evid. 803(8)(C) advisory committee's notes). Even if a report is admitted under Rule 803(8), a trial court can still exclude it as prejudicial under Rule 403. *Id.* at 1335.

First, defendant argues that the determination should be excluded because the EEOC exceeded its authority when it stated that it had found violations of Title VII because plaintiff and another female employee were subjected to sexual harassment, a hostile work environment, and plaintiff was subjected to retaliation and discharged. According to EEOC regulations, the commission can only "issue a determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring". *See* 29 C.F.R. § 1601.21(a). This argument is spurious; the language of the regulation does not preclude the EEOC from stating that Smokin' Joe's discriminated against its employees. Moreover, the next sentence of the letter states that the investigator "finds reason to believe that violations have occurred." Def's Mot. Ex. A. It is not possible, or material, to determine whether the EEOC letter is a reasonable cause finding or a violation finding.

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Defendant also argues that the EEOC determination lacks trustworthiness. Defendant asserts that the EEOC made its determination based on minimal evidence and did not cross examine witnesses during the fact finding conference. Defendant also states that the report was made in anticipation of litigation and suggests that both the plaintiff and the EEOC was biased.

Defendant's assertions lack merit. The EEOC determination is trustworthy. The investigation was timely: the EEOC complaint was filed on March 7, 2005, the fact-finding conference was held on July 21, 2005, and the determination was issued in February 2006. The EEOC investigation spanned 13 months. At the hearing, plaintiff proffered the five-hundred page investigation file. The file involves at least twenty-nine employees and makes specific factual findings. Defendant attended a fact finding conference and submitted evidence in support of its position.

Defendant also argues that the EEOC determination should be excluded under Rule 403 because its minimum probative value is substantially outweighed by the danger of unfair prejudice, confusion, and delay. This decision, again, is within the discretion of the trial court and to be determined on a case-by-case basis. *Coleman,* 306 F.3d at 1345.

It is well established that when an EEOC letter is inaccurate it can be excluded under Rule 403 for its low probative value and risk of undue delay. *Coleman,* 306 F.3d at 1346 (holding that the district court did not abuse its discretion in concluding that the EEOC report creating the risk of undue delay because the report's conclusion that the employee was highly experienced was shown to be incorrect through the plaintiff's own testimony); *Kovacs v. Conmed,* No. 04-1667, 2006 U.S. Dist. LEXIS 29437, at *5 (E.D.Pa. May 11, 2006) (excluding EEOC letter that contained various inaccuracies). Here, defendant does not contend that specific information in the EEOC letter is incorrect.

***7** Courts in the Eastern District advance varied reasons for excluding or admitting EEOC determinations. One court excluded the evidence as cumulative, since it would repeat facts proven at trial, and found that the jury would give undue weight to the letter's statement that there was discrimination. *Cambra v. The Rest. Sch.,* No. 04-2688, 2005 U.S. Dist. LEXIS 26231, *11-12 (E.D.Pa. Nov. 2, 2005). Another court opined that introducing the EEOC findings could consolidate the trial because the parties could rely on the findings instead of live witnesses. *Oliver v. Bell Atlantic Corp.,* No. 92-751, 1992 WL 535594, *2 (E.D.Pa. Oct.5, 1992). The court also held that a limiting instruction would prevent the jury from giving the report undue weight.

While I think that the EEOC report is admissible under Rule 803(8)(C), I will exclude it under Rule 403 as unduly prejudicial and cumulative. If the determination letter comes into evidence, it will be a sideshow that distracts the jury and lengthens the trial. The report is not binding on the jury. The defendant will have to spent a substantial amount of time discrediting the investigation, which will needlessly extend the trial. While plaintiff's case will parallel the ground covered by the EEOC report, plaintiff does not contend that evidence in the EEOC determination and investigation cannot be presented through first-person witnesses or other documents. Therefore, there is no prejudice to the plaintiff in excluding the information

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from trial. Even with a limiting instruction, it would be overly prejudicial to defendant to inform the jury that a governmental body found reasonable cause to believe that discrimination had occurred. I will therefore exclude the report.

IV. CONCLUSION

I will rule on the parties' motions as discussed above. An appropriate order follows.

ORDER

AND NOW, this 22nd day of August, 2007, upon consideration of the parties' motions in limine and the responses thereto and after hearing oral argument on the motions, it is hereby **ORDERED:**

(1) Plaintiff's Amended Motion in Limine to Exclude Evidence of Awards or Commendations to Darryl Wormuth (Document No. 79) is **DENIED** and plaintiff's First Motion in Limine to Exclude Evidence of Awards or Commendations to Darryl Wormuth (Document No. 70) is **DENIED** as **MOOT.**

(2) Plaintiff's Second Motion in Limine to Exclude Evidence of Accelerated Rehabilitative Disposition for Driving Under the Influence (Document No. 71) is **GRANTED.**

(3) Plaintiff's Third Motion in Limine to Exclude Evidence of Sexual History and Marital Status (Document No. 72) is **DENIED.** Defendant's Cross Motion pursuant to FRCP 412(c) (Document No. 90) is **GRANTED.** Defendant is permitted to introduce evidence at trial regarding plaintiff's sexual conduct in the workplace and her marital status at the time she was employed with defendant.

(4) Plaintiff's Fourth Motion in Limine to Exclude Evidence of Alleged Drug Use (Document No. 73) is **DENIED.** Defendant is precluded from introducing evidence of illegal or recreational drug use by plaintiff but may introduce evidence of prescription medication drugs taken by the plaintiff prior to and after her employment with defendant.

***8** (5) Plaintiff's Motion in Limine to Prevent Defendant from Introducing Evidence of the Settlement of Erin Murphy's Claims (Document No. 80) is **GRANTED.** Ms. Murphy's testimony is limited to her own observations of the workplace while she was employed with defendant. Defendant is not to introduce evidence concerning Ms. Murphy's remuneration. All documents submitted to the jury should omit the EEOC from the caption and solely list Kari Wasylak as plaintiff.

(6) Plaintiff's Amended Motion to Permit Jury Instruction Concerning Spoliation (Document No. 85) is **DENIED.** Plaintiff's Motion to Permit Jury Instruction Concerning Spoliation (Document No. 74) is **DENIED** as **MOOT.**

(7) Defendant's Motion in Limine to Exclude at Trial Any Evidence of the Equal Employment Opportunity Commission's Determination and Testimony Regarding the Determination (Document No. 86) is **GRANTED .** Plaintiff is precluded from introducing the EEOC determination and any evidence regarding its existence at trial.

(8) The court will not rule on plaintiff's Motion in Limine to Exclude Testimony, Evidence, Argument or Comment Inconsistent with 30(b)(6) Testimony of Richard

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Prezelski (Document No. 83) at this time as the parties are attempting to resolve this issue. The parties are requested to inform the court no later than ten (10) days before the trial begins if they would like the court to rule on this motion.

E.D.Pa.,2007.
E.E.O.C. v. Smokin' Joe's Tobacco Shop, Inc.
Not Reported in F.Supp.2d, 2007 WL 2461745 (E.D.Pa.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois.
CARLSON
v.
Officer BANKS and Village of South Chicago Heights.
No. 05 C 1650.

Feb. 2, 2007.

West KeySummary
Civil Rights 78 1412

78 Civil Rights
78III Federal Remedies in General
78k1408 Admissibility of Evidence
78k1412 k. Criminal Law Enforcement; Prisons. Most Cited Cases
References to prior injuries an arrestee may have suffered before her arrest were not excludable, on a motion in limine, in the arrestee's § 1983 action alleging use of excessive force and false arrest. If the arresting officer and village could establish by competent medical evidence that there was a causal connection between the prior injury and the injury allegedly arising from the arrest, that evidence was admissible. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Named Expert: Ms. Susan Merl Nachinson, Dr. Michael H. Haak, M.D., Dr. Martin Herman
Blake Wolfe Horwitz, Amanda Sunshine Yarusso, Tali K. Albukerk, Horwitz, Richardson & Baker, LLC, Chicago, IL, for Plaintiff.

Patrick John Ruberry, Litchfield Cavo, LLP, Chicago, IL, for Defendant.

STATEMENT

MARK FILIP, J.

INTRODUCTION

***1** Marlene Carlson ("Carlson" or "Plaintiff") sued Officer Dean Banks and the Village of South Chicago Heights under 42 U.S.C. § 1983 and Illinois common law for injuries she allegedly suffered when Officer Banks stopped her for a traffic violation on May 9, 2004. (D.E. 1 ¶ 4.) Carlson claims Officer Banks "arrested, grabbed and pushed [her] into her car, placed her prostrate, struck and manhandled her." (*Id.*) Plaintiff has advanced various claims, including excessive force and false arrest in violation of the Fourth Amendment. (*Id.* ¶¶ 7, 8.)

