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**Evidence Issues in Harassment and Retaliation Cases:  
The Plaintiff's Perspective**

by

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## **Introduction**

A trial can be won or lost before it even starts. The trial judge's rulings on the parties' motions *in limine* that seek to exclude certain lines of evidence to be offered by the opposing side, and on the parties' pre-trial memoranda regarding the admissibility of their own evidence, can significantly determine the scope of what the jury will be allowed to hear and see. Employment lawyers should not underestimate the power of these pretrial rulings in defining their case. Disputes over evidentiary issues lie at the core of most employment trials, given that the presence of discriminatory intent and animus can often be proven through testimonial or circumstantial evidence. Moreover, judges increasingly want such disputes resolved before trial, as opposed to holding bench conferences during the trial. These disputes are particularly acute in harassment cases, which often involve inflammatory testimony and exhibits, and which implicate provisions of the Federal Rules of Evidence that seldom arise in, *e.g.*, a failure to promote discrimination case. Taken together, these factors mean that employment lawyers need to consider all possible lines of evidence, both their own and their opponent's, that may raise concerns under the Federal Rules of Evidence, and should be prepared to brief these evidentiary issues in advance of trial.

## **Background**

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Jane Smith and Mary Johnson have brought Title VII, Section 1981, and D.C. Human Rights Act racial and sexual harassment claims against XYZ Corporation, their two first-level supervisors (Jeff Adams and Tom Martin, respectively), and their second-level supervisor, Rob Parker. The Section 1981 claims (limited to racial harassment) and the D.C. Human Rights Act claims (both sexual and racial harassment) have been brought against all defendants; the Title VII claims solely against XYZ Corporation.

Ms. Smith began her employment with XYZ in 1995, and remains employed at XYZ today, but has suffered significant emotional stress based on the hostile work environment. Ms. Johnson began her employment with XYZ in 2000, and was constructively discharged as of March 31, 2003.

The following analysis is keyed to the accompanying “Fact Pattern.” The proposed expert testimony is analyzed first, followed by the plaintiffs’ proposed evidence, and then by the defendants’ proposed evidence. For the non-expert testimony, there are several factors to be considered: who will present the testimony, and for what purpose. For example, a plaintiff may have heard of a harassing remark made about her, but on a second-hand basis from someone else, since the plaintiff was not present at the time. Although the plaintiff herself cannot testify as to the existence of the harassing remark for the truth of the matter asserted, as that would be hearsay, she can still testify as to the effect on her upon learning that such a remark was made about her. Moreover, the plaintiff can present testimony from others who were present when the remark was made, and can present testimony as to whether the employer took any remedial action in response. The plaintiff can, and should, consider calling the individual defendants, and other defense witnesses, as adverse witnesses, under Rule 611, Fed. R. Evid., and using their deposition testimony, under Rule 32(a)(2), Fed. R. Civ. P., in her own case-in-chief.

### **Expert Testimony**

There is a two-step analysis required for the consideration of expert testimony: admissibility and relevance. As a threshold matter, given the limited nature of the hypothetical Fact Pattern, and that both experts have published and testified previously on the proposed subjects, the following analysis assumes that the admissibility requirements of Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) have been satisfied, and focuses on the relevancy analysis. Even if expert testimony may be admissible under Daubert, Kumho Tire, and Rules 702-703, Fed. R. Evid., it may still be excluded as not being relevant, under Rules 401-402, Fed. R. Evid., or even if relevant, on the grounds of prejudice, confusion, or waste of time, under Rule 403, Fed. R. Evid.

#### **A. Plaintiffs’ Corporate Culture Expert Testimony Is Admissible and Relevant for the Issue of Defendants’ Liability.**

This Court should allow plaintiffs to present expert testimony from their corporate culture expert, a professor at a state university business school, who has published and testified

on issues relating to corporate culture. She will testify about her research, based on empirical surveys. Specifically, she will testify that, compared with corporations that have promulgated and implemented effective anti-harassment policies, corporations that tolerate sexist or racist conduct by managers are more likely to have workplace harassment, resulting in greater employee turnover; and such corporations are more likely to be found liable for their conduct. She will also testify that her research shows that employees are reasonable in not reporting harassment if the corporate culture condones workplace harassment. However, she will not testify as to whether XYZ has promulgated and implemented an effective anti-harassment policy, or whether XYZ tolerates sexist and racist conduct by managers, or whether plaintiffs were reasonable in not reporting harassment.

Other courts have similarly allowed such expert testimony, particularly where, as here, the expert is not testifying as an ultimate matter reserved for the trier of fact. In EEOC v. Morgan Stanley & Co., Inc., 324 F. Supp. 2d 451 (S.D.N.Y. 2004), aff'd in part, rev'd in part, 2004 WL 1542264 (S.D.N.Y. July 8, 2004), the court allowed the plaintiffs' expert witness to testify about "how these [gender] stereotypes may have affected decisions at Morgan Stanley," and "whether policies and practices relating to gender bias might affect employees' utilization of an equal employment opportunity program," as long as he did not testify about whether deficiencies in defendant's policies "are evidence of discrimination." Id. at 462. The court similarly allowed defendant's rebuttal expert witness to testify that "there is likewise no evidence that there is a better or more effective way of handling or investigating complaints than the processes used by Morgan Stanley." Id. Finally, another one of defendant's rebuttal experts, who was to testify that "Morgan Stanley had a careful compensation process and a system that holds managers accountable for bad decisions," was also deemed to be admissible evidence relating to defendant's defenses regarding the objectivity of their compensation system. Morgan Stanley, 2004 WL 1542264, at \*2 (reversing magistrate's exclusion of such evidence).

In Butler v. Home Depot, Inc., 984 F. Supp. 1257 (N.D. Cal. 1997), the district court denied the defendants' motion to exclude expert testimony relating to corporate culture issues, such as "diversity management," id. at 1261, decisionmaker stereotyping which "organizations can control . . . through proper information and motivation," id. at 1262, and "subjective employment practices" and "specific steps [defendant] might have taken." Id. at 1265.

Although both Butler and Morgan Stanley arose in the context of gender discrimination claims, the courts' recognition that defendants' criticisms of the proposed expert testimony were more properly addressed to the weight to be given to the evidence, and not its relevance or admissibility, applies with equal force in this harassment case. Moreover, the experts in Butler and Morgan Stanley were not only testifying as to general issues of gender stereotyping and corporate policy, but also were offering their expert opinions as to the nature of defendants' workplace and the effectiveness, pro and con, of defendants' anti-discrimination policies. Here, plaintiffs' proposed expert is only testifying as to general issues relating to the effectiveness and implementation of harassment policies, the consequences of not having effective policies, and the responses of employees to harassment. Since she will not be providing an expert opinion as

to the specific facts of this case, her testimony will not even implicate the concerns that existed in Butler and Morgan Stanley that such expert testimony might invade the province of the jury.

Defendants' arguments that the plaintiffs' expert testimony should be excluded because it consists of truisms readily discernable by lay persons ignores the fact that the expert testimony is based on a careful review of empirical surveys, published in the peer-review literature, and admitted by other courts. This undercuts defendants' arguments, since lay persons are unlikely to have learned this information through a similarly rigorous approach. Defendants' arguments that the plaintiffs' expert testimony should be excluded because it would improperly suggest to the jury that XYZ did not have adequate policies and procedures are misplaced, since plaintiffs' expert is not testifying about XYZ's policies and procedures, but only more generally about the consequences of corporate policies. Moreover, defendants are free to cross-examine plaintiffs' expert about the nature of her findings and their applicability to XYZ. Thus, there is no danger that plaintiffs' expert testimony will improperly invade the province of the jury, or will prejudice defendants, so that Rule 403, Fed. R. Evid., is not implicated. Therefore, this court should find that plaintiffs' proposed expert testimony on corporate culture issues is admissible and relevant.

