2004 WL 1196894
Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

Debra Rice SAFFORD
v.
ST. TAMMANY PARISH FIRE PROTECTION DISTRICT NO. 1, et al.

No. Civ.A. 02-0055.May 26, 2004.

Attorneys and Law Firms

Karen Delcambre McCarthy, Lanny R. Zatzkis, Yvette Anne D'Aunoy, Zatzkis, McCarthy & Associates, LLC, New Orleans, LA, for Plaintiff.

Guy J. D'Antonio, Covington, LA, Patrick J. Berrigan, Berrigan & English, LLC, Slidell, LA, Henry D. H. Olinde, Jr., Faye Dysart Morrison, Cade Aaron Evans, Scott Edward Mercer, Simoneaux, Carleton, Dunlap & Olinde, LLC, Baton Rouge, LA, Vincent J. Lobello, Vincent J. Lobello, Attorney at Law, Slidell, LA, Timothy George Schafer, Rachel Smith Kellogg, Schafer & Schafer, New Orleans, LA, for Defendants.

Opinion

ORDER AND REASONS

VANCE, J.

***1** Before the Court are the following six motions: (1) the motion *in limine* of defendant American Alternative Insurance Company ("AAIC") to limit time of trial presentations, (2) AAIC's motion *in limine* on evidentiary issues, (3) the motion *in limine* of defendants St. Tammany Fire Protection District No. 1 (the "Fire District") and Milton Kennedy to limit time of trial presentations, (4) the motion of the Fire District and Kennedy for partial summary judgment on damages issues, (5) the motion of the Fire District and Kennedy to exclude "other act" evidence, and (6) the motion of the Fire District and Kennedy to exclude evidence of the assessment performed by the McGrath Consulting Group, Inc. (the "McGrath Report"). For the following reasons, the Court grants defendants' motions to limit the time of trial presentations, grants in part and denies in part defendants' motion for partial summary judgment on damages issues, grants in part and denies in part defendants' motions to exclude "other act" evidence, and grants in part and denies in part defendants' motion to exclude the McGrath Report.

I. Background

Plaintiff Debra Rice Safford asserts that the Fire District failed to promote her from volunteer to full-time firefighter because of her gender and age. Safford claims that in May 2000, the Fire District passed over her application for a full-time firefighter position in favor of four younger, less-qualified men. Safford further alleges that in August 2001, she was passed over in favor of three younger, less-qualified men. Defendants assert that she was not given the job because she failed to perform well in an interview, she was the only applicant that had received a negative reference from a previous employer, and she did not timely submit a current civil service exam score to the Fire District's Civil Service Board for the August 2001 round of hiring. Plaintiff states that although her volunteer firefighter status is currently inactive,[1] her application is still on file with the Fire District, and she continues to be eligible for employment with the defendant.

1 Plaintiff contends that she fears retaliation from other firefighters as a result of this suit against the fire district and she stopped volunteering as a firefighter to avoid potentially life-threatening situations in which she would be forced to rely on the other

firefighters.

On September 22, 2001, plaintiff brought a claim before the Equal Employment Opportunity Commission. She received a right to sue letter from the EEOC dated January 11, 2002. On January 8, 2002, Safford filed a complaint against the Fire District and its insurer. Safford alleges that the Fire District discriminated against her on the basis of age and gender in violation of 42 U.S.C. § 1983; 42 U.S.C. § 2000e, *et seq.* ("Title VII"); 29 U.S.C. § 623, et seq. ("ADEA"); and Louisiana anti-discrimination laws.

Defendants AAIC, the Fire District and Kennedy now move to limit the time of trial presentations. Defendant AAIC also moves *in limine* to exclude "other act" evidence and the McGrath Report. Further, the Fire District and Kennedy move for partial summary judgment on damages issues, to exclude other act evidence, and to exclude the McGrath Report. The Court heard oral argument on the motions *in limine* to exclude other act evidence and the McGrath Report. After oral argument, the Fire District submitted a supplemental memorandum in support of its motion and plaintiff submitted a supplemental opposition. The Court now considers the motions in turn below.

II. Discussion

A. Time of Trial Presentations

***2** Defendants AAIC, the Fire District and Kennedy move the Court to limit the time allocated to each party for presentation of evidence at trial. Defendants assert that the parties agreed to the trial date based on the premise that trial would not last more than five days. Defendants contend that plaintiff's final witness and exhibits lists indicate that she intends to protract the trial of this matter unnecessarily. For example, plaintiff's final witness lists one witness that she will call and 124 witnesses that she may call. Defendants urge the Court to exercise its "inherent right to place reasonable limitations on the time allotted to any given trial." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir.1994) (citing *United States v. Reaves*, 636 F.Supp. 1575 (E.D.Ky.1986)). Plaintiff, on the other hand, indicates that she does not intend to call every witness on her final witness list. She argues, however, that splitting the time evenly between the plaintiff and defendants would be unfair because she alone bears the burden of proof at trial.