The defense acknowledges that Officer Banks arrested Carlson on the night in question, but denies any use of excessive force and raises the issue of qualified immunity. (D.E. 51-1 at 1.) According to the defense, Officer Banks stopped Carlson for speeding (*id.* at 1-2), she got out of her car and argued with him about giving her a ticket (*id.* at 2-3), and he had probable cause to arrest her for obstruction of a police officer after she continually refused to get back into her car (*id.* at 3). The defense further alleges that after Officer Banks informed Carlson she was under arrest and attempted to place her in the squad car, she began pulling away from him, kicking, and screaming. (*Id.*) "In what can only be characterized as resisting arrest, Ms. Carlson twisted, pulled and attempted to break away from the officer ." (*Id.*) According to the defense, an off-duty Harvey police officer arrived on the scene at this point and

helped Officer Banks put Carlson in the squad car, whereupon she began kicking the car's interior. (*Id.*) Carlson was charged with obstructing a police officer, resisting a police officer, and battery to a police officer. (*Id.*) These criminal charges were dismissed due to the state's attorney's failure to comply with a discovery order. (*Id.*)

Various motions in limine were filed, and some of those that were unopposed were previously resolved; the remaining unopposed motions are granted. This order resolves those motions in limine that are pending and disputed.

I. Legal Standards

A motion in limine should be granted if the evidence at issue clearly is admissible or inadmissible. *See Acevedo v. Canterbury,* No. 03 C 0073, 2004 WL 1166602, *1 (N.D.Ill. May 24, 2004) (Kocoras, C.J.) (citing *Hawthorne Partners v. AT & T Techs., Inc.,* 831 F.Supp. 1398, 1400 (N.D.Ill.1993) (Conlon, J.)). If evidence is not clearly admissible or inadmissible, " 'evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in the proper context.' " *Tzoumis v. Tempel Steel Co.,* 168 F.Supp.2d 871, 873-74 (N.D.Ill.2001) (Nordberg, J.) (quoting *Hawthorne Partners,* 831 F.Supp. at 1400). Caselaw teaches that when a district court denies a motion in limine, particularly without prejudice, the court does not hold that the evidence relating to the motion is guaranteed to be admitted or excluded at trial. *See, e.g., United States v. Connelly,* 874 F.2d 412, 416 (7th Cir.1989) ; *Acevedo,* 2004 WL 1166602, at *1. Put differently, denial of a motion in limine "merely means that without the context of trial, the court is unable"-or at least is not best positioned to fairly resolve-"whether the evidence in question should be excluded" or admitted. *Hawthorne Partners,* 831 F.Supp. at 1401.

II. Plaintiff's Motions in Limine

A. Plaintiff's Second Motion in Limine, to Exclude References to Injuries Suffered before Her Arrest, Is Denied.

***2** Plaintiff's second motion in limine seeks to exclude references to any injuries or medical conditions she suffered from prior to the arrest on May 9, 2004, unless Defendants can establish "by competent medical evidence that there is a causal connection to a prior injury (physical or emotional) of the Plaintiff and that to which Plaintiff complains at trial." (D.E. 74-1 at 2.) Specifically, Plaintiff seeks to exclude evidence of her spondylolisthesis; in this regard, she concedes that "the condition is clearly one that takes time to develop as it is caused by degeneration." (*Id.*) Plaintiff further asserts that "there is no evidence that Plaintiff had any medical problems (*i.e.,* manifestation of pain) in this connection," but suggests that the defense "may try to introduce evidence of prior manifestation of this condition. Plaintiff seeks to preclude the introduction of this evidence, in limine, as there is no scientific basis for the admissibility of same." (*Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).)

Defendants object to this motion, principally on two grounds. First, Defendants argue that Plaintiff's second motion "must be denied on its face inasmuch as Carlson has failed to comply with Fed.R.Civ.P. 26(a)." (D.E. 75-2 at 1.) Defendants argue that Plaintiff never provided a proper Rule

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26(a)(2)(A) disclosure regarding the treating physicians she intends to have testify about causation or permanency of her injuries. (*Id.* at 2.) Plaintiff responds that she did indeed provide the proper disclosure, on Nov. 22, 2005, seven days after it was requested. (*See generally* D.E. 83-2; D.E. 83-3.) This Court will assume, *arguendo,* that Plaintiff's assertion is correct, because the motion independently fails for other reasons. Second, Defendants argue that Plaintiff's second motion in limine should be denied because several witnesses-including physicians tendered as witnesses for Plaintiff-testified at their depositions that Plaintiff suffered back problems prior to the arrest in question. (D.E. 75-2 at 2-3.) For example, one of Plaintiff's orthopedic surgeons, Dr. Richard Lim, allegedly testified that Carlson herself could have aggravated her pre-existing spondylolisthesis by resisting arrest. (*Id.* at 3.) Defendants argue that Plaintiff has failed to show that these witnesses (including Plaintiff's own physicians) are unreliable, or, more specifically, that their methods are untrustworthy, such that they should not be allowed to testify as experts, including on cross-examination.

For the reasons discussed below, Plaintiff's motion is respectfully denied. First, Plaintiff has qualified her motion to exclude evidence of prior injuries with the admission that, if Defendants can establish by "competent medical evidence" that there is a causal connection between the prior injury and the injury at issue in this case, then that evidence should be admissible. The Court agrees, and, in fact, Defendants appear to agree. Defendants do not argue that they should be allowed to offer non-expert testimony about details concerning spondylolisthesis or similar subjects. Instead, they argue that various witnesses in question are qualified to testify as experts, and that Plaintiff has not shown that these witnesses' methods are unsound. (D.E. 75-2 at 3.) Plaintiff's less-than-a-page motion certainly has not made such a showing, so the motion cannot be credited. Nor does Plaintiff give any basis to think that the defense cannot cross-examine Plaintiff's own examining physicians about potential caveats or qualifications that may limit the scope or impact of their conclusions.

***3** Second, in more general terms, it is also conceivable that such evidence would be admissible even without the testimony of a qualified expert. Expert testimony is not always required to prove existence of an injury or manifestations of it or its symptoms. *See generally, e.g., Gil v. Reed,* 381 F.3d 649, 659 (7th Cir.2004) (citing, *inter alia, Ledford v. Sullivan,* 105 F.3d 354, 360 (7th Cir.1997)); *Musser v. Gentiva Health Services,* 356 F.3d 751, 760 (7th Cir.2004). For example, Plaintiff asserts that there is no evidence that she had any "manifestation of pain" in connection with her pre-existing medical conditions; however, if there is such evidence of pain (and such evidence could come from any number of non-expert sources, including admissions or statements of Plaintiff herself to others), then there is no basis for this Court to, as Plaintiff suggests, "preclude the introduction of this evidence." (D.E. 74 at 2.) At this juncture in the case, it is unclear whether expert testimony will be required or not; that decision should be deferred until trial, so that any questions of foundation can be addressed in the proper context. *See Tzoumis,* 168 F.Supp.2d at 873-74 (quoting *Hawthorne Partners,* 831 F.Supp. at 1400). This uncertainty independently militates against granting Plaintiff's motion.

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Third, although resolution of Plaintiff's second motion in limine does not strictly depend on the admissibility of expert testimony, both parties treat the motion as though that is the case, and therefore it is prudent to lay out the legal principles governing expert testimony here. In any event, these principles will be useful for some of the parties' subsequent motions. As discussed below, Plaintiff has not shown that any of the witnesses in question should not be qualified to testify as experts regarding her prior injuries. Nor has she argued that such evidence is irrelevant. Therefore, her motion to exclude this evidence must be denied.

Admissibility of expert testimony is governed by Fed.R.Evid. 702. *See Smith v. Ford Motor Co.,* 215 F.3d 713, 718 (7th Cir.2000). Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702. *Daubert* interpreted Rule 702 as requiring the trial judge to ensure "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Smith,* 215 F.3d at 718 (quoting *Daubert,* 509 U.S. at 589) (internal quotation marks omitted). Put somewhat differently, a district judge is to act "as a 'gatekeeper' for expert testimony, only admitting such testimony after receiving satisfactory evidence of its reliability." *Dhillon v. Crown Controls Corp.,* 269 F.3d 865, 869 (7th Cir.2001) (citing *Daubert,* 509 U.S. at 589).

***4** Rule 702 contemplates the admission of testimony by expert witnesses whose knowledge is based on experience. *See, e.g., Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 156, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."). "Thus, a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area." *Smith,* 215 F.3d at 718. Furthermore, an expert must possess "sufficient specialized expertise to render his opinion on the topic ... reliable, as required by *Daubert.* [An expert's] ... competence in the general field ... [at issue] must extend to his specific testimony on the matter" before the Court. *Ty, Inc. v. Publ'ns Int'l, Ltd.,* No. 99 C 5565, 2004 WL 2359250, at *5 (N.D.Ill. Oct.19, 2004) (Zagel, J.); *accord, e .g., Carroll v. Otis Elevator Co.,* 896 F.2d 210, 212 (7th Cir.1990) ("Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony.") (citing *Gladhill v. Gen'l Motors Corp.,* 743 F.2d 1049, 1052 (4th Cir.1984)).

All purported expert opinions are governed by the *Daubert* standard, "whether [the opinion] relates to areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Smith,* 215 F.3d

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at 719 (citing *Kumho,* 526 U.S. at 141). Factors that may illuminate the analysis include: (1) whether the theory or technique can be and has been verified by the scientific method through testing; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error of the technique; and (4) whether the theory or technique has been generally accepted by the relevant scientific community. *Daubert,* 509 U.S. at 593-94. These factors are merely guides, however, and do not serve as a series of prerequisites; their applicability depends on the particular facts and circumstances of each case. *See United States v. Cruz-Velasco,* 224 F.3d 654, 660 (7th Cir.2000). In applying these factors, a district court must focus on the expert's methodology, not the soundness of the factual underpinnings or the substance of the expert's conclusions. *Smith,* 215 F.3d at 718 (citing *Daubert,* 509 U.S. at 595); *see also Smith,* 215 F.3d at 719 ("It is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound.") (citation omitted).