**B. Defendants' Psychological Expert Testimony Is Not Relevant for the Determination of Either Defendants' Liability or Plaintiffs' Damages.**

This Court should exclude the proposed testimony of defendants' expert witness, who intends to present testimony on individual susceptibility to stressors. As a threshold matter, that individuals may vary widely in their responses to stressors, and that some individuals may have exaggerated responses to stressors that most other individuals can tolerate is a matter within the knowledge of lay persons, and not one requiring expert testimony. See Nichols v. American Nat'l Ins. Co., 154 F.3d 875 (8th Cir. 1998) ("Such [expert] evidence is not helpful if it draws inferences or reaches conclusions within the jury's competence . . ."). Even if this Court were to consider the substance of this expert testimony, it must still find that it is not relevant for either liability or damages.

Defendants' expert testimony is not relevant to the issue of defendants' liability. Presumably, defendants intend to use this testimony to show whether a reasonable person in the plaintiffs' position would have perceived the harassment to be both objectively and subjectively hostile or abusive. The Supreme Court, in Harris, recognized this requirement:

Conduct 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., Inc., 510 U.S. 17, 21-22 (1993) (emphasis added). The Supreme Court, in Oncale, held that "that the objective severity of harassment should be judged from the

perspective of a reasonable person in the plaintiff's position." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

Thus, all that is required is for the jury to determine, based on their lay experience, whether a reasonable person in the position of Ms. Smith and Ms. Johnson would have regarded the environment at XYZ Corporation to be objectively hostile, and whether the plaintiffs subjectively recognized the environment as hostile. Expert testimony on these issues would improperly invade the province of the jury, since this determination should be based on the testimony of the fact witnesses. Therefore, this Court should find that defendants' proposed expert testimony is not relevant to the issue of liability, and should be excluded on that ground.

Nor is defendants' proposed expert testimony relevant to the issue of damages. That some individuals may be more susceptible to others to harassing conduct does not serve to limit their damages, since it is a settled principle that the defendant takes the plaintiff as it finds her. See, e.g., Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1294-95 (8th Cir. 1997) (damages under the eggshell doctrine "includes damages assessed against a tortfeasor for harm caused to a plaintiff who happens to have a fragile psyche"); McKinnon v. Kwang Wah Restaurant, 83 F.3d 498, 506 (1st Cir. 1996) ("With respect to emotional distress, a plaintiff must demonstrate that an ordinarily sensitive person could have suffered the alleged harm. If the plaintiff meets this burden, then the defendant must 'take the victim as he finds her, extraordinarily sensitive or not.'). Thus, even if some individuals may have exaggerated responses to workplace stressors, expert testimony for that proposition has no bearing on plaintiffs' damages. Moreover, defendants' expert is not proposing to testify that plaintiffs themselves had exaggerated responses. Therefore, this Court should similarly exclude defendants' proposed expert testimony as not relevant to the issue of damages.

### **Plaintiffs' Factual (Non-Expert) Evidence**

1. Defendant Parker's Generic Racist and Sexist Comments at Staff Meetings Attended by Plaintiffs Is Admissible to Prove the Existence of XYZ's Hostile Work Environment.

Evidence that defendant Parker made generic sexist or racist comments at meetings that the plaintiffs attended is admissible to prove the existence of a hostile work environment at XYZ Corporation. Here, the remarks were made once or twice a year, over a three-year period from 2000 through late 2002, at official staff meetings, by the plaintiffs's second-level supervisor. Plaintiffs intend to use defendant Parker's remarks to show:

- (1) that sexist and racist remarks were made by high-level officers of XYZ Corporation;
- (2) that plaintiffs themselves were emotionally affected by those remarks;
- (3) that defendant Parker's statements encouraged his direct reports, defendants Martin and Adams, to engage in their own, more egregious conduct; and
- (4) that XYZ Corporation either condoned a hostile work environment, or failed to take adequate remedial actions, thereby defeating the defendants' invocation of the Ellerth /

Faragher affirmative defense to liability justifying the imposition of punitive damages under Kolstad.

Under the continuing violation doctrine, plaintiffs can introduce testimony of defendant Parker's remarks dating back to 2000, since one or more of the remarks occurred within the statute of limitations period for plaintiffs' Title VII and D.C. Human Rights Act claims. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) ("Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."). That defendant Parker made only a few remarks over a three-year time period does not foreclose their admissibility:

The number of instances of harassment is but one factor to be considered in the examination of the totality of the circumstances. A Title VII plaintiff does not prove racial harassment or the existence of a hostile working environment by alleging some 'magic' threshold number of incidents. Conversely, an employer may not rebut a claim simply by saying that the number of incidents alleged is too few.

Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273-74 (7th Cir. 1991); see also Richardson v. N.Y. State Dep't of Correctional Serv., 180 F.3d 426, 439 (2d Cir. 2000) ("There is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."). Thus, this Court should find that the frequency of defendant Parker's statements does not require their exclusion on that basis alone. Moreover, defendant Parker's statements should not be considered in isolation, but in the context of his other conduct, such as arranging for a stripper and sexist gifts at a going-away party for his predecessor, along with the statements made by defendants Adams, Martin, and others at XYZ. The Supreme Court emphasized that hostile work environment claims must be evaluated in the totality of the circumstances:

. . . whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The Court further recognized that "no single factor is required." Id. Hence, a "hostile environment claim must be evaluated on the basis of the cumulative effect of the abusive conduct." Dawson v. Westchester, 373 F.3d 265, 274 (2d Cir. 2004); see also Howley v. Stratford, 217 F.3d 141, 151 (2d Cir. 2000) (Court "should not consider the record solely in piecemeal fashion . . . for a jury . . . would be entitled to view the evidence as a whole"); Jackson v. Quanex Corp., 191 F.3d 647, 661 (6th Cir. 1999) ("Thus, a court should not examine each alleged incident of harassment in a vacuum."); Andrews v. Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.").

Since defendant Parker made his statements over a three-year period, at official staff meetings, plaintiffs should be able to introduce testimony about his statements to show not only that a hostile work environment was tolerated at more than one level in their supervisory hierarchy, but also that the unremedied existence of this harassment precludes defendants from invoking the Ellerth / Faragher affirmative defense to liability, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), and justifies the imposition of punitive damages, under Kolstad v. American Dental Ass'n, 527 U.S. 526, 545 (1999), and its progeny. Defendant Parker's statements tend to prove that XYZ has not been "making good faith efforts to enforce an antidiscrimination policy," *id.* at 546, thereby precluding the defendants from seeking to use their harassment policies as a shield to liability for punitive damages.

2. Evidence of Supervisory and Co-Worker Harassment of Plaintiffs from 2000 Through 2002 Is Admissible.

Evidence of supervisory and co-worker harassment of plaintiffs from 2000 through 2002 is admissible as relevant evidence under Rule 401, Fed. R. Evid. As a threshold issue, evidence of harassment that occurred prior to the statute of limitations for plaintiffs' Title VII and D.C. Human Rights Act claims is admissible under the continuing violation doctrine, since some of the harassment occurred within the statutory period, and is of the same nature as the older events. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). Since the statute of limitations for plaintiffs' Section 1981 racial harassment claims is four years, Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, \_\_\_, 124 S. Ct. 1836, 1842 (2004), and plaintiffs filed their lawsuit in 2003, all the racial harassment of plaintiffs from 2000 through 2002 falls within the statute of limitations.