As the *Deus* court noted, courts have wide discretion to manage the presentation of evidence under Federal Rules of Evidence 403 and 611(a). *Id.* In this regard, Rule 403 allows the Court to exclude relevant evidence if its probative value is substantially outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED.R.EVID. 403. Under Rule 611(a), court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to ... avoid needless consumption of time [.]" FED.R.EVID. 611(a).

Here, the Court grants defendants' motions and allocates the five days of trial as follows: one half day for jury selection and opening statements, a total of 2 and one half days for plaintiff's case-in-chief and any rebuttal, one and one half days for presentation of evidence by defendants, and one half day for closing arguments, jury instructions, and the start of deliberations. Obviously, jury deliberations are not subject to any limitations.

B. Partial Summary Judgment

Defendants the Fire District and Kennedy move for partial summary judgment on plaintiff's claims for punitive damages against the Fire District and her claims for mental anguish, front pay, and back pay.

1. Applicable Law

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must be satisfied "that the evidence favoring the nonmoving party is insufficient to

enable a reasonable jury to return a verdict in [its] favor." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The moving party bears the burden of establishing that there are no genuine issues of material fact.

2. Punitive Damages

***3** Plaintiff concedes that the Fire District is a political subdivision of the State of Louisiana and that punitive damages are not available against political subdivisions under Title VII or Section 1983. *See Beasley v. St. Tammany Parish School Bd.*, 1997 WL 382056, *4 (E.D.La.) (Vance, J.). The Court therefore grants defendants' motion for summary judgment on plaintiff's claim for punitive damages against the Fire District. Plaintiff asserts that she may still maintain a claim for punitive damages against Kennedy in his individual capacity under Section 1983. The Court does not reach this issue because defendants moved for summary judgment only on plaintiff's punitive damages claims against the Fire District.

3. Mental Anguish Claims

Defendants assert that plaintiff withdrew her mental anguish claim. Plaintiff affirms that she has withdrawn this claim. The Court therefore grants defendants' motion for summary judgment on plaintiff's mental anguish claim.

4. Front and Back Pay

Defendants contend that they are entitled to summary judgment on plaintiff's claims for front pay and back pay. They argue that plaintiff is able to earn a living and to earn as much as or more than she would have been able to earn at the Fire District. They also argue that plaintiff is not entitled to back pay because she did not lose work as a result of the alleged discrimination. Plaintiff responds that she does not allege claims for lost wages, but rather she alleges claims for lost retirement and medical benefits. Plaintiff contends that the Fire District's defined benefit retirement plan is worth more than other retirement benefits available to persons with her qualifications in other positions. Plaintiff also asserts that the medical insurance that is currently available to her is more expensive than comparable insurance would have been at the Fire District. Plaintiff seeks damages based on these lost retirement benefits and the increased cost of medical benefits. Plaintiff argues that under the current case law, it is unclear if these claims are considered claims for front pay, back pay, or other monetary damages, but defendants are nonetheless not entitled to summary judgment on these claims.

The Supreme Court described front pay in *Pollard v. E.I. du Pont de Nemours & Co.:*

Although courts have defined "front pay" in numerous ways, front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. For instance, when an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs.... In cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, courts have ordered front pay as a substitute for reinstatement.

***4** 532 U.S. 843, 846, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001) (citations omitted); *see also Green v. Administrators of Tulane Educ. Fund*, 284 F.3d 642, 658 (5th Cir.2002) (front pay is "a form of equitable relief contemplated by Title VII and is intended to compensate the plaintiff for lost future wages and benefits") (internal quotations omitted). Thus, Safford's claim for lost future retirement benefits can be properly classified as a claim for front pay. *Cf. Skalka v. Fernald Environmental Restoration Mgmt. Corp.*, 178 F.3d 414, 425 (6th Cir.1999), *cert. denied sub nom., Conover v. Fernald Environmental Restoration Mgmt. Corp.*, 530 U.S. 1242, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000) (award for expected future pension benefits should have been classified as front pay).[2]

2 Plaintiff cites *Sharkey v. Lasmo*, 214 F.3d 371 (2d Cir.2000), as an example of a court that classified lost pension benefits as back pay. In *Sharkey*, however, plaintiff's claim was for lost service and salary credits to his pension plan for the period for which the jury awarded back pay. *Id.* at 374-375. Thus, *Sharkey* is distinguishable from *Skalka* because the *Sharkey* plaintiff's claim was for benefits he should have received in the past, whereas the *Skalka* plaintiff's claim was for benefits he would have received in the

future. Here, Safford's claim is for pension benefits she would have received in the future, and thus this case is more similar to *Skalka.*