Finally, a district court must determine whether the proposed expert testimony would assist the trier of fact in understanding the evidence or determining a fact in issue. *See* Fed.R.Evid. 702. Expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of a proffered expert's testimony. *See Taylor v. Illinois Cent. R.R. Co.,* 8 F.3d 584, 586 (7th Cir.1993) ("Notwithstanding Dipprey's lengthy experience in the railway industry, any lay juror could understand this issue without the assistance of expert testimony. Therefore it was proper for the district court to exclude Dipprey's [proffered expert] testimony."); *accord, e.g., Hoffman v. Caterpillar, Inc.,* 368 F.3d 709, 713-14 (7th Cir.2004) (affirming the district court's exclusion of a purported expert's opinion based upon a videotape because "the videotape could be played for the jury and entered into evidence, and consequently, jurors could make a determination for themselves.... Based upon this independent assessment .... the jury could then draw ... [its own] inferences .... and expert testimony would be of no help.").

***5** The two touchstones for admissibility of expert testimony are relevance and reliability. *See Kumho Tire Co., Ltd.,* 526 U.S. at 147 (*"Daubert* ... held that ... Rule 702 imposes a special obligation upon a trial judge to ensure that any and all scientific testimony ... is not only relevant, but reliable.") (internal quotation marks and citation omitted). Plaintiff has argued that there is no scientific basis for admitting evidence of prior manifestations of her spondylolisthesis. This is another way of saying that such evidence is unreliable. But Plaintiff has not suggested how a scientific basis is lacking-she has not shown how it is unreliable. Ordinarily, to show that evidence lacks a scientific basis, a party argues that an expert is unqualified, or that his methods are unreliable, or, relatedly, that he lacks sufficient facts or data on which to base an opinion. Plaintiff has done none of the above. Instead, Plaintiff simply states, in a conclusory fashion, that such evidence lacks a scientific basis. This is insufficient.

Assuming that each of the witnesses in question is qualified to testify reliably on this issue (Plaintiff does not identify specific witnesses in her motion; in their re-

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sponse, Defendants mention Plaintiff's treating physicians Dr. Lim and Dr. Michael Haak, and Defendants' expert Dr. Martin Herman, *see* D.E. 78-2 at 2-3), the Court respectfully denies Plaintiff's motion to bar any reference to her prior injuries. The Court will entertain objections, if any, to specific questions or evidence as they arise at trial. *See Hawthorne Partners,* 831 F.Supp. at 1401 (citing *Connelly,* 874 F.2d at 416) (further citation and quotation omitted).

B. Plaintiff's Fifth Motion in Limine, to Exclude the Conclusions of Any Internal Investigation Conducted by the Police Department, Is Denied.

Plaintiff's fifth motion in limine seeks to bar, under Fed.R.Evid. 403, the "[c]onclusions of the Defendant Municipality and/or its officers and/or supervisors relative to Internal Investigation." (D.E. 74 at 3.) The motion appears to be moot, as there was no internal investigation in the case-likely, in substantial part, at least, because Plaintiff did not file any type of citizen's complaint concerning the events of May 9, 2004. (D.E. 78-2 at 4.)

In the papers, the defense suggests that the Plaintiff "may seek to introduce into evidence portions of the Department's policy manual that pertain to the use of force during the course of an arrest." (*Id.*) The defense reserves the right to introduce testimony from its officers about whether the arrest was properly effected under those policy manuals.

The Court reserves judgment on this issue. However, the Court notes that the entire subject likely will not be necessary to bridge during trial. As then District Judge Ann Williams has ruled, evidence that police officer-defendants violated departmental regulations in an encounter with a plaintiff is not admissible in a resultant civil rights suit. *See Walker v. Saenz,* No. 91 C 3669, 1992 WL 317188, at *4 (N.D.Ill. Oct.27, 1992) (Williams, J.). Judge Williams noted that violations of departmental regulations do not typically constitute constitutional violations, which are the relevant analytical metrics for the jury. *See id.* Judge Williams found this evidence therefore should properly be excluded, stating: "this court finds that the introduction of such evidence would be unduly prejudicial to the defendants. In spite of instructions to the contrary, the jury might improperly assume that a violation of police regulations also constitutes a Constitutional violation. As defendants suggest, the jury might also confuse the standards for finding a violation under the noted regulations with the standards for finding a constitutional violation. Therefore, defendants' objection to evidence regarding the violation of police department regulations is granted." *Id.*

***6** Similarly, in *Tanberg v. Sholtis,* 401 F.3d 1151 (10th Cir.2005), the Tenth Circuit adopted the same approach as Judge Williams, and it found that evidence that police officer-defendants allegedly violated "SOPs" (standard operating procedures) adopted by their police department was properly excluded as irrelevant and unduly prejudicial in an excessive force civil rights case. *See id .,* 401 F.3d at 1162-65. The Tenth Circuit found that the evidence of putative SOP violations was not relevant to the analytical inquiry that the jury needed to undertake: *i.e.,* whether constitutional standards had been violated in the police encounter at issue on trial. *See id.* at 1162-63; *see also id.* at 1164 ("If Officer Sholtis violated the SOP governing the use

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of force in effecting arrest, that fact might well be pertinent to the Albuquerque Police Department's future decisions to promote, retain, or discipline him; it is not relevant to determining if Plaintiffs' arrest violated the reasonableness requirement of the Fourth Amendment."); *id.* at 1163 ("This Court has consistently held that the violation of police regulations is insufficient to ground a § 1983 action for excessive force."). The Tenth Circuit further noted that, oftentimes, municipalities create departmental regulations that are designed to provide protections for arrestees' civil rights that are in excess of constitutional minima. *See id.* at 1164. (The Court notes that the U.S. Department of Justice also often does the same thing in documents such as the U.S. Attorney's Manual.) The Tenth Circuit explained that, "[i]f courts treated these administrative standards as evidence of constitutional violations in damages actions under § 1983, this would create a disincentive to adopt progressive standards. Thus, we decline Plaintiffs' invitation here to use the Albuquerque Police Department's operating procedures as evidence of the constitutional standard." *Id.* The Tenth Circuit also found that whatever probative value, if any, the evidence at issue might have, its prejudicial potential substantially exceeded it, such that exclusion under Rule 403 independently was appropriate. *Id.* at 1165.

Thus, while the Court will reserve judgment on any issues concerning Departmental policy manuals, the motion as most clearly framed and as titled is moot. Accordingly, the motion is denied.

C. Plaintiff's Sixth Motion in Limine, to Exclude Certain Background Evidence Concerning the Defendant Officer, Is Denied.

Plaintiff's sixth motion in limine appears to seek to exclude certain background or biographical evidence concerning Defendant Police Officer Banks-presumably evidence of promotions or commendations as a police officer. Plaintiff suggests that the evidence is inadmissible hearsay and is precluded under Fed.R.Evid. 404(b). This motion is denied, at least within the parameters and limits set forth herein.

Witnesses in this Courthouse typically offer various limited background information at the beginning of their respective testimonies. This process is subject to reasonable limits concerning the length and substance of such testimony. Thus, a witness is invariably allowed to testify, if he or she chooses, that he or she is married, went to college, has children, has been promoted during their career, etc.-even if those issues are not really being litigated in the case-as part of a brief, general, introduction to his or her testimony.

***7** In the setting of this case, this practice would allow Officer Banks to testify, if he chooses, about such general topics. He can explain that, if it is true, he was promoted from a trainee position, that he is married, and so forth. In this regard, it is common practice for law enforcement witnesses to briefly relate (*i .e.,* in response to a question or two) whether they have received commendations during their career.

Plaintiff has offered no convincing basis to deviate from that long-standing standard practice in this case. Such evidence is not character evidence, *per se;* it is simply general background information. Moreover, whether a person has ever received a commendation is not hearsay, any more than is testimony concerning whether the person is married or testimony that the person has graduated from medical school, or is em-

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ployed as a police officer, and so on.

That said, the Court does not suggest that Officer Banks will be permitted to engage in an extended exegesis concerning the list of any commendations he has received. Nor will he be allowed to relate the details of incidents that led to such commendations, or the written substance of any awards he received (*that* would be hearsay).

Within such parameters, Plaintiff's motion is denied.

D. Plaintiff's Seventh Motion in Limine, to Exclude Evidence or Comment on the Failure of Plaintiff's Medical Providers to Testify, Is Denied.

Plaintiff's seventh motion in limine seeks to exclude evidence or comment on the failure of any of Plaintiff's treating medical providers to testify, unless Defendants can show that those medical providers are within the exclusive control of Plaintiff. (D.E. 74-1 at 4.) In support of her argument, Plaintiff relies on Illinois caselaw establishing a four-part test for obtaining a "missing witness" jury instruction, and argues that, because the defense cannot satisfy that four-part test, it should not be allowed to comment on any of Plaintiff's medical providers' failure to testify. (*Id.* (citing Ill. Pattern Jury Instr.-Civ. 5.01 (2006 ed.); *Kersey v. Rush Trucking, Inc.,* 344 Ill.App.3d 690, 279 Ill.Dec. 559, 800 N.E.2d 847, 853 (Ill.App.Ct.2003); *Hawkes v. Casino Queen, Inc.,* 336 Ill.App.3d 994, 271 Ill.Dec. 575, 785 N.E.2d 507, 519 (Ill.App.Ct.2003)).) The Illinois missing witness instruction provides that if a party has failed to produce a witness, the jury may infer that the testimony of that witness would have been adverse to that party if: (1) the witness was under the control of the party and could have been produced by the exercise of reasonable diligence; (2) the witness was not equally available to an adverse party; (3) a reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the testimony would be favorable to him; and (4) no reasonable excuse for the failure has been shown. Ill. Pattern Jury Instr.-Civ. 5.01 (2006 ed.).