Although there are different theories for imposing liability on XYZ for supervisory vs. co-worker harassment, *i.e.*, vicarious liability and the negligence standard, respectively, evidence of harassment by either supervisors or co-workers is relevant for proving the sufficiency plaintiffs' harassment claims against XYZ and the individual defendants, which turn, in part, on the severity and frequency of the harassment. Such evidence is also relevant for countering the defendants' affirmative defenses to liability under either theory, or their defense to punitive damages. *See, e.g.*, Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 135-36 (2d Cir. 2001) (employer liable for co-worker harassment); EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 525 (7th Cir. 2001) (*en banc*) (same); Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864, 876 (9th Cir. 2001) (same). Therefore, this Court should allow plaintiffs to present evidence of harassment of themselves by their supervisors and their co-workers.

3. Evidence that Defendant Adams Made Sexist and Racist Remarks About Ms. Smith and Other Black Women at XYZ Is Admissible to Show His Discriminatory Intent and Animus.

Defendant Adams made crude sexist and racist remarks about Ms. Smith and other Black women at XYZ to another manager, Mr. Taylor. The remarks were made while Messrs. Adams



and Taylor were socializing, after work hours. Plaintiffs will present this evidence through the live testimony of Mr. Taylor (a former manager of XYZ) and Mr. Adams (called as an adverse witness); if Mr. Taylor is not available for trial, then plaintiffs will use his deposition testimony.

Although plaintiffs did not know of these remarks until after their lawsuit was filed, these remarks are relevant, and therefore admissible under Rule 401, Fed. R. Evid., because they make the existence of a discriminatory motivation for Mr. Adams' harassment of Ms. Smith in the workplace more probable than it would be without the evidence. Rule 403, Fed. R. Evid., does not bar this testimony, since it only applies when the "probative value [of the evidence is] *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 (emphasis added). This type of evidence, however, is the very essence of any case based on a hostile work environment, and is essential for the jury to be able to understand the harassment that Ms. Smith faced and the reason for her complaints.

4. Evidence that Defendant Adams Made Sexist Remarks About Ms. Wilson, His Subordinate, Is Admissible to Show Discriminatory Intent and Animus.

Defendant Adams made sexist remarks about at least one other subordinate, Alice Wilson, at the same time that he was harassing Ms. Smith, a colleague of Ms. Wilson's. Plaintiffs will present this evidence through the live testimony of Mr. Taylor (a former manager of XYZ), Mr. Adams (called as an adverse witness), and Ms. Wilson. Defendant Adams was dating Ms. Wilson at the same time that he was describing her sexual attributes to Mr. Taylor, during after-work socializing. Although plaintiffs did not know of these remarks until after their lawsuit was filed, these remarks show, as did the evidence of Mr. Adams' remarks to Mr. Taylor about Ms. Smith, that Mr. Adams has sexually objectified views of women in the workplace. See Gregory v. Daly, 243 F.3d 687, 695 (2d Cir. 2001) ("the sex-based character of much of Daly's behavior permits the inference that the remainder of his harassing conduct was also due to [plaintiff's] sex"). Such remarks are therefore admissible under Rule 401, Fed. R. Evid., because they make the existence of a discriminatory motivation for Mr. Adams' harassment of Ms. Smith in the workplace more probable than it would be without the evidence.

Plaintiffs emphasize that they have no intention of inquiring into the details of defendant Adams' personal life except insofar as evidence of statements or behavior by him, whether made while socializing with other managers, or in the workplace, may tend to support Ms. Smith's claims regarding Mr. Adams' propensity to engage in sexualized conversations in a manner debasing to women, engage in sexual innuendo, and otherwise create an oppressive and hostile work environment. See EEOC v. Farmer Bros., 31 F.3d 891, 897-98 (9th Cir. 1994) ("sexual harassment may be symptomatic of gender-based hostility, the employer or supervisor using sexual harassment primarily to subordinate women, to remind them of their lower status in the workplace, and to demean them").

5. Evidence that XYZ Failed to Provide Anti-Harassment Training to Mr. Taylor and Other Supervisors and that XYZ's President Made Sexist Remarks About Women in the Workplace Is Admissible to Counter Defendants' Affirmative Defenses to Liability and Punitive Damages.

XYZ Corporation failed to provide anti-harassment training to some or all of its supervisors in the Washington, D.C. office, which resulted in an environment where XYZ's President felt free to make sexist remarks about women in the workplace. Plaintiffs will introduce this evidence through testimony of Mr. Taylor, a supervisor (who worked at the same level as did defendants Adams and Martin), and of other supervisors who failed to receive this training. XYZ Corporation's President, at an annual manager's retreat in July 2002, made sexist remarks about women in the workplace. Plaintiffs will introduce this evidence through the testimony of Mr. Taylor and/or other supervisors who attended that retreat. The plaintiffs themselves will also testify as to the impact on themselves upon learning of the President's remarks. Although the plaintiffs are not offering the President's remarks as evidence of harassment of themselves, they seek to introduce it to show that sexist conduct was condoned at XYZ's highest levels, and that XYZ failed to make good faith efforts to comply with the employment discrimination statutes.

This evidence – failure to train, and the President's conduct – is admissible to counter defendants' affirmative defenses to both liability and damages. Under Supreme Court precedent, defendants can assert an affirmative defense to liability for supervisory harassment, only if they show “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). Here, the defendants' failure to provide anti-harassment training clearly precludes defendants from asserting the affirmative defense, since the absence of training does not reflect the requisite “exercise [of] reasonable care to prevent” harassment. The President's remarks, which occurred at the highest level of XYZ, also indicate either that the President himself received no training, or the training was ineffective. Plaintiffs should be permitted to present testimony, through Mr. Taylor and other supervisors, regarding the absence of anti-harassment training, and the President's remarks. The federal courts have precluded employers from asserting the affirmative defense to vicarious liability in similar circumstances. See, e.g., Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1027-28 (10th Cir. 2001) (policy never distributed, and “no seminars on the subject of sexual harassment were ever held”).

This evidence also precludes the defendants from asserting an affirmative defense to liability for punitive damages. Under Supreme Court precedent, such a defense is only available if the supervisor's conduct is “contrary to the employer's ‘good faith efforts to comply with Title VII.’” Kolstad v. American Dental Ass'n, 527 U.S. 526, 545 (1999). The failure to provide training, and the President's remarks at the retreat, tend to prove that XYZ has not been “making good faith efforts to enforce an antidiscrimination policy,” id. at 546, thereby precluding the defendants from seeking to use the affirmative defense to liability for punitive damages. The

federal circuit courts have upheld punitive damages in similar circumstances. See, e.g., Marrero v. Goya of P.R., Inc., 304 F.3d 7, 21-22 (1st Cir. 2002) (harassment policy never distributed or implemented); Anderson v. G.D.C., Inc., 281 F.3d 452, 461 (4th Cir. 2002) (employer “never adopted any anti-discrimination policy, nor did it provide any training whatsoever on the subject of discrimination”); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 438-39 (4th Cir. 2000) (evidence that Circuit City executives made comments demonstrating racial bias).

Therefore, the plaintiffs should be permitted to introduce testimony about the lack of anti-harassment training, and the President’s remarks, to show that XYZ made no efforts to exercise reasonable care to prevent harassment, or to enforce an anti-discrimination policy. This testimony would allow plaintiffs to challenge XYZ’s assertion of an affirmative defense to vicarious liability for supervisory harassment, or to liability for punitive damages.

6. Evidence of Sexually and Racially Derogatory Remarks Made About Plaintiffs’ Colleagues by Other Managers and Co-Workers in XYZ’s Washington Office Is Admissible.

Plaintiffs seek to present testimony about sexually and racially derogatory remarks that other managers and co-workers in their office made about other employees. Plaintiffs will present this evidence both through their own testimony (as to the remarks that they overheard, and that were reported to them), and through the testimony of colleagues who also heard these remarks. As to the remarks that plaintiffs did not hear, but learned of shortly thereafter, plaintiffs’ own testimony will be limited to the impact that learning of this work environment had on their emotional well-being. See Jackson v. Quanex Corp., 191 F.3d 647, 661 (6th Cir. 1999) (“racial epithets need not be hurled at the plaintiff in order to contribute to a work environment that was hostile to her”); Schwapp v. Avon, 118 F.3d 106, 111-12 (2d Cir. 1997) (“the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor can impact the work environment”).

