

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DR. SABINA BURTON,
Plaintiff,

v.

Case No. 14-CV-274

BOARD OF REGENTS UNIVERSITY OF
WISCONSIN, et al.,
Defendants.

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTIONS *IN LIMINE***

Plaintiff, by her counsel, Hawks Quindel, S.C., hereby responds to Defendant's five motions *in limine*, filed on March 4, 2016. (Dkt. 77)

I. Evidence predating October 10, 2012 is relevant to Plaintiff's Title IX claim and should not be excluded.

Defendant's first motion *in limine* is overbroad and requests that this Court exclude all evidence prior to October 10, 2012, on the ground that only evidence after that date is relevant to Plaintiff's claim of Title IX retaliation. However, the evidence predating October 10, 2012, is relevant to the Title IX retaliation claim because it provides facts showing Dr. Caywood's differential treatment of Plaintiff before and after October 10, 2012 and that the adverse actions taken after October 10, 2012 were pretextual. The pre-October 10, 2012 evidence shows: Plaintiff's and Dr. Caywood's joint efforts to establish and develop a cybercrime program in the Criminal Justice Department (CJ); Plaintiff's efforts to obtain funding for

development of a CJ cybercrime curriculum and a cybercrime program; and Dr. Caywood and Dean Throop's support for Plaintiff's efforts to establish a cybercrime program and to obtain funding for the development of such a program, which waned after October 10, 2012 and culminated with Dr. Caywood's abject renunciation of support in January, 2013. Plaintiff's Title IX retaliation claim is marked by Defendant Caywood's about-face, withdrawing his support for development of the cybercrime program, and Defendant Throop's collaboration. Plaintiff detailed that evidence and argued its materiality and relevance to her Title IX retaliation claim, and that claim only, in her brief opposing summary judgment. *See* Dkt. 57 at 10-17. Similarly, evidence demonstrating Dr. Caywood's prior retaliatory conduct is probative of his motivation in this case. *See* discussion *infra* at 8-9.

Defendant's motion is founded on its reliance on two cases, both of which are unavailing. Defendant's reliance on *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655, 657 (7th Cir. 2012) is curious, because the provision cited, recounting the elements of the direct method of proof of ADEA retaliation, requires a plaintiff to show that there is a causal connection between her statutorily-protected activity and an adverse employment action. Defendant ignores that, under *Burlington N. & Santa Fe Ry. Co. v. White*, Plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. 53, 68 (2006) (citations omitted). Plaintiff's pre-October 10, 2012 evidence, as summarized above and detailed in Dkt. 57 at 10-17,

will be proffered for that specific purpose: to show the material nature and therefore the causal connection of Plaintiff's Title IX protected activity and the adverse, retaliatory actions by Defendant's agents, Dr. Caywood and Dean Throop.

Further, Defendant's reliance on the decision in *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001), is entirely misplaced. The *Speedy* ruling is based on inapposite facts. Here, of course, Plaintiff claimed Title IX retaliation in her complaint. In *Speedy*, the plaintiff sought to introduce complaints by female employees and plaintiff's support for them as a basis for his termination in retaliation for his protected activity under Title VII. However, because the plaintiff had not claimed that he was fired in retaliation for Title VII protected activity in his complaint, at summary judgment, and throughout the pretrial, and had only raised that claim as an "eleventh-hour additional theory to be presented to the jury," the trial court excluded the evidence as irrelevant. *Id.* at 403-404.

Defendant will not be prejudiced by submission of the pre-October 10, 2012 evidence, nor has it offered any rationale by which it would be prejudiced. Plaintiff will not offer any evidence of discrimination in conditions of employment. Further, the evidence in question can hardly confuse the jury because it is all probative of Title IX retaliation and therefore material to the jury's consideration of Plaintiff's claims of Title IX retaliation by Defendant's agents. As a result, the Court should deny Defendant's first motion *in limine*.