As a preliminary matter, and as the defense points out in its response (D.E. 75-2 at 5), it is well settled that federal, not state, evidentiary law governs a federal trial in most instances. *See Barron v. Ford Motor Company,* 965 F.2d 195, 198-99 (7th Cir.1992) ("Even in diversity cases the rules of evidence applied in federal courts are the federal rules of evidence rather than state rules, *Lovejoy Electronics, Inc. v. O'Berto,* 873 F.2d 1001, 1005 (7th Cir.1989); *In re Air Crash Disaster Near Chicago,* 701 F.2d 1189, 1193 (7th Cir.1983); *Romine v. Parman,* 831 F.2d 944, [944-45] (10th Cir.1987), save with respect to matters of presumptions, privilege, and competency of witnesses, Fed.R.Evid. 302, 501, 601, none of which is involved here.").

***8** There is substantial federal precedent concerning missing witness arguments. One of the seminal cases is Judge Easterbrook's opinion from *United States v. Sblendorio,* 830 F.2d 1382 (7th Cir.1987). *Sblendorio* taught that, under federal law, treatment of missing witness arguments is entrusted to the discretion of the trial court. *Id.* at 1394; *accord, e.g., Hoffman,* 368 F.3d at 716-17. (The same is true, incidentally, under Illinois law. *See Kersey,* 279 Ill.Dec. 559, 800 N.E.2d at 853.) To the extent one party is allowed to comment on

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the other party's failure to call a particular witness, the jury is entitled to be informed (by the criticized party) of the commenting party's right to call that same witness (assuming that is the case), so long as the litigants do not attempt to mislead the jury about which party bears the burden of proof in the case. *See United States v. Miller,* 276 F.3d 370, 374-75 (7th Cir.2002).

The Court will resolve this issue during trial. Typically, these issues are of limited, if any, consequence: the defense would hypothetically argue that other doctors saw Plaintiff and were not called to testify; Plaintiff would hypothetically acknowledge her burden of proof and then explain that these doctors are also available via subpoena to the defense. Such argument typically tends to wash out of the case whether it is permitted or not. The parties will be able to assess and to address whether such argument is worth the jury's time, and the Court will rule after hearing such argument, if the issue is raised again. Accordingly, the motion in limine is denied without prejudice.

E. Plaintiff's Eighth Motion in Limine, to Bar Evidence or Comment on Whether Plaintiff's Medical Treatment Was Unnecessary or Excessive, Is Denied.

Plaintiff's eighth motion in limine seeks to exclude evidence or comment by Defendants regarding whether any of Plaintiff's medical treatment was unnecessary or excessive, unless Defendants can satisfy Rule 702's requirements for expert testimony. (D.E. 74-1 at 5.) Plaintiff argues that defense counsel is not competent to make medical conclusions and that defense counsel's arguments regarding alternative theories of medical causation are not exposed to the scientific method and will not assist the trier of fact. (*See id.*) Defendants oppose the motion on the basis that such evidence need not, as a matter of law, be introduced by an expert. (D.E. 75-2 at 6.) Defendants argue that opinions about whether medical treatment was necessary can come in under Rule 701, which governs opinion testimony by lay witnesses. (*Id.*) Defendants argue that if the Court accepts Plaintiff's argument, Plaintiff, too, would have to produce expert testimony to show that her treatment was reasonable and necessary. (*Id.* at 7.) Furthermore, Defendants argue that whether Plaintiff's medical treatment was reasonable and necessary is a factual issue reserved to the trier of fact. As such, Defendants argue, both Plaintiff and Defendants should be entitled to offer arguments on the issue.

***9** With respect, the parties appear to speak past each other on this issue in their briefs. The court anticipates that both lay and expert testimony may be deemed admissible on this question, and therefore, in a sense, both sides are correct. It should be noted at the outset that any witness-expert or not-must demonstrate before testifying that he or she is well situated to deliver a reliable opinion on the matter in question. *Ueland v. United States,* 291 F.3d 993, 998 (7th Cir.2002) (quotation marks omitted); *see also Gil v. Reed,* 381 F.3d 649, 659 (7th Cir.2004) ("In federal court, no expert testimony is needed [in a medical negligence case] when the symptoms exhibited by the plaintiff are not beyond a layperson's grasp.") (citing *Ledford v. Sullivan,* 105 F.3d 354, 359-60 (7th Cir.1997) (finding that no expert was needed in a deliberate indifference case where the plaintiff experienced nausea, dizziness, vomiting, a crawling sensation on his skin, emotional and mental regression, and de-

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pression when the defendants deprived him of his medication)). Thus, Plaintiff is correct that a witness must have a legitimate basis to rationally testify concerning this subject.

At the same time, however, the defense is correct that expert testimony on this question is not necessary as a matter of law in any and all instances. For example, the defense may offer lay witnesses who have personal knowledge that may circumstantially show that Plaintiff's medical treatment was unnecessary or excessive. The Court need not speculate as to what such testimony might entail or who might offer it. Perhaps more likely, defense counsel may cross-examine Plaintiff's witnesses on whether Plaintiff's treatment was unnecessary or excessive, and in so doing may draw out testimony to support argument to that effect. *See* Graham C. Lilly, *An Introduction to the Law of Evidence* 563 (West 3d ed. 1996) ("The cross-examiner may ask the expert to assume different facts than those assumed during direct examination, and to state whether these new factual assumptions would alter his opinion."). Defense counsel also may properly appeal to the jurors' own common sense in addressing this question: if a plaintiff were to go to the emergency room fifteen times for a simple sprained ankle, the jury could reasonably be asked to assess whether such treatment was appropriate in light of all the evidence in the case and their experiences in life. (In this regard, Plaintiff's citation of *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090 (7th Cir.1994), does not suggest any different result. *O'Conner* affirmed, as a proper exercise of discretion, a trial court's decision to exclude certain putative expert opinion on medical causation where the supposed expert offered no support for his causation assertion other than articles that prescribed certain analytical steps that he did not undertake. *See, e.g., id.* at 1107 ("His [*i.e.,* the putative expert's] method of diagnosis and his conclusion regarding causation therefore are not supported by the authors on which he claims to rely. Beyond the recitation of authorities which clearly do not support his opinion, Dr. Scheribel has not come forward with any other support for his causation opinion.") *O'Conner* certainly does not cast doubt on more-recent Seventh Circuit precedent like *Gil,* 381 F.3d at 659, which teaches that expert testimony is not always required concerning medical issues, nor did *O'Conner* even suggest that parties are precluded from asking juries to evaluate evidentiary claims in light of their common sense and life experiences concerning what is reasonable.)

***10** Thus, Plaintiff's motion is respectfully denied, subject to reassertion at trial, when issues of foundation as to the particular witness at issue can be better assessed.

F. Plaintiff's Ninth Motion in Limine, to Exclude Certain Nonmedical Opinions from the Testimony of Dr. Martin Herman, Is Granted.

Plaintiff's ninth motion in limine seeks to exclude nonmedical opinions from the testimony of defense witness Dr. Martin Herman, who testified at his deposition that he believed Plaintiff "exercised poor judgment" during her arrest on May 9, 2004. (D.E. 74-1 at 5-6.) Plaintiff argues that such opinions are not the proper subject of medical expert testimony. (*Id.*) The defense responds that, because Ms. Carlson has admitted to experiencing moderate low back pain prior to her arrest on May 9, 2004, Dr. Herman's opinion about her failure to exercise good judgment is relevant and will as-

sist the trier of fact.

Plaintiff's motion is granted. It is unclear how Dr. Herman's opinion that Plaintiff exercised poor judgment would assist the trier of fact, even if it were deemed relevant. Moreover, expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of the proffered expert's testimony. *See Taylor,* 8 F.3d at 586; *accord, e.g., Hoffman,* 368 F.3d at 713-14. The trier of fact does not need Dr. Herman's help determining whether Plaintiff exercised poor judgment on the night in question.

Furthermore, to the extent the evidence is offered outside the confines of Dr. Herman's medical expertise, it also would not be properly admitted. *See* Fed.R.Evid. 401-03. If the testimony were proper from a lay witness, every witness in the case could properly opine about whether Ms. Carlson (and presumably every other participant in the events) exercised poor judgment. This trial is not properly a referendum on each witness's respective views of the quality of judgment of the participants in the events of May 9, 2004. Accordingly, this motion is granted.