Although these remarks were not made about plaintiffs themselves, their frequency (as much as several times a month), and that plaintiffs directly heard some of the remarks, contributed to the hostile work environment that plaintiffs themselves endured, thereby increasing their emotional distress. See Dawson v. Westchester, 373 F.3d 265, 274 (2d Cir. 2004) (the “crucial question” is “whether the workplace atmosphere, considered as a whole, undermined plaintiffs’ ability to perform their jobs, compromising their status as equals to men in the workplace”). The courts have also recognized that “evidence of a discriminatory ‘atmosphere’ may sometimes be relevant to showing the corporate state-of-mind.” Cummings v. Standard Register Co., 265 F.3d 56, 63 (1st Cir. 2001) (upholding admission of testimony of co-workers who endured comparable discrimination). Also, evidence that others were similarly harassed tends to make “more credible [plaintiff’s] testimony about the environment that he was exposed to.” Williams v. ConAgra Poultry Co., 378 F.3d 790, 794 (8th Cir. 2004) (upholding admissibility of co-worker testimony of harassment they experienced, but plaintiff did not).

Moreover, this evidence tends to show that XYZ had a broader pattern and practice of tolerating or condoning a hostile work environment in its Washington office. As discussed *supra*, this Court should find that such evidence precludes defendants from asserting the affirmative defense to vicarious liability, or to punitive damages. This Court should similarly find that such evidence is relevant towards showing the existence of an overall discriminatory animus at XYZ's Washington office.

7. Evidence that Kevin Butler, Ms. Smith's Former Supervisor, Made Sexist Remarks about Her Is Admissible to Show that XYZ Condoned Harassing Conduct.

Plaintiffs seek to introduce evidence that Kevin Butler, who served as Ms. Smith's supervisor from 1995 to March 2000, repeatedly made highly derogatory sexist comments about her, including commenting on her purported sexual attributes. Despite Ms. Smith's complaints, Mr. Butler did not leave XYZ until after an IRS audit showed that he engaged in financial improprieties. As a threshold issue, evidence of Mr. Butler's harassment is admissible under the continuing violation doctrine, pursuant to the Supreme Court's Morgan decision. Here, Ms. Smith has alleged other, similar sexual harassment by XYZ managers during the statute of limitations period, and has alleged that XYZ's failure to remedy that supervisory harassment is consistent with its failure to remedy Mr. Butler's harassment.

As discussed *supra*, this evidence is also admissible to show that XYZ has a general pattern of condoning harassing conduct, even when employees complain about the harassment. This court should find that evidence of Mr. Butler's conduct is admissible and relevant to prove Ms. Smith's hostile work environment claims, and to counter defendants' attempts to invoke the affirmative defenses to vicarious liability or punitive damages.

8. Evidence of Workplace Graffiti about Plaintiffs and Other Women in the Men's Restroom Is Admissible to Prove Plaintiffs' Hostile Work Environment Claims.

Evidence that there was sexist graffiti about plaintiffs, and about women in general, in the men's restroom at XYZ's Washington office is admissible to prove plaintiffs' hostile work environment claims. Although plaintiffs did not see the graffiti, that is of no moment for two reasons: (1) plaintiffs could not have seen the graffiti unless they deliberately entered the "wrong" restroom; and (2) the graffiti clearly reflected a pattern of gender-based animosity towards plaintiffs specifically (by calling them "slut" and "whore"), and towards women in XYZ's workforce. Plaintiffs will present evidence of this graffiti through the testimony of a male co-worker, who reported it to them, and through the testimony of other men who saw the graffiti or were involved in the company's removal of the graffiti. Plaintiffs will also testify themselves as to the emotional effect on themselves upon learning about this graffiti.

As discussed *supra*, evidence regarding the graffiti is admissible to show the severe and pervasive nature of the sexually hostile work environment at XYZ. The fact that the graffiti was a recurring problem shows that even if XYZ timely removed the graffiti, its recurrence

demonstrates that XYZ's remedial efforts were inadequate. See Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1999) ("The proof at trial focused extensively on what the [defendants] did and failed to do about the harassment . . . painting over offensive graffiti every few months only to see it go up again in minutes . . . [defendants] failed to make a colorable case that its policies met the Ellerth/Faragher standards."); Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1077 (6th Cir. 1999) (harassing note on bathroom wall as evidence of harassment of plaintiff). Therefore, this Court should find that the graffiti is relevant evidence of plaintiffs' harassment claims and to counter defendants' affirmative defenses.

9. Evidence of Defendant Parker's Organizing a Going-Away Party with a Strip-Tease Dancer and Sexual Devices Is Admissible to Show XYZ's Pattern of Condoning a Sexually Hostile Work Environment.

Evidence that Defendant Parker organized a going-away party for his predecessor, at which a strip-tease dancer performed, and at which he gave his predecessor several sexual devices, is admissible, as harassment that the plaintiffs experienced, and as evidence of XYZ's pattern of condoning a sexually hostile work environment. Ms. Johnson attended the party, but left right after the strip-tease dancer performed, so she heard about the sexual devices several days later. Ms. Smith, who did not attend the party, heard about it from Ms. Johnson. Even though only Ms. Johnson was a witness, and then only to the strip-tease dancer, both she and Ms. Smith can testify as to the effect on them of learning that their second-level supervisor had organized such an event, which was clearly work-related in that it was organized for his predecessor, and attended by other XYZ managers and employees.

Moreover, defendant Parker's conduct with respect to this event should not be considered in isolation, but needs to be considered in combination with defendant Parker's other acts, including making sexist and racist comments at staff meetings, and condoning the harassing acts of his direct reports, defendants Adams and Martin, *supra*.

10. Evidence of a Hangman's Noose at XYZ's Mailroom Is Admissible to Show the Existence of a Racially Hostile Work Environment at XYZ.

Evidence of a hangman's noose – assuredly the vilest type of racial harassment – is admissible to prove the existence of a racially hostile work environment. Although only Ms. Johnson saw the noose, Ms. Smith having learned of it from others, the noose was still so severe as to send a chilling signal to employees of XYZ. The appellate courts have long recognized the severity and gravity of such an incident in the workplace: "It is hard to imagine an incident of this sort taking place in 1984. The grossness . . . is self-evident." Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 n.4 (11th Cir. 1989). A district court subsequently stated:

As for the severity of the display of a noose, there can be little doubt that such a symbol is significantly more egregious than the utterance of a racist joke. . . . Indeed, the noose is among the most repugnant of all racist symbols, because it is itself an instrument of

violence. It is impossible to appreciate the impact of the display of a noose without understanding this nation's opprobrious legacy of violence against African-Americans.

Williams v. N.Y. City Housing Auth., 154 F. Supp. 2d 820, 823-24 (S.D.N.Y. 2001). Further, plaintiffs were two of only five Black managers at XYZ's Washington office, so they were within a small group of persons who would be directly effected by the noose.

Defendants' argument that the noose only occurred once, and its source was not determined, is unavailing, since the severity of this incident offsets its frequency. Moreover, the noose cannot be considered in isolation, but must be considered in the context of other incidents of racial harassment, *supra*. The appellate courts have found that a single noose event in the workplace, in combination with other events, constitutes a racially hostile work environment. See Williams v. ConAgra Poultry Co., 378 F.3d 790, 793-94 (8th Cir. 2004) ("a black doll hung by a noose in the factory"); West v. Philadelphia Elec. Co., 45 F.3d 744, 749 n.1 (3d Cir. 1995) ("a large noose hanging in the workshop entranceway").

