IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARLO MCKINNIE and SONYA SAMS,	**:**	**CIVIL ACTION**
Plaintiffs	**:**	
	:	
v.	**:**	
	:	
TERESA CONLEY and CHEYNEY	**:**	
UNIVERSITY OF THE STATE SYSTEM	**:**	
OF HIGHER EDUCATION,	**:**	
Defendants	**:**	**NO. 04-932**

MEMORANDUM AND ORDER

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE **December 8, 2006**

Plaintiffs Carlo McKinnie and Sonya Sams are African-American police officers who have accused their employer, Cheyney University, a historically African-American university and its Director of Public Safety, Teresa Conley, of racially discriminatory, retaliatory, and harassing activity. Plaintiffs have filed four motions in limine to preclude evidence, which are granted in part and denied in part for the following reasons. Defendants have also moved to preclude plaintiffs' evidence of damages, which is denied.

I. FACTUAL BACKGROUND

McKinnie began working as a police officer for the Cheyney University Department of Public Safety ("Cheyney") on January 3, 2001. Sams became a police officer for Cheyney on December 28, 1998. Conley came to Cheyney in September, 2002 as the Interim Director of Public Safety, and became permanent in November, 2002 until her resignation. Dr. Clinton Pettus was the President of Cheyney, George Banks was the Cheyney Vice President of Finance and Administration, and Phaedra DeShields was the Cheyney Director of Human Resources.

Of the 15 full-time officers under Conley's supervision, most were African-American. Conley, who is Caucasian, reported to Banks, an African-American. Banks reported to former President Pettus, who is also African-American. Dr. Pettus was the ultimate decision maker on questions of hiring and firing personnel, after consultation with Banks.

The primary issue at trial will be whether Conley: (1) disciplined white officers more leniently than she did plaintiffs; (2) provided training opportunities and promotion to white officers over black officers in the Department; (3) generally favored white officers over black officers and (4) made statements evidencing racial animus. The events surrounding the dismissal of Sams and McKinnie will be a primary focus of the trial.

Conley asserts that the Cheyney University Department of Public Safety was not functioning properly, and the general conditions and procedures at the Department were poor when she arrived in 2002. For example, she stated in her deposition that as a result of suspected sleeping on duty by Department of Public Safety personnel during the night shift, with Banks' approval, Conley made an unscheduled visit to the campus during the night of July 1, 2003. When Conley arrived at the station, she found the front door was locked and she discovered Sams, as well as two other officers, sleeping. Conley next attempted to radio McKinnie, whom she had appointed as the evening shift supervisor. Conley asserts she had to call several times on the radio before she received any response. However, McKinnie claims he was responding to a fire alarm at the time. After meeting McKinnie on campus and telling him what she had observed or otherwise learned, Conley then returned to the station for the patrol logs, but, she alleges, no logs were available and, moreover, the required dispatch log for the shift had not been started.

In keeping with Cheyney employment discipline procedures, plaintiffs' pre-disciplinary conferences (PDC's) took place on July 7, 2003. Conley asserts, and plaintiffs do not dispute, she suggested that the employment of the two officers should not be terminated, but that they should be given another opportunity. Sams and McKinnie, as well as two other officers involved in the incident, received suspensions as a result of the PDC procedure.

A month later, on the evening of August 3, through the early morning of August 4, 2003, Conley made a second unscheduled visit to the campus during the night shift. She told Banks of her plan in advance. During her surveillance, Conley asserts she made a digital voice recording of her observations and took notes which she later converted into a typed document with side by side comparisons of her own observations to the entries made in Sams' dispatch log and McKinnie's patrol log. Defendants assert the discrepancies between Conley's observations and the plaintiffs' logs provide a basis for firing plaintiffs

II. DISCUSSION

Title VII provides in pertinent part that it is unlawful "for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . or to limit segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1) and (2). At trial, the jury will be required to determine whether defendants intentionally discriminated against the plaintiff.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the now familiar test for establishing an inference of discrimination in the absence of direct evidence. Id. at 802-05. First, a plaintiff must establish a prima facie case of a discriminatory discharge. If the plaintiff satisfies this requirement, the defendant must articulate a legitimate, non-discriminatory reason for the discharge. Thus, when the defendant articulates a legitimate, non-discriminatory reason for the discharge, the plaintiffs must "point to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-111 (1993)).