G. Plaintiff's Tenth Motion in Limine, to Exclude Plaintiff's Employment Records, Is Denied.

Plaintiff's tenth motion in limine seeks to exclude her employment history and work records as hearsay. (D.E. 74-1 at 6.) She also argues that such records are irrelevant to the issues in the case. (*Id.*) Defendants respond that such records are admissible under the business records exception to the hearsay rule, Fed.R.Evid. 803(6). Furthermore, Defendants argue that Plaintiff's employment records are relevant to rebut Plaintiff's claim of disability or loss of normal life, because the records show that Plaintiff was not disabled, subject to significant medical restrictions, or incapable of performing activities of daily living. (D.E. 75-2 at 8.) The defense suggests that the records will show that Plaintiff failed to request any accommodation consistent with her claim of severe pain or limitations. (*Id.*)

***11** Plaintiff has not addressed the likely applicability of the business records exception, nor identified any specific information or statement that might be considered hearsay. Nor does Plaintiff explain why the records might not potentially reveal, either directly or by material omission, evidence that she was not injured as claimed or injured to the extent claimed. In sum, Plaintiff's motion is inadequate to justify excising the records in their entirety from the case. Therefore, the Court denies Plaintiff's motion without prejudice.

III. Defendants' Motions in Limine

A. Defense Motion in Limine Number One, to Bar Testimony by Susan Merl Nachinson, Is Granted in Part and Denied in Part.

The first defense motion in limine seeks to bar testimony from Susan Merl Nachinson, who is described as a “Licensed Clinical Professional Counselor.” (D.E. 52 at 2.) The motion suggests that the Plaintiff may intend to call Ms. Nachinson to “testify that as a result of the incident in question, Ms. Carlson suffered psychological damages, including but not limited to, post-traumatic stress disorder.” (*Id.* at 2-3.) The motion contends that half of Ms. Nachinson's practice concerns “relationship coun-

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seling" and that the other half is "devoted to adult and adolescent counseling." (*Id.* at 3.) The motion further contends that "Ms. Nachinson acknowledges that post-traumatic stress disorder is a 'medical diagnosis' and can be treated with medication." (*Id.*) The motion cites various cases applying *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and states that Ms. Nachinson's "area of expertise lies in the area of marriage and family therapy. As such, she is not qualified to offer a diagnosis of post-traumatic stress disorder." (D.E. 52 at 3-4.) The motion further relates various alleged concessions of Ms. Nachinson from her deposition, in which she allegedly made clear that she is incapable of offering meaningful testimony about PTSD issues. *See, e.g., id.* at 4 ("Nachinson freely and openly admitted that she is incapable of offering an opinion as to whether the incident in question caused Ms. Carlson to suffer post-traumatic stress disorder."). The final paragraph of the motion speaks much more broadly, without further explication, and "prays for entry of an order in limine barring Susan Merl Nachinson from offering any opinion testimony at the trial of this cause...." (*Id.* at 5 .)

In her response, Plaintiff offers various concessions. For example, in the response, "Plaintiff stipulates that Ms. Nachinson does not have an adequate foundation to diagnose PTSD. The same applies for opinions regarding permanency and/or future treatment." (D.E. 81-2 at 2; *see also id.* ("Defendants point out that Ms. Nachinson opines that she cannot state that Plaintiff actually suffered from PTSD. Plaintiff agrees as to this point.").)

The heart of the defense motion relates to PTSD testimony and issues. On that issue, Plaintiff concedes that Ms. Nachinson cannot offer testimony. Accordingly, the motion is granted as to PTSD issues.

***12** As explained above, the motion also in passing suggests that Ms. Nachinson be barred from testifying altogether. The motion does not offer a basis for this ruling. Accordingly, to the extent the motion suggests that Ms. Nachinson be barred from testifying altogether, it is denied.

B. Defense Motion in Limine Number Six, to Exclude the Testimony of Dr. Michael Haak, Is Denied.

The sixth defense motion in limine (D.E.57) seeks to bar testimony from Dr. Michael Haak, an orthopedic surgeon with the Northwestern Medical Faculty Foundation, who saw Ms. Carlson in November 2004. Defendants argue that Dr. Haak's testimony, although relevant, is not sufficiently reliable to be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). (D.E. 57-1 ¶ 3.) In support, Defendants seem to argue that Dr. Haak was unable to connect Plaintiff's injuries to her arrest. In this regard, and by way of background, Dr. Haak reviewed certain radiographic studies of the Plaintiff and concluded that Plaintiff suffered from an L5-S1 spondylolisthesis, an annular tear, and possibly a degenerative disc disease. (*Id.*) Dr. Haak concluded that Plaintiff's spondylolisthesis and her degenerative disc condition occurred prior to the arrest on May 9, 2004. (*Id.*) He could not say whether the annular tear occurred before or after the arrest. (*Id.*) Defendants also state that Dr. Haak testified that annular tears are not caused by blunt force, but rather are the result of a rotating or twisting injury. (*Id.*) Defendants argue that Dr.

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Haak's opinion is not based on sufficient data or facts, because he has no specific information regarding the mechanism that caused Plaintiff's injuries. (*Id.* ¶ 4.) This latter argument appears to be based on the fact that Dr. Haak was not at the scene of the arrest and therefore cannot testify that Plaintiff was subjected to excessive force.

Plaintiff stipulates that her spondylolisthesis predated the arrest, but argues that Dr. Haak should be allowed to testify that the incidents during the arrest could have aggravated what had previously been an asymptomatic condition. (D.E. 81-2 at 4.) Plaintiff also stipulates that an annular tear is the result of a twisting injury, not a blunt force injury, but argues that Dr. Haak should be allowed to testify that Plaintiff's altercation with Officer Banks could have led to such an injury. (*Id.* at 5-6.) Plaintiff also cites to Dr. Haak's deposition, during which he stated that it is his opinion that Plaintiff had underlying structural problems that were either exacerbated or caused by the events during her arrest. (*See id.* at 5 (citing D.E. 81-6 at 29).)

The motion in limine to exclude Dr. Haak's testimony is respectfully denied. The motion does not challenge Dr. Haak's qualifications or the relevance of his testimony. Instead, the motion challenges the reliability of his testimony, and, separately, the sufficiency of the data and facts upon which that testimony is based. These attacks are unpersuasive-at least insofar as they seek to preclude Dr. Haak from testifying entirely. They may cause the jury to put less weight on the testimony, or to disregard it altogether, and the defense will get a fair opportunity to make its points during cross-examination. However, the motion's request to bar Dr. Haak entirely is respectfully rejected. An expert is entitled to assume that a certain set of facts is true (here, that Ms. Carlson is telling the truth in the entirety) and opine about issues within the scope of the expert's competence on the basis of such assumptions. On the basis of the briefing presented to date, at least, that appears to be what Dr. Haak would do here.

***13** In support of their argument that Dr. Haak's testimony is unreliable, Defendants state only that he concluded that Plaintiff's spondylolisthesis predated her arrest and that her annular tear could not have been caused by blunt force to the back. (D.E. 57-1 ¶ 3.) Plaintiff concedes these facts, and puts forth other bases for Dr. Haak's testimony. (D.E. 81-2 at 4-5.) To be sure, a jury would need to credit Plaintiff's version of various disputed factual issues, because if Plaintiff's account is rejected, then Dr. Haak's testimony (which appears to be fundamentally predicated on her version of events) would appear to fall to the side. That is a potential failure of proof issue, however, not a basis to exclude in the entirety under *Daubert. See, e.g., Smith,* 215 F.3d at 718 (finding that the district court must focus on the expert's methodology, not the factual underpinnings or the substance of the expert's conclusions) (citing *Daubert,* 509 U.S. at 595). In sum, experts need not be at the scene to offer reliable testimony on probable causes of injury. Dr. Haak personally examined Plaintiff, and he may coherently draw on his expertise as an orthopedic surgeon in evaluating the information gleaned from the radiographic studies and the history he obtained from the Plaintiff during his examination of her.

Finally, the defense motion cites *Huguet v. Barnett,* 900 F.2d 838, 841 (5th Cir.1990), and *Hinojosa v. City of Terrell,* 834 F.2d 1223, 1228-31 (5th Cir.1988); the defense

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argues that “[a]n unnecessary force claim requires proof of ... [injury], resulting directly and *only* from the use of force that was clearly excessive to the need, was objectively unreasonable and constituted an unnecessary and wanton infliction of pain.” (D.E. 57 at 3 (emphasis in original).) Plaintiff does not challenge this assertion. However, even if this is the applicable standard, the requirement the defense offers does not disable Dr. Haak from testifying. Again, a jury could use Dr. Haak's more generalized causation testimony, in conjunction with testimony of the Plaintiff (who may well testify, for example, that she was doing nothing wrong at all and that therefore no force was necessary or appropriate at all), to assess whether Plaintiff has made her case.

Accordingly, although the defense is free to cross-examine Dr. Haak in an effort to demonstrate the unpersuasiveness of his testimony, he is not properly excluded as a witness in the entirety. The motion is therefore denied.

C. Defendants' Fourth Motion in Limine, Regarding “Code of Silence” Arguments or Evidence, Is Granted in Part and Denied in Part.

The fourth defense motion in limine seeks to bar evidence or argument to the effect that there is a police “code of silence” or references to recent events of police misconduct. (D.E. 55 ¶ 1.) Defendants argue that generalized allegations of police misconduct or that “police officers cover up for each other” are improper under Fed.R.Evid. 401, 402, and 403. (*Id.*)

***14** Plaintiff's brief response is somewhat opaque. Portions of the paragraph (D.E. 81-2 at 3) suggest that Plaintiff intends to argue that the evidence *in this case* (*e.g.,* the police officers' testimony) will demonstrate that “the officers who testify in this cause (for the defense)” have falsely tried to “stick together, change facts and tr[ied] to help each other, so that Defendant Officer Banks” will prevail. (*Id.*) A litigant is certainly entitled to comment on the truthfulness of the other side's witnesses, and to suggest that those witnesses are biased in that they have loyalties to the opposing party. None of this is problematic.