Defendants' argument that some other courts may have held that evidence of a noose in the workplace was not admissible is not determinative of whether this Court should find that such evidence was admissible to prove plaintiffs' claims in this case, since such determinations are fact-specific. See Barbour v. Browner, 181 F.3d 1342, 1348 (D.C. Cir. 1999) ("because harassment cases tend to be intensely fact-specific, a judicial determination that particular offensive conduct was or was not 'severe or pervasive' will often be of limited value to courts in other cases"); Curry v. District of Columbia, 195 F.3d 654, 666 n.3 (D.C. Cir. 1999) (that "other courts have found harassing behavior . . . not to be actionable does not establish any sort of generalization that [such conduct is not] severe enough to be actionable").

Thus, this Court should find that evidence of the noose in XYZ's Washington office is admissible as evidence of the racially hostile work environment that plaintiffs endured.

11. Evidence of Sex Discrimination by Defendants Against Other Women at XYZ's Washington Office Is Admissible to Show Defendants' Discriminatory Animus Against Women in the Workplace.

Plaintiffs should be permitted to present evidence that defendants Adams, Martin, and Parker engaged in sex discrimination against other women at XYZ's Washington office. Although plaintiffs themselves do not raise claims based on failure to promote, or unequal wages, evidence of this sex discrimination is relevant to show defendants' discriminatory animus against women in the workplace. Evidence relating to other claims of discrimination and retaliation may be relevant to issues of motive and intent and also to plaintiffs' entitlement to punitive damages. The D.C. Circuit held that it was reversible error to exclude such evidence in the retaliation context, since "evidence showing that the employer followed a broad practice of retaliation and responded to any protected criticism with disciplinary action has some probative value on the issue of the employer's likely motivation here." Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1046 (D.C. Cir. 1983) (citing Rules 401, 404(b), Fed. R. Evid.);

accord Jones v. Washington Metro. Area Transit Auth., 946 F. Supp. 1011, 1019 (D.D.C. 1996) (“the fact that WMATA may have been engaged in widespread discrimination based upon sex, age, race or any other impermissible factor would certainly be relevant to its intent or motive to retaliate against those who complained of such discrimination”).

This court should also find that evidence of prior or ongoing acts of discrimination against other employees is similarly admissible. Indeed, the discrimination was against other women, and was by the same individuals who are defendants in this case, which is an even closer nexus than in Morris and Jones. Further, evidence pertaining to other discrimination claims involving XYZ’s Washington office may be admissible to show that XYZ likely knew that its treatment of plaintiffs could result in a finding that its conduct was unlawful and, thus, entitle plaintiffs to punitive damages. See Cummings v. Standard Register Co., 265 F.3d 56, 64 (1st Cir. 2001) (upholding admission of testimony of co-workers who also alleged discrimination, since defendant “raised, as part of its defense, its national corporate practices of nondiscrimination, making evidence challenging those claims especially relevant”).

Alternatively, if this Court holds that plaintiffs cannot introduce evidence regarding sex discrimination against other female employees in XYZ’s Washington office, then plaintiffs respectfully seek a ruling that XYZ cannot introduce exculpatory evidence intended to show that XYZ has effective anti-discrimination policies and that XYZ properly implements those policies in response to discrimination complaints.

12. Evidence of Harassment of Hispanic Employees in XYZ’s Texas Office Is Admissible to Show XYZ’s Practice of Condoning Racial Harassment, and to Preclude Defendants from Asserting the Affirmative Defenses to Liability and Punitive Damages.

Plaintiffs should be allowed to present evidence of racial harassment of Hispanics in XYZ’s Texas office to show XYZ’s pattern of condoning racial harassment, and to counter defendants’ affirmative defenses based on company-wide policies and procedures for preventing harassment in the workplace. Plaintiffs will present this evidence through calling XYZ’s human resources managers and other senior officers with knowledge of the events and litigation, and through the testimony of one or more Hispanic employees from XYZ’s Texas office.

As discussed *supra*, evidence of other types of harassment in XYZ’s workplace may be admissible to show issues of intent and motivation by XYZ’s supervisors and managers in harassing plaintiffs. Moreover, that the harassment occurred in XYZ’s Texas office shows that harassment, far from being limited to a single office, is more pervasive at XYZ, thereby showing that XYZ’s anti-harassment policies are either non-existent or inadequately implemented. This Court should find that such evidence is probative for countering defendants’ affirmative defenses to liability, and to punitive damages.

Alternatively, if this Court holds that plaintiffs cannot introduce evidence regarding harassment of Hispanic employees in XYZ’s Texas office, then plaintiffs respectfully seek a

ruling that XYZ cannot introduce exculpatory evidence intended to show that XYZ has effective company-wide harassment policies, or that XYZ properly implements those policies in response to harassment complaints.

13. Plaintiffs' Tape Recordings Are Admissions of a Party-Opponent and Are Admissible under Federal Law as Evidence of Defendants' Harassment.

Plaintiffs' tape recordings of conversations they had with their supervisors are admissible as constituting admissions of a party-opponent. The plaintiffs' tape recordings show that their supervisors made sexist remarks about the plaintiffs in the context of their performance reviews. Under Rule 801(d)(2)(A), Fed. R. Evid., a statement is not hearsay where "the statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity . . ." To the extent that these tape recordings contain statements made by defendants Adams and Martin, who were acting in their official capacity as agents of XYZ, then the tape recordings are not hearsay. See Rauh v. Coyne, 744 F. Supp. 1181, 1183 (D.D.C. 1990) (admitting discrimination plaintiff's tape recording, since it "is an admission of a party-defendant").

The tape recordings are relevant evidence, and hence admissible under Rules 401 and 402, Fed. R. Evid. The tape recordings serve to document statements made by defendants Adams and Martin, which corroborate plaintiff's harassment claims. See Rauh, 744 F. Supp. at 1183 (denying defendants' motion in limine to exclude plaintiff's tape recording since "it is relevant to the issue of pretext"); see also Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1189 (1st Cir. 1996) (tape recording was one of "three significant pieces of direct evidence"); Woodhouse v. Magnolia Hosp., 92 F.3d 248, 253-54 (5th Cir. 1996) ("admission on tape is sufficient to raise a jury issue on plaintiff's discrimination claims"); Stringel v. Methodist Hosp. of Indiana, Inc., 89 F.3d 415, 420-23 (7th Cir. 1996) (upholding admission of tape recording at trial). Therefore, the tape recordings are of consequence to these claims, and will help resolve these issues which lie at the core of plaintiffs' case.

The tape recordings are also the best evidence of those conversations, under Rule 1002, Fed. R. Evid., which provides, in relevant part, that: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required." Here, the tape recording is itself the best evidence of the underlying conversations and meetings, as opposed to witnesses attempting to recall, months later, the substance of these conversations and meetings. There is no effective substitute for a tape recording, since a written transcript fails to convey the full dynamics of a conversation. See Byrd v. Reno, No. Civ. A. 96-2375 (CKK/JMF), 1998 WL 429767, at \*1 (D.D.C. Mar. 18, 1998) ("there is not and cannot be anything that is the substantial equivalent of the tape recording of a conversation. . . . There is literally no substitute for the tape recordings.").