Defendants argue that plaintiff is not entitled to future pension benefits because awarding front pay until retirement would be entirely speculative. In support, defendants cite *Burns v. Texas City Refining, Inc.*, 890 F.2d 747 (5th Cir.1989). As the *Burns* Court noted, however, "[a]wards of front pay are necessarily speculative." *Id.* at 753. Thus, the speculative nature of a front pay award alone is not sufficient grounds for granting summary judgment. Indeed, the Fifth Circuit recognizes that "[f]ront pay can only be calculated through intelligent guesswork" and accords district courts wide latitude in determining such awards. *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir.1990) (citing *Sellers v. Delgado College*, 781 F.2d 503, 505 (5th Cir.1986)). In *Burns*, the Fifth Circuit concluded that the district court abused its discretion when it awarded front pay to the plaintiff from the date of judgment through her projected retirement. *See id.* The court found that the award was purely speculative, particularly in light of the defendant's sale of all of its assets to another refinery, after which the new owner terminated all of the employees except a small transition team. There was no evidence that the new owner would have rehired the plaintiff. As a result, the Court found that the front pay award was not supported by substantial evidence. *See id.* Here, there remains a question of fact as to whether Safford would have earned retirement benefits with the Fire District, and the Court cannot conclude that plaintiff is not entitled to her claim for lost retirement benefits. In addition, defendants fail to address plaintiff's claim for lost future medical benefits. The Court therefore denies defendants' motion for summary judgment on plaintiff's front pay claim.

Back pay refers to the "wages and other benefits that an employee would have earned if the unlawful event that affected the employee's job related compensation had not occurred." *Rutherford v. Harris County, Tex.*, 197 F.3d 173, 191 (5th Cir.1999). Here, plaintiff indicates that she asserts a claim for the difference between the medical benefits she would have received as a Fire District employee and those she has available to her now. This claim covers the period from the alleged discrimination to the date of judgment. *See Sellers v. Delgado College*, 781 F.2d 503, 505 (5th Cir.1986) ("Back pay may be awarded for a period beginning not more than two years before the filing of the EEOC claim and may extend to the date of judgment.") (citing 42 U.S.C. § 2000e-5(g)). In their reply memorandum, defendants argue that the net compensation plaintiff received through her alternate employment is more than the net compensation plaintiff would have received at the Fire District, including wages *and* benefits. Defendants argument considers the period from the initial date of the alleged discrimination through the end of 2003. As noted above, however, a back pay claim covers the period through the date of judgment, *see id.*, and there has been no judgment in this case. Because the relevant period has not yet been determined, there is still a question of fact as to whether the wages and benefits that plaintiff would have earned exceed the wages and benefits she did earn during the relevant period. The Court therefore denies defendants' motion for summary judgment on plaintiff's back pay claim.

C. "Other Act" Evidence

***5** The Fire District, Kennedy and AAIC all move to exclude other act evidence related to Debra Rhyce, Angela Hassert, Debra Graham, Rachel McLellan, Johanna Solnitzky, Diana Aucoin and Karolyn Fischer because the evidence is irrelevant and prejudicial. In her opposition, plaintiff states that she does not intend to introduce evidence about Hassert, Graham, or Solnitzky. In her opposition to defendants' post-oral argument memorandum, plaintiff informed the Court that, after further consideration, she also does not intend to call Rachel McLellan. She contends, however, that evidence about the remaining individuals is admissible under Federal Rule of Evidence 404(b).

1. Applicable Law

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" Rule 404(b) requires similarity between the proffered evidence and the acts at issue, or the other acts are irrelevant. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir.1978). The two-prong test set forth by the Fifth Circuit in *Beechum* governs the admissibility of evidence of extrinsic offenses. *See Aetna Casualty & Surety Co. v. Guynes*, 713 F.2d 1187, 1193 (5th Cir.1983) (applying *Beechum* analysis in the civil context). *Beechum* requires the Court to determine first, whether the extrinsic acts evidence is

relevant to an issue other than the party's character. *See Beechum,* 582 F.2d at 911. The second prong of the *Beechum* test requires the Court to make a Federal Rule of Evidence 403 determination regarding whether the probative value of the extrinsic acts evidence is substantially outweighed by the danger of unfair prejudice to the party. *Id.*

As this Court noted in an earlier opinion in this case,3 the Fifth Circuit has recognized that an employer's history and work practices may be probative as to its intent to discriminate. *See, e.g., Vance v. Union Planters Corporation,* 209 F.3d 438, 445 (5th Cir.2000); *see also Kelly v. Boeing Petroleum Services, Inc.,* 61 F.3d 350, 360 (5th Cir.1995) (employer's history and work practices are background evidence that may be critical for jury's assessment of whether employer acted from unlawful motive). Indeed, a district court can abuse its discretion by limiting a plaintiff's ability to show the "atmosphere" in which the plaintiff operated. *Kelly,* 61 F.3d at 358 (quoting *Ratliff v. Governor's Highway Safety Program,* 791 F.2d 394, 402 (5th Cir.1986)). In the same breath, however, the *Kelly* court found that the district court did not abuse its discretion in ruling that the probative value of evidence of past discriminatory acts would be substantially outweighed by the danger of unfair prejudice and confusion of the issues. *Id.* at 360. The *Kelly* court reached this conclusion for three reasons: (1) the supervisor responsible for the past discriminatory act was not involved in the decision-making process affecting the plaintiff's employment conditions; (2) there was a dearth of evidence showing the discriminatory animus of the relevant decision-makers; and (3) defendant presented "overwhelming evidence" that the adverse employment action was caused by a personality conflict. *Id.*

3 *See Safford v. St. Tammany Parish Fire Protection Dist. No. 1,* 2003 WL 1873907, *2 (E.D.La.).