Other portions of Plaintiff's response are problematic: “Plaintiff will argue that officers stick together. Plaintiff will argue that officers misrepresent facts.” (*Id.*) These sorts of generalized arguments are improper and will not be allowed-any more than the Court would allow the government in a criminal case to argue that “FBI agents are carefully screened for their integrity and thus tell the truth.” This case will be tried on the basis of the evidence adduced in the courtroom, not on the basis of generalized and speculative arguments and innuendos about “what police officers or law enforcement agents do (or do not) do.” *Accord, e.g., Basile v. Ondrato,* No. 02 C 3795, 2003 WL 22953340, *2 (N.D.Ill.Dec.12, 2003) (Kocoras, C.J.) (granting motion in limine to prohibit evidence or argument “regarding a police ‘code of silence’ ... including the use of the phrase ‘code of silence,’ “ but allowing plaintiff to argue “that a witness is biased by virtue of his or her relationship to the Defendants, *e.g.,* both are members of the police force”); *Webb v. Chicago Police Oficers,* No. 99 C 71, 2003 WL 22058575, *1 (Sept. 3, 2003) (Moran, J.) (“The motion to bar any reference to a ‘Code of Silence’ is granted in part. Plaintiff is not entitled to engage in a general attack on the Chicago Police Department, although he

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may seek to develop the theme that the officers involved in the events of August 25, 1997, are protecting each other."). Accordingly, the motion is granted in part and denied in part.

D. Defense Motion in Limine Number Five, to Bar Testimony Regarding Plaintiff's Resignation, Is Denied in Part and Denied Without Prejudice in Part.

Defense motion in limine number five seeks to bar testimony concerning Plaintiff's voluntary resignation from her job at Acxiom a few months after she was arrested. (D.E.56.) In this regard, the motion notes that, at her deposition, Ms. Carlson stated that she is not making any wage loss claim. In her response, Plaintiff confirms that there is no wage loss issue, and indicates that "she may introduce evidence with regard to ability to perform certain work activities and pain associated with such activities. In that connection, testimony may be brought out that Plaintiff has difficulty sitting in a chair for long periods of time and as a result of that difficulty, she may testify that she had to change jobs." (D.E. 81-2 at 3.)

***15** Plaintiff is certainly entitled to testify that the alleged misdeeds caused her pain or difficulty sitting in a chair for long periods of time. To the extent the motion seeks to exclude such evidence, it is denied.

However, the fact that Plaintiff voluntarily resigned from one position, and as a result suffered no claimed injury, appears to be the sort of subject that may possibly be precluded under Fed.R.Evid. 403; the topic relates to potentially cumulative evidence, and to a subject that has a high potential for wasting time by creating a collateral mini-trial on an issue of attenuated significance, if any. Pain and inability to sit for long periods would affect one's life regardless of where one worked-or even whether one worked at all. Litigating issues connected with a job change that caused no harm to Plaintiff does little, if anything, to advance the ball about the impact of such impediments. Plaintiff will claim that the pain prompted the move, the defense will be prompted to suggest that other issues (higher pay, a shorter commute, scheduling flexibility, better opportunities for advancement or raises, etc., etc.) motivated the move. None of this concerns the pain that one would suffer (if Plaintiff's version of events is credited) in one's life if injured as she alleges.

Thus, for present purposes at least, the motion is denied in part and denied without prejudice in part. Either party may advance a Rule 403 objection, within the context of trial, if this subject arises at trial. The parties should confer before trial to see if Plaintiff actually intends to offer testimony about the post-incident job move.

CONCLUSION

For the reasons discussed above, Plaintiff's second, fifth, sixth, seventh, eighth, and tenth motions in limine are denied. Plaintiff's ninth motion in limine is granted. Defendants' first and fourth motions in limine are granted in part and denied in part. Defendants' sixth motion in limine is denied, and Defendants' fifth motion in limine is denied in part and denied without prejudice in part.

N.D.Ill.,2007.
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United States District Court, N.D. Illinois, Eastern Division.
UNITED STATES of America, Plaintiff,
v.
Michael POSNER and Sidney Muskovsky, Defendants.
No. 87 CR 59.

Sept. 15, 1987.

MEMORANDUM OPINION AND ORDER

WILLIAM T. HART, District Judge.

***1** Presently before the court are a number of pretrial motions filed by defendants Michael Posner and Sidney Muskovsky.FN1 By prior order, Posner has joined in most of the motions filed by Muskovsky. Defendants are charged with one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d), and fourteen counts of violating the Travel Act, 18 U.S.C. § 1952, and the aiding and abetting statute, 18 U.S.C. § 2. Briefly stated, the indictment alleges that Posner was the owner and Muskovsky the manager of the Roman House in Prairie View, Illinois, a nightclub featuring nude dancing, where some female employees also engaged in acts of prostitution. It is further alleged that the acts of prostitution were paid for by credit card and interstate phone calls were made to obtain authorization to accept the credit cards, and also that one mailing was made to secure payment for a credit card slip representing payment for prostitution services. The motions can be divided into three categories: (a) motions to dismiss or strike the indictment; (b) discovery motions; and (c) motions in limine.

I. MOTIONS TO DISMISS OR STRIKE THE INDICTMENT

Defendants move to dismiss the indictment on the grounds that the underlying statutes are unconstitutional and, even if constitutional, the allegations in the indictment are inadequate. They also move to dismiss the indictment on the ground that the government failed to disclose exculpatory evidence to the grand jury.

Defendants claim the Travel Act is constitutionally defective because it (a) contains no requirement of a nexus between the use of an interstate facility and the "thereafter act," (b) is vague as to the intent required, (c) provides no opportunity to withdraw after the interstate act, but before the "thereafter act," (d) contains no clear statute of limitations, and (e) is unclear as regards a number of other issues. The court need not decide if the alleged deficiencies would make the statute unconstitutional, since it is clear that the alleged deficiencies do not exist. *See United States v. Raineri,* 670 F.2d 702, 715-17 (7th Cir.), *cert. denied,* 459 U.S. 1035 (1982) (interstate use must relate significantly to illegal activity; defining intent element; defining what constitutes a single violation of the Act); *United States v. Steele,* 685 F.2d 793, 807 (3d Cir.), *cert. denied,* 459 U.S. 908 (1982) (statute of limitations); *United States v. Castellano,* 610 F.Supp. 1359, 1381 (S.D.N.Y.1985) (same). *See also United States v. Lookretis,* 422 F.2d 647, 651 (7th Cir.), *cert. denied,* 398 U.S. 904 (1970); *United States v. Hines,* 696 F.2d 722, 725 & n. 4 (10th Cir.1982); *United*

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States v. Pepe, 747 F.2d 632, 660 n. 44 (11th Cir.1984); *United States v. Davis,* 666 F.2d 195, 198-200 (5th Cir.1982).

The defendants claim they need more time to consider RICO defects. The defendants have had adequate time. The motion is denied without prejudice to raise timely objections. *See* Fed.R.Crim.P. 12(b)(2).

***2** Contrary to defendants' argument, the RICO count does not allege a conspiracy to commit a conspiracy. Nor is there such a problem with the Travel Act counts simply because Illinois's conspiracy statute was one of several statutes cited in defining prostitution. *See United States v. Loucas,* 629 F.2d 989, 991-92 (4th Cir.1980), *cert. denied.* 450 U.S. 1030 (1981) (state law only defines the prohibited conduct). Defendants also claim the indictment is inadequate because it does not allege the "thereafter acts" with adequate specificity. A sufficient indictment should state all the elements of the offense, inform the defendant of the charges so he may prepare a defense, and enable the defendant to plead the judgment as a bar to a later prosecution. *United States v. Gironda,* 758 F.2d 1201, 1209 (7th Cir.), *cert. denied,* 106 S.Ct. 523 (1985). There is no argument that the elements of the crime are not alleged. The indictment adequately identifies the "thereafter acts" (prostitution at the Roman House during 1982, 1983, and 1984) so that defendants can adequately prepare a defense. *See United States v. Stanley,* 765 F.2d 1224, 1239 & n. 14 (5th Cir.1985). Since the act of interstate travel or use is the element that would principally distinguish charges for the purpose of determining bars to future prosecution, *see Raineri,* 670 F.2d at 715 n. 9, and the indictment is very specific in alleging the interstate use, defendants are adequately informed as regards possible future bars to prosecution. The indictment is not inadequate for determining whether the statute of limitations is a bar since it is clear that the limitations period did not expire prior to indictment.

Defendants have also moved to dismiss the indictment on the ground that the government failed to present certain exculpatory evidence to the grand jury. As defendants concede, a high standard must be met to dismiss the indictment on such grounds. "[W]hile prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt." *United States v. Dorfman,* 532 F.Supp. 1118, 1133 (N.D.Ill.1981); *United States v. Flomenhoft,* 714 F.2d 708, 712 (7th Cir.1983), *cert. denied,* 465 U.S. 1068 (1984); *United States v. Horak,* 633 F.Supp. 190, 194 (N.D.Ill.1986). Flagrant abuse of the power to determine what evidence goes before the grand jury will be grounds for dismissing an indictment. *United States v. Cederquist,* 641 F.2d 1347, 1352-53 (9th Cir.1981); *Dorfman,* 532 F.Supp. at 1133. There was no such abuse in the present case. As defendants concede, the grand jury heard testimony that Roman House customers did not always receive sexual services; that at least some dancers told customers to hide sexual activity from waitresses; and that defendants told Roman House employees to lead customers on but encourage them to stay and spend more money, not to engage in prostitution, that they would be fired if they engaged in sexual relations with customers, and to report anyone engaging in sexual relations with a customer. That the government did not also present employees and customers who stated in interviews that they had never seen acts of prostitution at the Roman House is not, in light of the

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exculpatory evidence presented, grounds for dismissing the indictment.