Defendants contend plaintiffs will be unable to prove Cheyney accorded them less favorable treatment than it accorded Caucasian officers in the Department because they are African-American. As the Hon. Gene E.K. Pratter, U.S. District Court Judge, noted in denying summary judgment in this case, the evidence allows for varied interpretations of the actions taken by Conley, such as: whether white officers were disciplined more leniently than Plaintiffs, whether Conley provided training opportunities and promotion to white officers over black officers in the Department, whether Conley generally favored white officers over black officers, and ultimately whether Plaintiffs were discharged for infractions for which similarly situated white officers were not.

In addition, defendants' intent will be the focus of whether plaintiffs can establish a hostile work environment led to their discharge. To establish a hostile work environment claim

under Title VII, Plaintiffs must demonstrate that (1) they suffered intentional discrimination because of their race or sex; (2) the discrimination was severe or pervasive; (3) it detrimentally affected them; (4) it would have detrimentally affected a reasonable person of the same protected class in their position; and (5) there is a basis for vicarious liability. Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001); See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996).

Plaintiffs have alleged 17 examples of conduct allegedly based on racially discriminatory motives. This list includes assertions of hiring and promotion based on race, disparities in disciplinary actions based on race, unequal treatment with respect to training opportunities and access to other positions available, Conley exhibiting comradery with white officers but not black officers, and targeting black officers for disciplinary violations. McKinnie also recounted several statements by Conley that he perceived as racist. First, Conley stated that as a swimming instructor at the YMCA, she had observed that black children could not float. McKinnie also felt it was insensitive and inappropriate for Conley to mention that her dog did not like black people.. McKinnie was again offended when Conley instructed officers to wear their bulletproof vests, adding "this is Cheyney, for Christ's sake." McKinnie did not object to wearing a vest, but felt that Conley was implying that Cheyney was dangerous because it was a historically black college. Finally, a poster appeared in the station that stated, "There Are No Black or White Officers, We Are All Considered Blue." McKinnie construed the poster as racially hostile, because he felt that white officers received special treatment.

A. Discipline of Plaintiffs for Sleeping on Duty

Plaintiffs seek to preclude defendants from offering evidence that McKinnie and Sams were disciplined because Sams was sleeping on duty on July 1, 2003, when McKinnie was supervising her. They allege this incident is irrelevant because they were ultimately fired for other reasons relating to conflicts between Conley's observations and their dispatch logs in August, 2003. In addition, they contend any arguable relevance is substantially outweighed by unfair prejudice because the jury could draw an "adverse impression" of Sams for sleeping on duty.

Evidence is admissible if it is relevant, i.e., if it tends to make the existence or nonexistence of a disputed material fact more probable than it would be without that evidence. See Fed. R. Evid. 401, 402. Moreover, Rule 404(b) permits the admission of evidence relating to "other crimes, wrongs, or acts" for a proper purpose unrelated to showing that the individual is a person of a certain character. For example, the Rule lists proper purposes as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Pursuant to Rule 403 of the Federal Rules of Evidence, I may nonetheless exclude relevant evidence if 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. Rule 403 is an "umbrella rule" applied "in tandem with other Federal Rules under which evidence would be admissible." See Coleman v. Home Depot, Inc., 306 F.3d 1333, 1343 (3d Cir. 2002). Although there is a strong presumption that relevant evidence should be admitted, exclusion

under Rule 403 is justified if the probative value of evidence is "'substantially outweighed' by the problems in admitting it." Id. at 1343-1344.

Thus, to be admissible under Rule 404(b), "(1) the evidence must have a proper purpose; (2) it must be relevant under Rule 401 and 402; (3) its probative value must outweigh its prejudicial effect under Rule 403; and (4) the court must charge the jury to consider the evidence only for the purpose for which it was admitted. Ansell v. Green Acres Contracting Co, Inc., 347 F.3d 515, 520 (3d Cir. 2003).

Defendants are not offering evidence that Sams slept on duty to prove bad character. Rather, the evidence is offered to explain the sequence of events that led to her termination for reasons defendants claim were unrelated to her race. Contrary to plaintiffs' claim, the evidence is not an unrelated, isolated incident. Rather, the July sleeping incident is inextricably intertwined with the stated reasons for plaintiffs' termination in August. The August surveillance of plaintiffs by Conley was prompted by the July infraction. The letter firing plaintiffs referenced "prior related discipline" concerning Sams sleeping on duty while under McKinnie's supervision. See Pl. Ex. 37, 85.