***6** In *Wyvill v. United Cos. Life Ins. Co.,* 212 F.3d 296 (5th Cir.2000), an age discrimination case, plaintiff introduced anecdotal testimony about former employees in an effort to show that the defendant had a pattern or practice of discriminating against older workers. The Fifth Circuit concluded that the district court abused his discretion in admitting this testimony because the employees were not similarly situated to the plaintiff. *See id.* at 302. The Court found that the admission of this testimony prejudiced the defendant because it was forced to respond to each witness's claims, which "creat[ed], in effect, several 'trials within a trial." ' *Id.* at 303 (quoting *Mooney v. Aramco Services Co.,* 54 F.3d 1207, 1220-21 (5th Cir.1995)).

Plaintiff contends that *Wyvill* is inapplicable here because in *Wyvill,* the Court analyzed the evidence under the McDonnell Douglas burden-shifting analysis. Under this analysis, a Title VII plaintiff bears the initial burden to prove a *prima facie* case of discrimination by a preponderance of the evidence. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once established, the plaintiff's prima facie case raises an inference of intentional discrimination. *See Grimes v. Texas Dept. of Mental Health and Mental Retardation,* 102 F.3d 137, 140 (5th Cir.1996); *see also McDonnell Douglas,* 411 U.S. at 802. The burden then shifts to the defendant to rebut that presumption by articulating a legitimate, nondiscriminatory reason for the challenged employment action. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The plaintiff then has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.,* 450 U.S. at 253.

When a plaintiff presents direct evidence of discrimination, however, the *McDonnell Douglas* burden-shifting test is inapplicable. *See Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1984); *Garcia v. City of Houston,* 201 F.3d 672, 676, n. 1 (5th Cir.2000). The Fifth Circuit has found that in the context of Title VII, "direct evidence includes any statement or written document showing a discriminatory motive on its face." *Portis v. First National Bank of New Albany,* 34 F.3d 325, 329 (5th Cir.1994) (finding that summary judgment was precluded when plaintiff testified to statements made by her employer that showed an intent to discriminate based on sex).

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), *superceded by statute,* the Supreme Court established the mixed-motive defense, which is applicable in cases in which there is direct evidence of discrimination, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination. There, the Court held that an employer would not be held liable if the employer could prove that even if it had not taken into account the impermissible factor of gender, the employer would have come to the same decision. *Id.* at 242. In order to prove a mixed-motive defense, the employer should be able to present some objective proof that the same decision would have been made. *Id.* at 252. The legitimate reason must be present at the time the decision was made. *Id.* It is not enough for the employer to demonstrate that the same decision would have been justified, but instead, the employer must show that its legitimate reason standing alone would have produced the same decision. *Id.* The employer must prove the mixed-motive defense by a preponderance of the evidence. *Id.* at 253. The Fifth Circuit has found that *Price Waterhouse* involves a "shift of the burden of persuasion to the defendant." *Mooney,* 54 F.3d at 1217 (5th Cir.1995).

*7 Congress amended the holding in *Price Waterhouse* through passage of the Civil Rights Act of 1991. Currently, under Title VII, an unlawful employment practice is established when the complaining party establishes that race, color, national origin, or sex was a motivating factor for any employment action, even though other facts also motivated the practice. 42 U.S.C. § 2000e-2(m); *Garcia*, 201 F.3d at 676. If the employer can show that it would have taken the same action in the absence of the impermissible motivating factor, plaintiff's relief is limited to injunctive and declaratory relief, costs and attorney's fees. *See Garcia*, 201 F.3d at 676 (citations omitted).

Here, plaintiff seeks to introduce evidence about three individuals: Debra Rhyce, Diana Aucoin and Karolyn Fischer. Plaintiff argues that evidence of discrimination against these individuals is relevant to plaintiff's claim because the evidence is direct evidence of a discriminatory animus and triggers analysis of her claim under *Price Waterhouse*. Plaintiff points out that "the Fifth Circuit has found that direct evidence of discriminatory animus can trigger the *Price Waterhouse* framework even if the evidence is not connected directly to the particular employment decision at issue." *Templet v. Hard Rock Const. Co.*, 2003 WL 181363, *5 (E.D.La.) (Engelhardt, J.) (citing *Brown v. East Miss. Elec. Power Ass'n,* 989 F.2d 858, 861-62 (5th Cir.1993), in which the Fifth Circuit found that plaintiff's evidence that one manager's racism had motivated disciplinary actions against him constituted direct evidence of a discriminatory animus related to employer's decision to demote plaintiff). In the cases cited by plaintiff, however, there was direct evidence of discriminatory animus directed at the *plaintiff*, concerning a different employment decision. *See, e.g.*, *Brown*, 989 F.2d at 861-62 (direct evidence of racism related to disciplinary actions triggered *Price Waterhouse* analysis of plaintiff's claim based on demotion); *Templet*, 2003 WL 181363, *5 (direct evidence of discrimination related to plaintiff's demotion triggered *Price Waterhouse* analysis of plaintiff's wrongful discharge claim). These cases therefore do not support a conclusion that direct evidence of discrimination toward others is sufficient to trigger the *Price Waterhouse* analysis of plaintiff's claim. Accordingly, the Court rejects plaintiff's argument that the *Wyvill* case is inapposite because it applied the *McDonnell Douglas* burden-shifting analysis.