Whether Ms. Johnson's tape recording, made in Maryland, was in violation of Maryland law, is not relevant to this Court's determination of the admissibility of such evidence in a non-diversity, federal question case. See Feldman v. Allstate Ins. Co., 322 F.3d 660, 666 (9th



Cir. 2003) (“evidence obtained in contravention of state law is admissible in federal court, so long as no federal law is violated,” other than in diversity cases), cert. denied, 540 U.S. 875 (2003); Zhou v. Pittsburg State Univ., 252 F. Supp. 2d 1194, 1204 (D. Kan. 2003) (“in this case which is based on a federal question, the tape recording of the telephone conversation . . . is admissible”), aff’d on other grounds, 2004 WL 1529525 (10th Cir. July 8, 2004). Plaintiffs also seek a limiting instruction precluding defendants from introducing any evidence regarding the potential illegality of Ms. Johnson’s tape recording, or that Ms. Smith’s tape recording was made in violation of XYZ’s corporate policy, since Ms. Johnson is not being prosecuted, and XYZ took no action against Ms. Smith for her alleged violation of corporate policy.

Defendants’ arguments that the tape recordings are corporate property and that any further use of them by plaintiffs or plaintiffs’ counsel is unethical, are misplaced. Even if plaintiffs’ counsel turned over the original tape recordings to defendants’ counsel, the latter would still be required to produce the tape recordings during discovery, as relevant evidence under Rules 26(a)(1)(B), 26(b)(1), and 34, Fed. R. Civ. P.

This Court should find that the plaintiffs’ tape recordings of their conversations with their supervisors constitute admissions of a party-opponent, are the best evidence of those conversations, and are not excludable as potentially illegal under the Maryland wiretapping statute in this non-diversity, federal question case. Thus, this Court should allow plaintiffs to present the tape recordings in their case-in-chief and to impeach defendants Adams and Martin.

14. Evidence that Defendant XYZ Corporation was Convicted for Financial Fraud and Tax Evasion with Defendant Parker’s Participation Is Admissible to Impeach Parker’s Credibility.

Evidence that defendant XYZ Corporation was convicted of financial fraud and tax evasion, with defendant Parker’s participation, is admissible to impeach the credibility of Parker and of XYZ itself. Rule 609(a)(2), Fed. R. Evid., allows a party to attack the credibility of a witness by evidence “that any witness has been convicted of a crime . . . if it involved dishonesty or false statement.” Here defendant Parker was directly connected with the conviction, albeit as an unindicted co-conspirator. The Third Circuit held, in the only reported appellate decisions applying Rule 609(a) to employment cases, that: “Only if the witness is directly connected to a prior conviction for a crime involving dishonesty or a false statement does Rule 609(a)(2)’s automatic admission provision apply.” Walden v. Georgia-Pacific Corp., 126 F.3d 506, 524 (3d Cir. 1997). Unlike in Walden, where the proposed impeachment was of witnesses “who were not directly connected to the underlying criminal act,” id., and hence constituted impermissible impeachment, in this case, the proposed impeachment is of defendant Parker who was directly connected with the underlying conviction for financial fraud and tax evasion.

More generally, as a district court recently recognized, when a defendant corporation testifies, through its officers, as to the corporation’s alleged good acts, “their testimony placed Norfolk Southern’s credibility at issue. Speaking through its agents, Norfolk Southern told the jury the company had a good environmental and safety record.” Hickson Corp. v. Norfolk

Southern Ry. Co., 227 F. Supp. 2d 903, 908 (E.D. Tenn. 2002). Thus, testimony on behalf of XYZ, such as its alleged good-faith efforts to comply with the laws, means that XYZ “can be a vicarious witness” through its officers who so testify, id. at 907, so that XYZ itself can be impeached through testimony about its prior conviction. Id. at 907-08.

Therefore, this Court should allow plaintiffs to impeach the credibility of both Parker and XYZ itself with evidence of XYZ’s felony conviction, under Rule 609(a)(2), Fed. R. Evid.

### **Defendants’ Factual (Non-Expert) Evidence**

1. Defendants’ Evidence Regarding the Timing of Ms. Johnson’s Objections to Mr. Martin’s Harassment Is Inadmissible Since She did Report the Harassment and Was Not Required to Complain Directly to the Harasser.

Defendants’ evidence that Ms. Martin waited weeks or months to report defendant Martin’s harassment of her, and that she never complained directly to defendant Martin, is inadmissible. As the Supreme Court recognized, the anti-discrimination statutes are violated at the outset, not when the harassment becomes so severe that the plaintiff complains or suffers emotional distress. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (“Title VII comes into play before the harassing conduct leads to a nervous breakdown.”). Thus, the courts have held that a plaintiff is not required to report each harassing incident immediately, nor is she required to complain directly to the harasser. One court held that the plaintiff need not report harassing remarks when they are first made, and can wait until the harassment “became virtually impossible to ignore.” Corcoran v. Shoney’s Colonial, Inc., 24 F. Supp. 2d 601, 607-08 (W.D. Va. 1998) (plaintiff did not complain at time of the first remark, and waited seven months, during which the harassment escalated, before complaining); accord Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999) (“Watts alleges that her supervisor’s harassment intensified in the spring of 1994. A jury could find that waiting until July of that same year before complaining is not unreasonable.”); Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 885 (N.D. Ind. 1998) (“the Court cannot say as a matter of law that a sexual assault victim who waits three months to report the incident, under these circumstances, unreasonably failed to take advantage of the University’s anti-harassment procedures.”).

The second element of the Ellerth / Faragher affirmative defense to vicarious liability for supervisory harassment asks whether the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). Here, however, Ms. Martin did report the harassment to XYZ management, she simply did not do so on a same-day basis, and defendants’ proposed testimony would be unfairly prejudicial, under Rule 403, Fed. R. Evid., as implying that she was somehow required to report her harassment on an expedited basis.

Particularly where, as here, Ms. Martin was harassed directly by her supervisor, as opposed to co-workers or customers, it was reasonable for her to wait until she could recover from a harassing incident before going to management. Further, the burden of proof is on the defendant to show that “a reasonable person in [plaintiff’s] position would have come forward early enough to prevent [her supervisor’s] harassment from becoming ‘severe or pervasive.’” Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999). Defendant’s one-sided evidence regarding the timing of her reports does not address their burden of showing that Ms. Martin ought to have reported the harassment sooner.

Moreover, there is no obligation for Ms. Martin to complain about the harassment to defendant Martin, when he is one of the principal harassers of her. In the summary judgment context, the courts have held the reasonableness of the employee’s reporting, and the employer’s policy, to be a factual issue for the jury in precisely these circumstances. For example, where the employer had designated only one person “as the individual to receive and investigate complaints” yet it was that very individual who had allegedly harassed the plaintiff, then it was a question of fact as to whether defendant had “exercised reasonable care” in implementing its anti-harassment policy. Ponticelli v. Zurich Am. Ins. Group, 16 F. Supp. 2d 414, 431 (S.D.N.Y. 1998); see also Brandrup v. Starkey, 30 F. Supp. 2d 1279, 1289 (D. Or. 1998) (“Instructing an employee to voice complaints directly to the supervisor that is allegedly responsible for the harassing behavior would not be a reasonable response to an employee’s concerns and would contravene the spirit, if not the terms of [defendant’s] own sexual harassment policy.”).

Therefore, this Court should exclude defendants’ proposed testimony regarding the timing of Ms. Martin’s reports, and her failure to report the harassment by her supervisor, to her supervisor, as irrelevant. This Court should also find that such evidence is contrary to defendants’ own obligations under Ellerth and Faragher.

2. Defendants’ Evidence Regarding Ms. Smith’s Mental Health History and Treatments Is Inadmissible for Purposes of Either Defendants’ Liability or Plaintiffs’ Damages.

Defendants seek to introduce evidence regarding Ms. Smith’s mental health history, and her ongoing mental health treatments, in order to argue that her emotional damages stem from a college rape and an ensuing abortion, some twenty years ago. Defendants argue that anything that may have happened to Ms. Smith while working at XYZ did not cause her emotional stress, which arose from, and continue to be affected by, those events.