Similarly, the evidence is relevant because it tends to make the existence or nonexistence of a disputed material fact, defendants' discriminatory intent, more probable than it would be without that evidence. If, as plaintiffs allege, defendants discriminated or retaliated against them with racial animus, the fact finder is entitled to assess the full context of the parties' interaction leading to the plaintiffs' firing. For example, a reasonable jury could conclude that defendants' reasons for firing plaintiffs was based on progressive discripline beginning in July with the sleeping incident and ending in August with Conley's second surveillance report of plaintiffs'

job performance. No chain in this logic includes any link involving an inference that plaintiffs are bad people disposed to do bad acts. By their nature, plaintiffs' allegations in this lawsuit implicate their performance as police officers since the jury must discern the true reason for their dismissal.

Nor is the probative value substantially outweighed by any risk of unfair prejudice or jury confusion. Evidence of the July sleeping incident will not arouse the jury's passion and prompt a verdict on an improper or irrational basis. The evidence is highly relevant to the issue of defendants' discriminatory intent and the risk of prejudice is nonexistent or slight, at most. To the extent any arguable prejudice exists, plaintiffs shall submit a proposed instruction consistent with this ruling limiting the purposes for which the jury may consider the evidence. See Fed. R. Evid. 105. Such an instruction will further ensure the jury considers the evidence only for its proper purpose and not to establish plaintiffs' bad characters.

B. Subsequent Fire Bombing of Defendants' Automobiles

Plaintiffs also seek to preclude defendants from offering evidence that within two months of plaintiffs' dismissal in August, the automobiles of Banks and Conley were firebombed on the Cheyney campus. Defendants acknowledge they suspect no foul play by either plaintiff.

Defendants allege the evidence is relevant, however, to prove a statement Conley made to McKinnie was not racist. Conley had told officers they should wear bulletproof vests because "this is Cheyney, for Christ's sake." McKinnie viewed this comment as racist. Because Cheyney is historically a black university, McKinnie apparently inferred from the remark that Conley believed this fact increased the likelihood officers would be shot. Conley alleges the post-firing fire bombings are relevant to prove Cheyney is a dangerous place.

Subsequent acts of violence, however, have little or no relevance to Conley's state of mind at the time she made the statement directing officers to wear bulletproof vests because they worked at Cheyney. To explain Conley's reasoning for requiring the vests, defendants could offer evidence of past or ongoing events that Conley believed justified the officers' need for bulletproof vests. Even if the subsequent evidence of the bombing is somehow relevant to Conley's state of mind, the marginal probative value is substantially outweighed by the risk of unfair prejudice. It is inevitable that a jury would speculate that plaintiffs were somehow involved in directly or indirectly orchestrating the fire bombings. This risk is especially high in a hotly contested employment discrimination suit involving armed police officers. Even a limiting instruction would not eliminate the risk or unfair prejudice, and an instruction may further confuse the jury about how it should use the evidence.

C. Subsequent Discipline of Caucasian Police Officers

Defendants' evidence of their discipline of Caucasian police officers does not suffer from the same defect as the firebombing evidence. Since defendants' treatment of its police officers is at issue, defendants propose to establish they disciplined two Caucasian police officers within two months after plaintiffs were fired. Plaintiffs allege such evidence is irrelevant. They do not allege any risk of unfair prejudice that could implicate Rule 403. Such post-incident conduct, however, implicates Rule 404(b).

The central issue at trial will be whether defendants' actions leading to plaintiffs' dismissal were based on racial animus or poor job performance. Evidence that shortly after plaintiffs' dismissal, defendants disciplined Caucasian officers tends to make the existence or nonexistence of a disputed material fact, defendants' discriminatory intent, more probable than it

would be without that evidence. If, as plaintiffs allege, defendants discriminated or retaliated against them with racial animus, the fact finder is entitled to examine the discipline of other officers within a reasonable time of plaintiffs' firing.