The Court considers the evidence related to each of the four individuals in light of the above principles.

2. Debra Rhyce

Rhyce was one of two female firefighters employed by the Fire District. Rhyce quit in 2000 because the Fire District would not allow her to take vacation days in half day increments.[4] After she quit, Rhyce discovered that the Fire District had allowed men to take their vacation in half day increments.[5] Rhyce approached Steve Farris, the Fire District Board of Commissioners Chairman, and the Board later admitted that Rhyce had been the subject of discriminatory practices and agreed to reinstate her.[6] Rhyce was reinstated in 2000, and she alleged that the Fire District and certain individuals associated with the Fire District then retaliated and discriminated against her when they refused to honor certain conditions of her reinstatement agreement.[7] Rhyce also alleged that she received a phone call, during which the caller threatened her life if she returned to the Fire District.[8]

4 *See Rhyce v. Martin*, 173 F.Supp.2d 521, 525 (E.D.La.2001).

5 *Id.*

6 *Id.*

7 *Id.* at 526.

8 *Id.*

*8 In 2000, Rhyce sue the Fire District and several individuals, alleging violations of federal and state anti-discrimination and civil rights laws, breach of contract, intentional infliction of emotional distress, defamation, conspiracy and misrepresentation. Rhyce sought to admit evidence of Safford's failure to hire claims. Judge Zainey excluded this evidence because Safford's claims were not factually similar to Rhyce's disparate treatment claims and any probative value that the testimony may have had was outweighed by its prejudicial effect.[9] Rhyce's allegations were based on the Fire District's refusal to allow her to take her vacation in half day increments and on the treatment she received when she returned to the Fire District's employ. This Court likewise concludes that Rhyce's allegations are materially different from Safford's failure

to hire allegations.

9 *See Rhyce v. Martin*, 2003 WL 57040, *3 (E.D.La.).

Plaintiff contends that this evidence is admissible because there is direct evidence of discrimination against Rhyce. She cites a letter written by Board Chairman Farris, in which Farris states "[t]he board of commissioners is in full agreement that Firefighter Rhyce was discriminated against[.]"10 As noted above, however, this is direct evidence of discrimination against another employee, not direct evidence of discrimination against Safford. The Court finds that the factual differences between the manner in which the Fire District allegedly discriminated against Safford and the way it allegedly discriminated against Rhyce minimize the probative value of the proferred evidence. The Court therefore finds that the minimal probative value of the evidence of discrimination against Rhyce is outweighed by its prejudicial effect. The Court grants defendants' motion to exclude this evidence.

10 Pla.'s Memo. in Opp. to Defs.' Mots. in limine to Exclude Other Act Evidence, Ex. L, Letter from Steve Farris dated Feb. 24, 2000.

3. Diana Aucoin

During the relevant time period, Diana Aucoin was an administrative assistant for the Fire District.11 She conducted background checks on applicants for employment, including Safford.12 As a part of Safford's background check, Aucoin contacted one of Safford's previous employers and reported that the employer gave Safford a negative reference.13 Aucoin also sat on the Hiring Committee when the committee interviewed Safford and unanimously decided not hire her in May 2000.14 Safford contends that Aucoin "assisted" her and has been subjected to severe retaliation as a result. Although it is unclear from the motions how Aucoin assisted Safford, plaintiff's counsel indicated at oral argument that Aucoin provided information about Michael Landry, a younger male applicant whom the Fire District allegedly hired in spite of two negative employment references, and provided some favorable testimony about Rachel McLellan, a female applicant who applied before Safford and whom the Fire District also did not hire.

11 *See* Rec. Doc. 168, Order and Reasons denying defendant's motion to join Aucoin as a necessary party dated Jan. 8, 2004.

12 *See id.*

13 *See id.*

14 *See id.*

The parties vehemently dispute whether the Fire District actually retaliated against Aucoin. Plaintiff focuses on three ways in which the Fire District allegedly retaliated against Aucoin, including suing her personally to recover money transferred to the Firefighters' Retirement System ("FRS") on her behalf, attempting to terminate her position, and terminating her medical benefits.