II. Plaintiff has not proposed to present testimony from experts whom she has not disclosed.

Defendant's second motion *in limine* is based on erroneous facts or assumptions, specifically that Plaintiff proposes to present expert witnesses whom she has not disclosed. Plaintiff has not proposed to present testimony from experts she has not disclosed. *See* Plaintiff's Rule 26(a) pretrial report containing her list of witnesses (Dkt. 65) and Plaintiff's witness list (conforming to use of the Court's requested form) (Dkt. 80). As a result, the Court should deny Defendant's second motion *in limine*.

III. Plaintiff has not proposed to present audio recordings of Dr. Burton's conversations.

Defendant's third motion *in limine* is also based on its erroneous assumption that Plaintiff proposes to present Dr. Burton's audio recordings of conversations. Because Plaintiff has not proposed to present any such audio recordings, this motion should also be denied. *See* Plaintiff's Rule 26(a) pretrial report containing her list of witnesses (Dkt. 65) and Plaintiff's witness list (conforming to use of the Court's requested form) (Dkt. 80).

Nevertheless, Plaintiff reserves the right to present her audio recordings, all of which were disclosed to Defendant, if they are needed for the purposes of impeachment or rebuttal.

IV. Discussions between Ronald Jacobus and Dr. Dalecki, Deborah Rice and others in UW-Platteville administration are relevant to Dr. Burton's Title VII retaliation claim and should not be excluded.

Defendant's fourth motion *in limine* seeks to exclude references to conversations between Mr. Jacobus and Dr. Dalecki and others. The conversations with others (CJ academic staff Deborah Rice, Provost Den Herder) concerned their inflammatory and damaging statements about Dr. Burton and the imminent cessation of her employment, in Mr. Jacobus's presence. The conversation between Mr. Jacobus and Dr. Dalecki occurred after Dr. Dalecki learned that someone told Dr. Burton, and he assumed that person was Mr. Jacobus, about the false and damaging statements of Ms. Rice and the Provost, and Dr. Burton complained about them to Human Resources 27 days after the defamation incident occurred. Defendant claims that such evidence is either irrelevant to the Board's agents' Title IX or Title VII retaliation or, if it is relevant, it should nevertheless be excluded on the basis of its general, rote litany of potential bases for exclusion: probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time, needless presentation of cumulative evidence. (Def.'s motion, Dkt. 77 at 9-10) This motion is overbroad and should be denied, because such conversations are relevant and material to Dr. Burton's Title VII retaliation claim, as she argued in the brief opposing summary judgment motion, Dkt. 57 at 23-25.

With regard to Interim Chair Dalecki, Mr. Jacobus's testimony establishes that Dr. Dalecki sat silent when a departmental colleague, Ms. Rice, accused Dr.

Burton of being mentally unstable in Mr. Jacobus's presence. The silence of the Department Chair, upon witnessing such a remark would ordinarily be understood, and as Dr. Burton believes the jury will understand, as his confirmation of the truth of Ms. Rice's statement.

Mr. Jacobus's testimony sets the stage for further evidence to establish that Chair Dalecki did nothing to correct the reputation-damaging and prejudicial remark. It will also establish that Dr. Dalecki, rather than counseling the student to disregard Ms. Rice's remark immediately upon hearing it or shortly thereafter, and rather than promptly confronting Ms. Rice over the impropriety of her remark, attacked Mr. Jacobus for sharing truthful, albeit, damaging information with Dr. Burton. His testimony establishes to the contrary that Dr. Dalecki threatened Mr. Jacobus to be careful to align himself with the party paying his paycheck, a threat that jurors may reasonably infer led to the elimination of Mr. Jacobus's position and a threat that corroborates Dr. Burton's testimony regarding Dr. Dalecki's use of threats during the prior academic year to coerce her into dismissing her charge of discrimination against Dean Throop and not to file the suit that commenced this action.