This evidence is inadmissible for its highly prejudicial value, and since it is defendants’ burden, not plaintiff’s, to demonstrate that emotional distress damages can be parsed as defendants assert. As a threshold matter, under Rule 403, Fed. R. Evid., evidence of a rape and an ensuing abortion is so highly inflammatory as to be unfairly prejudicial to Ms. Smith. Such evidence of Ms. Smith’s mental health history, which arises from her prior sexual history must also be subjected to the stringent review of Rule 412, Fed. R. Evid. Thus, the Eighth Circuit held that it was reversible error to admit evidence of plaintiff’s abortion in a Title VII case:

Informing the jury that Nichols had had an abortion presented the danger of provoking “the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner.” Nickerson v. G.D. Searle & Co., 900 F.2d 412, 418 (1st Cir. 1990). The evidence exposed a very private area of Nichols’ life and a type of experience which frequently involves a conflict in conscience. Such evidence tends to be highly prejudicial.

Nichols v. American Nat’l Ins. Co., 154 F.3d 875, 885 (8th Cir. 1998) (remanding for new trial).

Even if this Court were to consider admitting evidence regarding Ms. Smith’s prior mental health history, notwithstanding its prejudicial value, it must still find that such evidence is improper. Here, the defendants’ position is that there are outside factors that have caused Ms. Smith’s emotional injuries. As the Eighth Circuit held, once a plaintiff has shown that she has suffered substantial harm from the defendants’ unlawful conduct, then it is defendants’ burden to demonstrate that the harm can be parsed, and if so, to parse it. Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1293-94 (8th Cir. 1997). As the court recognized, if emotional and physical harm somehow could not be parsed, then that is the defendant’s problem, not the plaintiff’s:

Assuming the doctrine [of apportionment] is applicable, it is the *defendant* who must prove that any damage caused by other factors was divisible, and if so, what portion of damages the defendant caused. Plaintiffs were required to show that defendants’ sex discrimination and sexual harassment were substantial factors in causing their emotional harm. The Special Master’s individual awards of damages to plaintiffs indicates plaintiffs made this showing. However, what the plaintiffs did not have to prove was that other factors did *not* contribute to that harm. To limit its liability through apportionment, a defendant must prove that a plaintiff’s damages are divisible, and other outside factors contributed to the plaintiff’s harm. This the defendants were required to do; this the defendants failed to do.

Id. at 1294 (citing Restatement (Second) of Torts, § 433A).

However, if this Court decides that evidence of Ms. Smith’s history of mental health treatments can be introduced, then plaintiff request a limiting instruction providing that defendants cannot introduce any evidence regarding the initial causes, *i.e.*, her rape and abortion, as being too remote in time and too inflammatory.

3. Evidence that Ms. Johnson Allegedly Used Sexist Language in the Workplace Is Inadmissible Because She Did Not Welcome the Defendants’ Harassment.

The defendants seek to introduce evidence that Ms. Johnson allegedly used sexist language in the workplace, either about a female probationary employee, or about several male co-workers whom she dated. However, such evidence fails to show that the defendants’ harassment of her was unwelcome. In similar circumstances, the Eighth Circuit held that a plaintiff who had “used sexually explicit language” in the workplace still found the harassment

to be unwelcome based on the fact that he did not invite the harassment, he complained about the harassment, and he testified that he suffered emotional distress from the harassment:

Beach's conduct indicated that he found the graffiti to be offensive. In order to find conduct unwelcome, the complaining party must show that he "neither solicited it nor invited it and regarded the conduct as undesirable or offensive." Scusa, 181 F.3d at 966. "The proper inquiry is whether [appellant] indicated by his conduct that the alleged harassment was unwelcome." Id. Beach repeatedly complained to Yellow Freight management about the graffiti. . . . Beach suffered psychological problems as a result of the graffiti. He testified that he felt degraded, demeaned, and humiliated by the graffiti. . . . All of this indicates Beach found the graffiti offensive. . . . This evidence supported the district court's finding that Beach was subjectively offended by the graffiti.

Beach v. Yellow Freight Sys., 312 F.3d 391, 396-97 (8th Cir. 2002). Similarly, a district court rejected the employer's argument that the plaintiff welcomed the behavior in question by virtue of her own workplace conversations. Morton v. Steven Ford-Mercury of Augusta, Inc., 162 F. Supp. 2d 1228, 1230 (D. Kan. 2001).

Thus, this Court should find that evidence regarding Ms. Johnson's alleged sexist remarks is inadmissible, since it does not contravene the fact that she found the harassment of her, which she did not solicit, to be unwelcome and offensive.

4. Defendants' Evidence that Defendant Adams did not Harass any Other Women, or any Other Black Employee at XYZ, Is Inadmissible as Constituting Subsequent Remedial Measures and as Its Probative Value Is Outweighed by Its Undue Prejudice.

Defendants seek to introduce evidence from several female and black employees of XYZ, who will testify that they were not harassed by defendant Adams, and that they did not witness him harassing others, besides plaintiffs. These witnesses will testify about varying time periods, from 2000 to the present.

As a threshold matter, some of this evidence should be excluded as constituting subsequent remedial measures, to the extent that any of these witnesses are testifying about favorable conduct that occurred after Ms. Smith started complaining about her harassment, and certainly after she filed her EEOC charge. Rule 402, Fed. R. Evid., provides that evidence that is not relevant is not admissible. The appellate courts have consistently recognized, in employment discrimination cases, that because evidence of an employer's subsequent remedial measures is irrelevant to whether the employer discriminated against the plaintiff, it is inadmissible as evidence to exculpate the employer. See, e.g., Chuang v. University of Calif. Davis, Bd. of Trustees, 225 F.3d 1115, 1129-30 (9th Cir. 2000); Gonzales v. Police Dep't, City of San Jose, Calif., 901 F.2d 758, 761-62 (9th Cir. 1990) (collecting cases); Gamble v. Birmingham Southern R.R. Co., 514 F.2d 678, 683 (5th Cir. 1975). For example, the Ninth Circuit held that the district

court erred in relying on evidence about the defendant's subsequent favorable treatment of another woman:

Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer.

Lam v. University of Haw., 40 F.3d 1551, 1561 n.17 (9th Cir. 1994). Similarly, the Seventh Circuit held that an employer's later corrective actions did not absolve it from liability based on its past discriminatory conduct. EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 314 (7th Cir. 1988). Thus, to the extent that any of defendants' witnesses are testifying about recent conduct, such evidence should be excluded as constituting inadmissible subsequent remedial measures.

Even as to evidence from women whose work exposure to defendant Adams is contemporaneous with that of Ms. Smith, this Court must still exclude such testimony under Rule 403, because its minimal probative value is outweighed by its prejudicial effect, confusion of the issues, potential for misleading the jury, and for causing undue delay, waste of time and the needless presentation of cumulative evidence, the cornerstones of Rule 403.

First, with regard to the testimony of each witness, it would be necessary to hold a series of mini-trials to establish the factual context of defendant Adams' treatment of them and their observations of his treatment of other women, *e.g.*, timing; presence or absence of supervisory relationship between Adams and the witness; extent of their first-hand knowledge of Adams' actions; and the similarity of the actions with Adams' actions against Ms. Smith. This alone would cause undue delay and waste of time, particularly as a number of witnesses are involved.

Second, while the probative value of defendant Adams' remedial measures is essentially non-existent, the jury could easily confuse defendant Adams' actions with the issue of defendants' liability for events that occurred during the period up to the present. This would unfairly prejudice Ms. Smith and confuse the issues that are properly before the jury, *i.e.*, defendants' liability to Ms. Smith for their discriminatory conduct taken against her. As the Second Circuit cogently stated, even favorable treatment that is contemporaneous with the alleged discriminatory events would not preclude liability:

Vassar's grant of tenure to another female biology professor at the same time Vassar rejected the plaintiff does not exclude the possibility that plaintiff was subjected to discrimination based on her sex.