***3** Defendants have also moved, pursuant to Fed.R.Crim.P. 7(d), to strike surplusage from the indictment. The contested allegations concern an attempt to reduce the fee that National Credit Services, Inc. ("NCS") charged the Roman House to process credit card transactions. NCS was an undercover operation of the FBI. In 1984 Roman House was able to obtain a reduction in the fee charged by NCS after defendant Posner had a conversation with an undercover agent representing NCS and received assurances from Michael Spilotro that Posner was a "good guy." Spilotro was a reputed member of the Chicago "mob" whose 1986 murder received much publicity in the Chicago media. Spilotro is not alleged, in the indictment, to be a co-conspirator of defendants. The government argues, though, that Posner's and Spilotro's conversations seeking the fee reduction are statements of a coconspirator made in the course of an alleged conspiracy and in furtherance of its object and therefore admissible under Fed.R.Evid. 801(d)(2)(E).

Putting aside questions of the admissibility of evidence under Rule 801(d)(2)(E), the government has failed to show the materiality of the challenged allegations. The alleged racketeering activity "consist[s] of multiple uses of interstate facilities, to wit, utilizing the interstate telephone lines to secure authorization for the acceptance of payments by credit cards ... in order to facilitate the carrying on of a business enterprise involving prostitution,...." That defendants sought to reduce credit card fees so that they could increase the amount of their allegedly unlawful profits is not proof that they committed racketeering acts of prostitution involving the use of interstate facilities. While the attempt to reduce credit card fees, and thus increase profits, may show how the business operated and why defendants had some of their meetings with NCS undercover agents, seeking the reduction was not a substantive offense [FN2] and its inclusion in the indictment may be prejudicial to defendants. *United States v. Hubbard,* 474 F.Supp. 64, 83 (D.D.C.1979). This material will be redacted from the indictment before it is sent to the jury. Paragraphs 8 and 9(j) in their entirety shall be redacted from the indictment. The phrase "a reduction in the fee NCS charged the Roman House for" shall be redacted from ¶ 9(e) of the indictment. The phrase "and a reduction in the fee NCS charged the Roman House for processing credit card charges from its customers" shall be redacted from ¶ 9(i) of the indictment. In all other regards, the Motion to Strike Surplusage From Indictment is denied.

II. DISCOVERY MOTIONS

Defendants' Motion for Discovery and Inspection has been fully complied with except that defendants complain the government did not provide photographs of customers of alleged prostitution. The government responded that no photographs of the customers "were taken in connection with this investigation," but did not expressly state that it has no photographs of the customers. The government shall provide any such photographs to defendants or a statement that it does not possess such photographs.

***4** Defendants have moved for the disclosure of favorable evidence. The dispute concerns whether the government is obligated to provide defendants with statements and other documents related to Roman House customers who stated they were not soli-

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cited for prostitution services or else did not receive such services. *Brady v. Maryland* and its progeny require the disclosure of "evidence favorable to an accused ... where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). Defendants cite the materiality standard of *United States v. Bagley,* 473 U.S. 667, 682 (1985), but that materiality standard applies to posttrial determinations of whether a conviction should be reversed for failure to disclose *Brady* evidence. *See id.* at 669. This court will assume, as the parties have implicitly assumed in their briefs, that the materiality of the requested evidence will turn on whether the requested evidence would be admissible at trial. In line with *Bagley,* the court will require disclosure of the evidence if there is a "reasonable probability" that the evidence will be admissible.

The government argues that the evidence is inadmissible since evidence that a defendant engaged in lawful transactions on one occasion is not relevant as to whether he engaged in unlawful activity on other occasions. As defendants point out, though, the cases cited by the government, *see United States v. Winograd,* 656 F.2d 279, 284 (7th Cir.1981), *cert. denied,* 455 U.S. 989 (1982), and the cases cited therein, involve more discrete and separate transactions than the present case. At issue in the present case is not simply whether defendants were involved in particular prostitution offenses, but also whether they conducted an enterprise that engaged in a pattern of prostitution. Also, unlike the cases cited by the government, the other lawful conduct is not directly the conduct of defendants, but the conduct of various customers and employees. The cases cited by defendants, *see Porcaro v. United States,* 784 F.2d 38, 40 (1st Cir.1986); *United States v. Shavin,* 287 F.2d 647, 652-53 (7th Cir.1961), are also not on point, but the point made is well-taken, prior lawful conduct can be relevant to questions of intent or other issues besides mere conformity with prior conduct. *See also United States v. Burke,* 781 F.2d 1234, 1243 (7th Cir.1985). The disclosure of the requested information may produce admissible evidence and therefore defendants' motion is granted. Should any of this evidence be found to be admissible at trial, the court has the discretion to limit the number of customers that testify. *Shavin,* 287 F.2d at 653.

The government has satisfied its obligation to provide Muskovsky with a copy of his prior criminal record. *See* Fed.R.Crim.P. 16(a)(1)(B). Muskovsky's Motion for Production of Copies of Prior Criminal Records is denied. The government has agreed to provide fourteen days' notice of its intent to use Fed.R.Evid. 404(b) evidence. Therefore, Muskovsky's Motion for an Order Requiring the Government to Give Notice of Its Intention to Use Other Crimes, Wrongs or Acts Evidence is denied as moot. The government has agreed to provide defendants with memoranda of conversations between defendants and government agents. Therefore, defendants' Motion for the Production of All Statements Made by the Defendants and in the Government's Possession, Custody, or Control is denied as moot. Defendants have also moved to have Jencks Act material, the Santiago proffer, and prior bad acts motion twenty-one days before trial. This motion is denied. The government has already provided the Santiago statement; it will provide the bad acts motion within fourteen days which is adequate time; and there is no reason to provide the Jencks Act material any sooner than is customary.

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***5** The defendants have also requested all statements of Roman House employees that the government possesses. Since the Roman House is not a defendant, such disclosure is not mandated by Rule 16's requirements concerning corporate defendants. *See* Fed.R.Crim.P. 16(a)(1)(A). It is also clear that the government cannot be compelled to disclose the statements of coconspirators who are prospective trial witnesses. *United States v. McMillen,* 489 F.2d 229, 230 (7th Cir.1972), *cert. denied,* 410 U.S. 955 (1973); *United States v. Percevault,* 490 F.2d 126, 131-32 (2d Cir.1974); *United States v. Konefal,* 566 F.Supp. 698, 706 (N.D.N.Y.1983). The statements of prospective witnesses appear to be the statements defendants are principally interested in obtaining, but they ask for all statements. The court must consider whether the government should be compelled to disclose statements of Roman House employees who are not prospective witnesses. The government has characterized such statements as statements of coconspirators. Although disclosure of these statements is not mandated by Rule 16, the Seventh Circuit has repeatedly stated in dictum that district courts have the discretion to compel such disclosure. *See McMillen,* 489 F.2d at 231; *United States v. Zarattini,* 552 F.2d 753, 757-58 (7th Cir.), *cert. denied,* 431 U.S. 942 (1977); *United States v. Disston,* 612 F.2d 1035, 1037-38 (7th Cir.1980). In a number of cases, such disclosure has been ordered by the district court. *See United States v. Brighton Building & Maintenance Co.,* 435 F.Supp. 222, 223 n. 20 (N.D.Ill.1977), *aff'd,* 598 F.2d 1101 (7th Cir.), *cert. denied,* 444 U.S. 840 (1979); *United States v. Fine,* 413 F.Supp. 740, 742-43 (W.D.Wis.1976); *Konefal,* 566 F.Supp. at 706-07 (collecting cases). *But see United States v. Bronk,* 604 F.Supp. 743, 746 (W.D.Wis.1985). The court finds the present case to be an appropriate case for compelling such disclosure. Defendants' Motion for Production of All Statements of Roman House Employees is granted, but only as to those employees who are *not* prospective government witnesses.

Defendants have requested the production of photographs of Roman House employees. The government has agreed to produce the photographs, but will not provide them until the Friday before the trial. The reason for this date is that the government does not wish to disclose in advance which employees will be witnesses. But there apparently are photographs of a number of employees, not just those who will be witnesses. Defendants' Motion to Compel the Production of Photographs of Roman House Employees is granted and the photographs shall be promptly produced.

Defendants have filed three motions seeking audio tapes and other surveillance. Alternatively, they seek a hearing in which they can examine government agents concerning whether certain conversations were recorded. Defendants claim it is incredulous that five conversations that are allegedly most incriminating were not recorded, yet a large number of nonincriminating conversations were recorded and the tapes saved. They also point to a notebook indicating one of the conversations was recorded, but the agent who kept that notebook has stated in an affidavit that the notation is in error. The government has provided affidavits from the prosecutor, the case agent, and the undercover agents involved in the allegedly incriminating conversations. The affidavits adequately state that the specific conversations were not recorded and that the government does not possess any material tapes which it has not turned over to the defendants. Additionally,

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the government need not turn over tapes of late 1970's conversations between Posner and a customer cooperating with the government. Those tapes were part of an investigation of charges Posner was not indicted on, the customer will not be a witness, the customer is fearful of retribution if his cooperation is discovered, and the tapes contain no exculpatory material. The tapes are not material to the defendants' case so they need not be produced. The court finds no need for an *in camera* inspection of the 1970's tapes nor for a hearing concerning those or any other tapes. The defendants' motions concerning surveillance and audio tapes are denied.