Mr. Jacobus's testimony establishes that Dr. Dalecki became the silent witness to the reputational damage done by Ms. Rice on November 13, 2014, shortly after Dean Throop issued her retaliatory Letter of Direction and shortly before Dean Throop falsely accused Dr. Burton of failing to teach a class, threatening discipline. And significantly, it establishes the date that Provost Den Herder, who is

Dean Throop's boss, said in Mr. Jacobus's presence that Dr. Burton was "alone on a sinking ship." Mr. Jacobus will also testify that Ms. Rice informed him prior to November 13, 2014 that Dr. Burton "would not be at UW-Platteville" much longer.

Additionally, Mr. Jacobus will testify (correcting several misstatements contained in Defendant's motions *in limine*) that Plaintiff taught and advised him with regard to academic and vocational matters as an undergraduate student; that he signed up for research projects in the Spring 2013 supervised by Dr. Burton; that he chose to attend the graduate program at UW-Platteville with the belief that he would be engaged in that research -- specifically grid security; that he was disappointed and surprised to learn that he would be assisting Dr. Stackman instead of Dr. Burton; and that he did not record his conversation with Dr. Dalecki "for" Dr. Burton but rather he did so at his singular initiative.

Dr. Dalecki was a critically important agent of the Board, closely aligned with Dean Throop, a named defendant in Plaintiff's EEOC charge and in the second amended complaint (Dkt. 28). Dr. Dalecki was defending his boss and attempting to silence one who alerted Dr. Burton to another person who was defaming her.

So, in sum Mr. Jacobus's testimony permits a jury reasonably to conclude that the preceding "constellation of surrounding circumstances, expectations, and relationships" would deter a reasonable employee filing a charge of retaliation or a complaint of same in federal court. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)). There is no prejudicial consequence of Jacobus's testimony. The jury can

fairly evaluate whether Dr. Dalecki was offering well-intentioned avuncular advice to Mr. Jacobus or whether he was issuing another veiled threat to Dr. Burton. The jury can fairly evaluate whether Mr. Jacobus is truthful.

The court should allow the recording because it is the most reliable evidence of what Dr. Dalecki and Mr. Jacobus said.

The jury can reasonably infer that Mr. Jacobus lost his position because he supported Dr. Burton, who had filed a lawsuit against Dr. Dalecki's sponsor, Dean Throop. That is relevant. In higher education, disputes between faculty and administration are multi-year struggles.

V. Dr. Banachowski-Fuller's claims of discrimination are not relevant to Dr. Burton's claims of Title IX or Title VII retaliation.

For their fifth motion *in limine*, Defendant seeks to exclude references to Dr. Banachowski-Fuller's claim of sex discrimination against Dr. Caywood. Defendant misconceives the purpose for which Dr. Burton refers to Dr. Fuller's complaint of sex discrimination. As then LA&E Dean (now Provost), Dr. Nimocks Den Herder wrote regarding this matter following her investigation of Dr. Fuller's complaint, "she feels harassed, is stymied in the performance of her job, and is treated in a discriminatory manner" and was subject to a "hostile work environment." (Nimocks Memo, Dkt. 53-7; Plaintiff's Ex. 4, Dkt. 80) Other trial testimony will establish that Dr. Fuller's complaint was resolved by reorganizing the chain of command such that Dr. Fuller no longer reported to Dr. Caywood. In the way of an offer of proof, Dr. Burton intends to testify that subsequent to Dr. Fuller's complaint and its resolution, Dr. Caywood engaged in retaliatory behavior toward Dr. Fuller – largely

in the form of a lack of support for Dr. Fuller's program. This is evidence that makes Dr. Burton's assertion that Defendant's agents engaged in retaliation of her after her Title IX protected activities more probably true. It is relevant and not prejudicial.

Conclusion

On the basis of all of the above and the referenced provisions in Plaintiff's brief opposing summary judgment (Dkt. 57), Plaintiff hereby requests that the Court deny Defendant's first through fourth motions *in limine*. Plaintiff does not oppose Defendant's fifth motion *in limine*.

March 11, 2016

Respectfully submitted,
s/Timothy E. Hawks

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