***9** The Fire District indicates that Aucoin and two other Fire District employees were members of the Louisiana Parochial Employees Retirement System and transferred to the FRS in 1999. As a part of this transfer, the Fire District transferred approximately $150,000 in funds to the FRS to cover the higher costs in the FRS. The Fire District asserts that the St. Tammany Parish District Attorney's office determined in 2003 that this transfer violated the state constitution, which prohibits the donation of public funds. The District Attorney's office sued the three employees on behalf of the State and the Fire District to recover the funds. Plaintiff asserts that in that case, the court found after a two-hour hearing that Aucoin played no part in the transfer of funds from one retirement system to the other and had not misappropriated any funds. Plaintiff contends that as a result, the court found that the 10-year prescriptive period in Louisiana Revised Statute § 42:1461, which establishes a civil cause of action for the recovery of funds misappropriated by a public official, did not apply, and thus the claims against Aucoin were prescribed. Plaintiff argues that the lawsuit was meritless and retaliatory. Plaintiff also suggests that, as further evidence of the retaliatory nature of the suit, the Fire District and the D.A.'s office leaked

information about the lawsuit before attempting to serve Aucoin, and as a result, Aucoin first heard about the lawsuit on the evening news.

The Fire District argues that the lawsuit is inadmissible as evidence of retaliation because the lawsuit is not an ultimate employment decision under Title VII, because the lawsuit was also filed against two other employees-a younger white male and a younger white female, and because it is questionable whether a lawsuit could ever be considered retaliatory under Title VII. The Court notes that defendant's first argument is misplaced. Plaintiff does not seek to introduce this evidence as an example of a similar Title VII violation, but rather seeks to introduce evidence of retaliation against a witness as evidence of defendant's intent to discriminate. Thus, the definition of retaliation as applied under Title VII is not applicable here. As a result, the filing of a lawsuit could be considered retaliatory in this context if, for example, the lawsuit were wholly without merit, and thus defendant's third argument also lacks merit.

The Court nonetheless excludes this evidence for a number of reasons. First, the evidence that the lawsuit against Aucoin was in retaliation for the assistance that she provided to the plaintiff is weak at best. To begin with, the District Attorney filed the lawsuit, and there is no evidence that the D.A. intended to retaliate against Aucoin. Further, the D.A. filed the lawsuit against two other individuals, which weakens the argument that the purpose of the lawsuit was to retaliate against Aucoin. In addition, presentation of this evidence would essentially lead to a mini-trial on this issue. The evidence would raise questions as to the intent of the D.A.'s office when it filed the lawsuit, and the jury would have to consider the merits of the lawsuit to determine whether its purpose was to retaliate against Aucoin. As a result, the Court find that the potential for confusion of the issues outweighs the probative value of this evidence and excludes it.

***10** Plaintiff also argues that the Fire District attempted to terminate Aucoin's position, and when the Civil Service Board rejected the Fire District's request to abolish her position, the Fire District appealed the decision to the Office of State Examiner.[15] Defendants argue that the Fire District did not retaliate against Aucoin, noting that in the same time frame, the Fire District's Board of Commissioners also recommended that the Civil Service Board abolish the position of two males. The Civil Service Board abolished the positions of the two males, but did not abolish Aucoin's position.

15 *See* Hearing Exhibit 8, Letter from the Office of State Examiner to the Civil Service Board.

The Court again finds that there is minimal evidence of retaliation against Aucoin. The Fire District recommended the abolition of several positions within the District around the same time and did not single out Aucoin. In addition, plaintiff cites no evidence to support her contention that the Fire District appealed the Civil Service Board's decision to the State Examiner. The letter from the Office of State Examiner affirming the Board's decision appears to be in response to a letter from the Civil Service Board, not the Fire District. This evidence of alleged retaliation therefore has minimal probative value. Further, it would entail a mini-trial on the Fire District's actions to demonstrate why its proposal to eliminate her position was retaliatory when it was at the same time proposing to eliminate the other positions, as to which there is no suggestion of retaliatory motive. As a result, the Court excludes this evidence.

Finally, plaintiff alleges that the Fire District retaliated against Aucoin when it terminated her medical insurance. Plaintiff asserts that Aucoin discovered the termination of her health insurance only when she attempted to obtain needed cardiac medications and was refused. Defendant, on the other hand, contends that the termination of Aucoin's medical insurance was the result of a clerical error that stemmed from the Board of Commissioner's recommendation to abolish her position.[16] Defendant asserts that when the mistake was discovered, it promptly reinstated Aucoin's insurance coverage, and she experienced no lapse in coverage.[17] Because the Fire District ultimately reinstated Aucoin's insurance, and she experienced no lapse in coverage, the Court again finds that this evidence has minimal probative value as evidence of retaliation. The potential for confusion is significant, however, as the parties will vehemently contest whether the termination of Aucoin's insurance was intentional or accidental. Consequently, the Court excludes this evidence.