***6** Defendants have moved for a bill of particulars. *See* Fed.R.Crim.P. 7(f). "The test for whether a bill of particulars is necessary is 'whether the indictment sets forth the elements of the *offense charged* and sufficiently apprises the defendant of the *charges* to enable him to prepare for trial.' " *United States v. Kendall,* 665 F.2d 126, 134 (7th Cir.1981), *cert. denied,* 455 U.S. 1021 (1982) (quoting *United States v. Roya,* 574 F.2d 386, 391 (7th Cir.), *cert. denied,* 439 U.S. 857 (1978)) (emphasis in *Kendall*). The defendant is entitled to know the theory of the government's case, but not the details of the government's evidence nor the details of how the government intends to prove its case. *Id.* at 135. The discovery materials already provided to defendants should be considered in determining if a bill of particulars is necessary. *Id.*

Defendants have been provided with tapes, transcripts, or reports of all the conversations mentioned in paragraphs two through eight of the bill of particulars. Therefore, there is no reason to grant the bill as to those particulars. Defendants request a list of all co-conspirators. There is no absolute right to such a list. *United States v. Johnson,* 504 F.2d 622, 627-28 (7th Cir.1974). The government has already provided defendants with the names of customers who will be called as witnesses. Defendants also have customer cards detailing the dates customers were at the Roman House and the dancers and waitresses who were with them. Furthermore, defendants have the grand jury testimony or FBI 302 reports of a number of Roman House employees. Given the extensive discovery in this case, a list of co-conspirators will not be required. *See Johnson,* 504 F.2d at 628; *United States v. Society of Independent Gasoline Marketers of Americsa,* 624 F.2d 461, 466 (4th Cir.1979), *cert. denied,* 449 U.S. 1078 (1981); *United States v. Giese,* 597 F.2d 1170, 1180 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979). The last remaining request concerns details as to the acts of prostitution related to the fourteen Travel Act counts. Details as to the precise sexual acts performed and whether the defendants were on the premises at the time of the acts of prostitution need not be provided. The government also does not have to provide the names of witnesses to the acts of prostitution. *United States v. Conway,* 415 F.2d 158, 161-62 (3d Cir.1969), *cert. denied,* 397 U.S. 994 (1970). Even assuming the records defendants already have do not show what company issued the credit cards that were used for the credit card payments referred to in the indictment, the court fails to see the materiality of that fact. The payment authorizations are adequately identified in the indictment. Last, defendants request the names of the customers and employees who participated in the acts of prostitution related to the credit card authorizations mentioned in the Travel Act counts. The government has already provided a list of

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fourteen customers who received or were solicited for prostitution services. The government also claims that the information sought can be gleaned from the customer cards and credit cards records. Defendants insist, though, that the credit card records show only the date the charge cleared and not necessarily the date the customer used his credit card at the Roman House. The government, therefore, shall provide defendants with the charge dates for the credit card authorizations recited in Counts II through XV of the indictment. The government shall also provide any additional information necessary to associate each authorization with a customer and the date he used his credit card at the Roman House. In all other regards, the Motion for a Bill of Particulars is denied.

III. MOTIONS IN LIMINE

***7** Defendants have moved to exclude five conversations involving Michael Spilotro. One conversation concerned a reduction in the credit card processing fee. Apparently, the conversations may also indicate that Spilotro was providing “protection” for NCS and that he spoke to another man who was providing “protection” for the Roman House. Spilotro then indicated to undercover agents working for NCS that NCS could reduce the fee charged the Roman House for processing its credit card transactions. This court has already determined that the facts concerning the fee reduction will be redacted from the indictment. That ruling does not mean, however, that there can be no mention of the fee reduction at trial. It may be proper to bring out some facts about the fee reduction in order to put into context a number of meetings between NCS undercover agents and defendants. The fee reduction is still a collateral issue on which excessive detail will not be permitted. Regardless of whether Spilotro should be considered a co-conspirator, the facts about his involvement are only peripherally relevant to the offenses charged in the indictment. The government cites cases permitting the admission, under Fed.R.Evid. 801(d)(2)(E), of conversations about attempts to collect proceeds of an illegal conspiracy. *United States v. Archbold-Newball,* 554 F.2d 665, 676 (5th Cir.), *cert. denied,* 434 U.S. 1000 (1977); *United States v. Howard,* 770 F.2d 57, 61 (6th Cir.1985); *United States v. Davis,* 766 F.2d 1452, 1458 (10th Cir.), *cert. denied,* 106 S.Ct. 239 (1985). But in those cases, the collection activity at issue was more directly related to the crime. *Howard* concerns collection of a fraudulent insurance claim. *Davis* concerns one co-conspirator's demand that the others pay her fee for participating in obtaining a fraudulent loan. *Archbold-Newball* concerns collecting the payment for drugs that are the basis of the underlying crime. In the present case, the prostitution was allegedly paid for when the customer charged the expense. Collection on the charge slip was allegedly obtained by having NCS process the charges. Changing a fee for processing the collection of charge slips is only indirectly related to the offense charged. It is no more relevant to the crime than if the Roman House had negotiated with a long-distance phone service to reduce its charges for the long distance phone calls that are the bases of the Travel Act counts. That Spilotro was allegedly providing protection for NCS is a conspiracy separate from the charges against defendants. Defendants' motion is granted except where mention of one or more of the Spilotro conversations is necessary to place other conversations or evidence in context.

Defendants have moved to suppress a Lake

County, Illinois Judgment Order. In that agreed Judgment Order, defendants agreed to close the Roman House and not to further participate in certain specified activities, e.g. a business which features live nude dancing or lingerie shows featuring nude or semi-nude models. The parties stipulated that, if a trial were had, the state would establish, among other things, that certain specified acts of prostitution occurred at the Roman House. One of the findings of the court was "that acts of prostitution have occurred at the Roman House." The stipulations include that the defendants deny the stipulated facts and that the stipulation is a compromise of doubtful and dubious claims. The stipulations also state: "Nothing contained herein shall constitute an admission against any defendant nor shall this order or stipulation be admissible against any individual defendant in any other ligitation."

***8** In its response, the government states that it will not introduce the Judgment Order in its case-in-chief. Therefore it is unnecessary to decide if the Order should be considered an admission or another type of directly admissible evidence. The government also states that it will not use the Order to impeach a statement by a defendant that there was no prostitution at the Roman House. The government, however, states that it may otherwise use the Order to impeach a defendant. The government urges the court to wait until the trial to determine, if necessary, the propriety of using the Judgment Order as impeachment.

The agreement not to use the judgment order in further litigation was between the State of Illinois and defendants. That agreement is not binding on the federal government. Settlement agreements are often admissible as impeachment or for other purposes. *See Broklesby v. United States,* 767 F.2d 1288, 1292-93 (9th Cir.1985), *cert denied,* 106 S.Ct. 882 (1986); *Reichenbach v. Smith,* 528 F.2d 1072, 1075 (5th Cir.1976); *Stacey v. Bangor Punta Corp.,* 620 F.Supp. 636, 637 (D.Me.1985). The court agrees with the government that it would be best to wait and see precisely what the government might seek to use the Judgment Order for before deciding whether it can be used as impeachment. *Id.* at 637-38. However, since the government has not argued that the Order is admissible in its case-in-chief, it is appropriate to grant defendants' motion as to such use.

Defendants' motion is granted in part and denied in part. The government is prohibited from introducing the Lake County, Illinois Judgment Order in its case-in-chief. As to other uses of the Judgment Order, defendants' motion is denied as premature. No counsel, at trial in the presence of the jury, shall refer to or offer evidence of the fact of, or any aspect of, the Judgment Order without first notifying the court and counsel of the intention to do so and affording counsel an opportunity to register objection and the court a chance to rule on such objection outside the hearing of the jury.

The other pending motions in limine will be decided at a later date.

IT IS THEREFORE ORDERED that:

Defendants' motion to suppress Lake County, Illinois Judgment Order is granted in part and denied in part. The government may not introduce the Lake County, Illinois Judgment Order in its case-in-chief. No counsel, at trial in the presence of the jury, shall refer to or offer evidence of the fact of, or any aspect of, the Lake County, Illinois Judgment Order without first noti-

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fying the court and counsel of the intention to do so and affording counsel an opportunity to register objection and the court a chance to rule on such objection outside the hearing of the jury.

FN1. This memorandum opinion explains an order issued on September 9, 1987 and also decides one additional motion.

FN2. The government argues that the relation between Spilotro, defendants, the undercover agent, and another reputed member of the Chicago mob shows a relationship with organized crime, apparently some sort of protection scheme. But that is not what is charged in the indictment.

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CERTIFICATE OF SERVICE

I, MARC W. MARTIN, an attorney for Defendant Jon Burge, hereby certify that on this, the 7th day of April, 2010, I filed the above-attached document on the CM/ECF system of the United States District Court for the Northern District of Illinois, which constitutes service of the same.

/s/ Marc W. Martin

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