Fisher v. Vassar College, 70 F.3d 1420, 1448 (2d Cir. 1995) (emphasis added), aff'd on reh'g en banc, 114 F.3d 1332 (2d Cir. 1997).

Thus, this Court must exclude testimony from these witnesses about defendant Adams' treatment of other women, on the grounds that it constitutes inadmissible subsequent remedial

measures, and that its probative value is outweighed by its danger of unfair prejudice, of confusing the issues, of misleading the jury, and that it would cause undue delay, waste of time or the needless presentation of cumulative evidence.

5. Defendants' Evidence that Defendant Martin Made Sexist Comments About and Towards both Men and Women Is Inadmissible as Its Probative Value is Outweighed by Its Prejudicial Effect.

Defendants seek to introduce evidence that defendant Martin was an equal-opportunity harasser: that he indiscriminately made sexist remarks about and towards men and women, in order to show that any harassment of plaintiffs was not illegal discrimination on the basis of their gender, as required by Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998).

This Court should exclude such evidence, for much the same reason that evidence of defendant Adams' allegedly favorable treatment of other women and minorities should be excluded, *supra*. First, to the extent that defendant Martin's conduct took place after Ms. Johnson started complaining about his harassment of her, such conduct constitutes inadmissible evidence of subsequent remedial measures, *i.e.*, an attempt to defeat plaintiff's allegations that she was harassed because of her sex. Second, even to the extent that the conduct was contemporaneous with, or antedated, defendant Martin's harassment of Ms. Johnson, the presentation of this evidence would require a series of time consuming mini-trials, in which the context and circumstances of defendant Martin's conduct would have to be delineated with respect to each witness. The jury would be substantially distracted by having to decide whether defendant Martin's harassment of others was equivalent to his harassment of Ms. Johnson.

Thus, this Court must exclude testimony from these witnesses about defendant Martin's treatment of other employees, on the grounds that it constitutes inadmissible subsequent remedial measures, and that its probative value is outweighed by its danger of unfair prejudice, of confusing the issues, of misleading the jury, and that it would cause undue delay, waste of time or the needless presentation of cumulative evidence.

6. Evidence Regarding Ms. Johnson's Alleged Termination by Her Prior Employer and Falsification on her XYZ Job Application Should be Excluded as Unfairly Prejudicial and Irrelevant.

Defendants seek to introduce evidence that Ms. Johnson was fired from her previous employer, prior to the time XYZ hired her, and that she falsely stated on her XYZ employment application that she had been laid off due to a downsizing.

As a threshold issue, defendants have never asserted that Ms. Johnson's performance was at issue, or that they would have fired her had they known of these events. At most, such evidence should only be considered as after-acquired evidence, and used solely for purposes of limiting her eligibility to economic damages. McKennon v. Nashville Banner Publ. Co., 513 U.S. 352 (1995). In order for the employer to invoke the after-acquired evidence doctrine, "it

must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” *Id.* at 362-63. Defendants have not made this showing. See Sheehan v. Donlen Corp., 173 F.3d 1039, 1047-48 (7th Cir. 1999) (although plaintiff had falsified her resume, “it was not disputed that no one in the history of Donlen had ever been fired for falsification of a resume,” so its policy of discharging employees for falsification was not supported by “further evidence that the policy actually would have been applied”); Roalson v. Wal-Mart Stores, Inc., 10 F. Supp. 2d 1234, 1237 (D. Kan. 1998) (“genuine issues of material fact exist regarding whether Wal-Mart indeed would have refused to hire plaintiff had it known about the alleged misrepresentation at the time of the hiring decision”).

Even if this Court were to consider allowing such evidence for purposes of economic damages, it must still find that it is unfairly prejudicial and would unduly burden the plaintiff. Once again, a mini-trial would be required to present evidence of the termination of plaintiff by her prior employer, which would require the testimony of witnesses with knowledge of those now-remote events, and whether XYZ ever took actions against anyone else for such acts. Such testimony would impermissibly divert the jury from its function of determining whether Ms. Johnson suffered from the harassment. If this Court should allow defendants to present such evidence, it should be limited to establishing whether Ms. Johnson correctly stated the circumstances of her departure from her prior employer, in order to avoid any prejudicial effect from those events.

7. Defendants’ Evidence Regarding Discrimination Lawsuits Filed by Ms. Johnson in 2004 Is Not Admissible as Prejudicial and an Improper Waste of Time Since the Lawsuits are Contested.

Defendants seek to introduce evidence that Ms. Johnson has filed several discrimination lawsuits against five other companies in 2004, all based on their failure to hire her, when she applied to them after her constructive discharge from XYZ. Defendants argue that these lawsuits show that Ms. Johnson is litigation-prone, and files frivolous claims.

This evidence should be excluded, because the lawsuits are based on failure-to-hire claims, not on harassment claims, so they involve different conduct, not to mention different actors. Moreover, the other suits are all still in the preliminary stages, so they are being actively contested and there has been no judicial resolution on the merits. Inviting the jury to consider the existence of these lawsuits would not only require the conduct of time-consuming mini-trials in this case on the merits of those lawsuits, but would allow the jury to improperly infringe on the right of the courts in those other cases to determine the merits. Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 776 (7th Cir. 2001) (upholding exclusion at trial of evidence of plaintiffs’ other pending lawsuits); Koch v. Koch Industries, Inc., 203 F.3d 1202, 1227 (10th Cir. 2000) (“district court should have excluded the evidence [of other lawsuits] as irrelevant”).

Finally, using these lawsuits to suggest that Ms. Johnson has a penchant for filing frivolous lawsuits is unfairly prejudicial, and the evidence should be excluded on that ground



alone, if not for the other reasons. The Second Circuit held that it was reversible error to allow the defendant to refer to plaintiff's other lawsuits, since the "charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent." Outley v. City of New York, 837 F.2d 587, 592 (2d Cir. 1988) (reversing and remanding for a new trial before a different judge). Such evidence is inadmissible not only under Rule 403 (danger of unfair prejudice) but also under Rule 404(b) (evidence of other acts "is not admissible to prove the character of a person"). Id. at 592-93. Thus, this Court should exclude defendants from presenting any evidence about Ms. Martin's pending failure to hire lawsuits brought against other companies.

8. Defendants' Evidence that Ms. Smith Filed False Tax Returns Should be Excluded as Irrelevant and Unfairly Prejudicial.

Defendants seek to introduce evidence that Ms. Smith filed tax returns that did not accurately report her outside income from her hobby activities that she does on her own time, at home. Defendants intend to present this evidence solely to impeach Ms. Smith if she should testify at trial. Although some courts have allowed such testimony, under Rule 608, Fed. R. Evid, to impeach a testifying party on the stand, those courts have done so in circumstances where the plaintiff failed to file any tax return at all, or failed to report any of her outside income. Chnapkova v. Koh, 985 F.2d 79 (2d Cir. 1993) (plaintiff failed to file tax returns from "1984 up to the time of trial in 1992"); Chamblee v. Harris & Harris, Inc., 154 F. Supp. 2d 670, 681 (S.D.N.Y. 2001) (plaintiff failed to pay any income tax on her outside income).

Here, in contrast, Ms. Smith did file tax returns, and did report her outside income, and the alleged evidence is that she under-reported the outside income. This Court should find that Ms. Smith's conduct does not rise to the level in Chnapkova and Chamblee, thereby warranting exclusion of such evidence for purposes of impeaching her. However, if this Court should allow defendants to impeach her, then this Court should instruct that the impeachment should be limited to establishing whether she properly reported her outside income on her tax returns, to avoid diverting the jury's attention from their overall assessment of Ms. Smith's credibility.