16 Def.'s Post-Hearing Memo., Ex. E, Mark Waniewski Declaration, p. 2.

17 *Id.*

5. Karolyn Fischer

Plaintiff asserts that Fischer applied for a fire suppression position with the Fire District in 2002, when plaintiff's application

was still pending and not long after plaintiff's application was rejected in the August 2001 round of hiring. She contends that Fischer interviewed for the position in January 2003, again when plaintiff's application was still pending. She also asserts that during this time period, Kennedy had the sole authority to hire and fire firefighters. Plaintiff states that District Chief Vince Coulon was the Interview Committee Chairman during Fischer's interview. His interview score sheet for Fischer notes that she "brought up rumors about other female employees,"[18] and in his deposition, Coulon testified that this "may have" contributed to an overall lowering of her interview score.[19]

18 Pla.'s Memo. in Opp. to Defs.' Mots. in Limine to Exclude Other Act Evidence, Ex. K, Interview Score Sheet.

19 *Id.*, Ex. C, Coulon's Depo., at p. 42.

***11** Defendants contend that the factual differences between the Safford and Fischer are material. Defendants argue that Fischer's interview occurred almost three years after Safford's interview. Fischer applied for a position with the fire district less than a year, however, after the Fire District allegedly discriminated against Safford in the August 2001 round of hiring. Defendants point out that some of the interview committee members who interviewed Safford were not on the committee that interviewed Fischer. The Court notes, on the other hand, that there was some overlap in the committee members. Also, plaintiff indicates that Kennedy was involved in Safford's interview and had sole hiring authority when the committee interviewed Fischer. The Court finds that these two applicants were similarly situated, and thus evidence of discrimination against Fischer is sufficiently relevant to Safford's claims.[20] The Court therefore denies defendants' motions to exclude this evidence.

20 The Court notes that in its post-hearing supplemental memorandum, the Fire District argues that the Court should exclude any evidence about Fischer because there is no evidence that the decision not to hire Fischer was in retaliation for engaging in activity protected by Title VII. Defendant's argument again misses the mark. Here, plaintiff seeks to introduce information about Fischer as evidence of discriminatory intent because Fischer was similarly situated to Safford and the Fire District did not hire her either. Thus, defendant's argument about retaliation is inapplicable.

D. The McGrath Report

In June 2003, the Fire District's Board of Commissioners engaged a private consulting firm, McGrath Consulting Group, Inc., to "assess the [Fire District's] entire organization and find opportunities to improve the department, especially in the area of labor/management issues."[21] McGrath prepared a report dated September 2003, in which it noted that the district faced numerous issues related to its rapid growth, as well as "a labor/management dilemma that has caused extreme organizational dysfunction."[22] The report focuses on the areas of labor/management relations, leadership training, and operational and human resources systems,[23] and includes numerous recommendations related to improving the workplace environment, training, fire operations systems, and human resources systems.[24]

21 Defs.' Mot. *in Limine* to Exclude Evidence of Assessment and Report, Ex. 1, McGrath Report, at p. 6.

22 *Id.*

23 *Id.*

24 *Id.* at pp. 146-149.

Defendants now move to exclude evidence of the assessment and resulting report on the grounds that this evidence is irrelevant, will unfairly prejudice and/or mislead the jury, is based on hearsay, contains inadmissible opinion testimony, and contains information about subsequent remedial measures. Plaintiff, on the other hand, contends that the evidence is relevant and admissible.

1. Relevance

Plaintiff argues that the McGrath consultants identified numerous deficiencies in the hiring process that are relevant to plaintiff's claim. As examples, she points to the comments in the McGrath Report such as "[a]n interview committee is selected by the Fire Chief to review and interview candidates for all positions hired within the District.... There are no guidelines or rules established for this committee[,]"[25] and testimony by consultant Victoria McGrath about the ineffectiveness of Kennedy as a Fire Chief. The Court finds, however, that the McGrath opinions on the deficiencies in the Fire District's human resources systems shed little light on whether defendants intentionally discriminated against Safford. To begin with, McGrath identifies dysfunction that stretches across gender and age lines. Nowhere does McGrath find that defendants discriminated against Safford or any other applicant, nor does it conclude that the defendants' hiring process was likely to lead to discrimination. The report identified no inherently discriminatory policy or procedure. General conclusions about the Fire District's dysfunction will not assist the jury in determining whether the Fire District discriminated against Safford. As another example of an allegedly relevant conclusion that the plaintiff identifies, the report states that "[u]nfortunately, fire departments have, in many cases, become 'closed shops' allowing only a select few into their ranks."[26] The Court finds that this statement is not relevant in the manner suggested by plaintiff. This is a general statement about fire departments but notably does not directly conclude that the Fire District has become a "closed shop." Further, the statement does not indicate who qualifies as the "select few" or imply that this group is limited to a specific gender, race, or age group. Again, the Court finds that opinions such as this will not assist the finder of fact in this matter.

25 *Id.* at pp. 104-105.

26 *Id.* at p. 54.

***12** Further, to the extent that McGrath's opinions are expert opinions on the hiring process itself, the Court finds that such expert testimony will not assist the jury. *See* FED.R.EVID. 702. The average lay person is generally familiar with hiring procedures and can apply his or her common sense to conclude that an employer should treat its applicants in a consistent manner and that the interviewers should ask questions tailored to the specific job qualifications. *Cf. Peters v. Five Star Marine Service*, 898 F.2d 448, 450 (5th Cir.1990) (trial judge correctly decided that the jury could adeptly assess the situation using "only their common sense and knowledge," and thus expert testimony was unnecessary).

2. Prejudicial Impact

The prejudicial impact of the McGrath opinions, on the other hand, is significant. First, there is an inherent danger that admission of the evidence could create the impression that McGrath was specifically hired to investigate potential discrimination and found discrimination in the Fire District. The report describes "extreme organizational dysfunction,"[27] a pervasive atmosphere characterized by "a lack of respect and value,"[28] "a significant lack of communication,"[29] and the threat of imminent workplace violence.[30] These statements applied to labor-management relations in general and to employees of all stripes and were not made as part of an analysis of sexually discriminatory practices. Statements such as these may well mislead and improperly persuade the jury because of their highly charged language. Based on the above considerations, the Court concludes that the prejudicial impact of the McGrath Report substantially outweighs its probative value. The Court excludes the report and opinion testimony of Victoria McGrath, except to the extent that it is admissible as impeachment evidence, as discussed below.

27 *Id.* at p. 6.

28 *Id.* at p. 13.

29 *Id.* at p. 17.

30 *Id.* at p. 13.

3. Impeachment Evidence

The McGrath Report notes that "the [interview] committee does not receive a formal list of questions pertinent to the position to ensure consistency between candidates. This apparent lack of consistency could raise claims to discriminatory practices."[31] Plaintiff asserts that this statement directly contradicts the testimony of District Chief Vince Coulon. Coulon testified:

31 *Id.* at p. 105.

Q: Do you ask a standard set of questions to each interviewee?

A: Yes.

Q: Do you vary from those questions at all?
A: We never stray for that list of questions.[32]

32 Pla.'s Memo. in Opp. to Defs.' Mots. in Limine to Exclude Other Act Evidence, Ex. C, Depo. of Vince Coulon, at p. 13.

The Court notes that the McGrath consultants found that the interview committee had a list of potential questions that members could ask interviewees, but the committee did not have a list that was tailored to each specific job position.[33] Coulon's testimony that the committee had a "standard set of questions" from which they never strayed may have referred to the list of "potential questions" that McGrath observed. As such, the Court cannot conclude at this time that McGrath's testimony directly contradicts Coulon's testimony. If, at trial, Coulon's testimony differs from his earlier statements such that it is evident that the McGrath evidence contradicts his testimony, then the McGrath evidence may be admissible for the limited purpose of impeachment.

33 *Id.*, Ex. M, Testimony of Victoria McGrath, at p. 98.

4. Subsequent Remedial Measures

***13** Defendants argue that the McGrath assessment and conclusions are inadmissible as subsequent remedial measures under Federal Rule of Evidence 407. Rule 407 provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

As discussed above, the Court excludes the McGrath Report and testimony because its prejudicial impact substantially outweighs its probative value but noted that the evidence may be used for impeachment purposes if warranted at trial. The Court need not reach the issue of whether the assessment qualifies as a subsequent remedial measure in light of the Court's conclusion that the evidence is inadmissible except for impeachment because of its potential to mislead and prejudice the jury.

5. McGrath as a Fact Witness

Plaintiff also contends that Victoria McGrath is a fact witness, and her testimony is relevant in that capacity. As discussed above, the Court finds that the McGrath opinions are not relevant to plaintiff's claims. To the extent that Victoria McGrath observed specific features of the Fire District's hiring process to which she might factually testify, plaintiff has other, more appropriate avenues through which she may introduce such evidence. McGrath is an outside, independent consultant, who was not directly involved in the hiring process. Other witnesses who were directly involved in the hiring process during the relevant time period can testify to the hiring process at issue. For example, the McGrath Report notes that the application form collects race and sex information, and "[t]here could be a perception of discrimination by collecting Race/Sex information of the application form."[34] As discussed above, the opinion that collection of this information could lead to a "perception of discrimination" does not assist the jury in determining whether defendants discriminated against Safford. As

to the factual information contained in this statement, other witnesses, such as Safford herself, could testify that the application form collected race and sex information. Because this factual evidence may be introduced through other means, the probative value of McGrath's testimony as a factual witness is minimal and is substantially outweighed by its prejudicial value. Accordingly, the Court also excludes McGrath's testimony as a fact witness.

34 Defs.' Mot. *in Limine* to Exclude Evidence of Assessment and Report, Ex. 1, McGrath Report, at p. 104.

III. Conclusion

For the foregoing reasons, the Court grants defendants' motions to limit the time of trial presentations, grants in part and denies in part defendants' motion for partial summary judgment on damages issues, grants in part and denies in part defendants' motions to exclude "other act" evidence, and grants in part and denies in part defendants' motion to exclude the McGrath Report.

End of Document