Evidence of defendants' conduct toward other employees "has long been held relevant and admissible to show that an employer's proffered justification is pretext." Ansell, 347 F.3d at 521. Thus, other acts are admissible under Rule 404(b) in the employment discrimination context "for the proper purpose of establishing or negating discriminatory intent." Id. It is important to distinguish between evidence used to prove defendants' intent, which is admissible, as opposed to evidence used to prove defendants acted in conformity with those prior acts, which is not admissible since it would violate the ban on admission of propensity evidence. See id. at 521-22 (citing Becker v. ARCO Chemical Co., 207 F.3d 176, 194 (3d Cir. 2000)). Evidence that Caucasian officers were disciplined within a few months of plaintiffs' firing tends to rebut plaintiffs' theory that defendants treated Caucasian officers more favorably. It also tends to support defendants' proffered non-discriminatory reasons for firing plaintiffs.[1]

D. Evidence Whether Dogs Can Discern Race or Racial Profile

Plaintiffs will offer evidence that Conley advised McKinnie that her dog "doesn't like black people." McKinnie will testify that his "understanding" is that dogs are "color blind" and that Conley's statement demonstrated insensitivity. Defendants contend this remark allows them to introduce rebuttal evidence by a national expert on animal behavior and whether dogs can

[1] Like plaintiffs, I cannot discern any possible unfair prejudice from such evidence. Even assuming some arguable prejudice from defendants' subsequent acts, e.g., a motive to cover up discrimination by subsequently sanctioning Caucasian officers, the probative value is not substantially outweighed by such speculative prejudice because there is no evidence to support such speculation on defendants' motives for disciplining the Caucasian officers.

determine race. Plaintiffs object to this evidence as irrelevant and improper expert testimony under Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 516 U.S. 869 (1995).

The merits of whether dogs can discern race and see beyond the shades of grey must await another day. This is a tangential issue on an isolated comment in the case. Under Rule 403, resolution of this question would distract the jury from its primary task and exhaust valuable judicial resources. Moreover, the jury will have no need to delve into this theoretical question because I will preclude McKinnie from commenting on his subjective beliefs whether dogs are color blind. McKinnie's view is speculative; he has no expertise in the field. Although Conley's comment is relevant since it has some tendency to make the existence of her discriminatory intent more likely, the remark is ambigous on its face and merits rebuttal by Conley. Thus, if McKinnie deems Conley's comment important to proving defendants' discriminatory motive, Conley will be permitted to describe her efforts to help her dog socialize with non-Caucasians, including her African-American partner. This will assist the jury to assess whether the remark was motivated by any racial animus, as plaintiffs contend.

E. Plaintiffs' Testimony on Economic Damages

Defendants contend plaintiffs should be barred from offering testimony on economic damages because they possess no expertise in computation of damages, and their view of lost benefits would constitute hearsay and be based on speculation. Although plaintiffs consulted an actuarial expert, Bunin Associates, they failed to comply with Judge Pratter's scheduling order and the Federal Rules of Civil Procedure by timely notifying defendants of the expert, its qualifications, or its findings. See Fed. R. Civ. P. 26(a)(2)(C). Defendants maintain plaintiffs are now limited to offering their own testimony on their prior earnings history.

Evidence of damages must be based on a proper foundation with sufficient factual predicates to support the contested calculations. Benjamin v. Peter's Farm Condominium Owners Assoc., 820 F.2d 640, 642 (3d Cir. 1987). Speculative belief in earning potential is insufficient, as are extrapolations based on insufficient evidence. Id. at 643. Thus, plaintiffs may, without expert testimony, offer limited testimony from which a jury could compute damages. For example, plaintiffs could testify on their prior earning and benefits history and their anticipated retirement date based on their occupation, retirement plan, and personal needs. From these facts, a jury could reasonably estimate damages, including front pay based on past earnings. See Maxfield v. Sinclair International, 766 F.2d 788, 797 (3d Cir. 1985) (expert testimony not required to establish front pay based on former earnings). Such a model, however, is not ideal and can be easily avoided here. Although plaintiffs inexcusably failed to comply with Rule 26 and make timely disclosures of its expert report, I will grant defendants leave to take additional discovery on the issue of damages and depose plaintiffs' expert on damages. Trial has been rescheduled to February 12, 2007, leaving the defendants sufficient time to depose plaintiffs' expert. Plaintiffs, of course, are directed to produce promptly all discoverable material relating to their expert's damages computations and to make their expert available on a date certain selected by defendants no later than January 12, 2007. If these conditions are met, plaintiffs shall be permitted to offer expert testimony, which is important to assist the fact-finder in assessing the proper measure of damages if plaintiffs prevail at trial.

An appropriate Order consistent with this Memorandum follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARLO MCKINNIE and SONYA SAMS,	:	**CIVIL ACTION**
Plaintiffs	:	
	:	
v.	:	
	:	
TERESA CONLEY and CHEYNEY	:	
UNIVERSITY OF THE STATE SYSTEM	:	
OF HIGHER EDUCATION,	:	
Defendants	:	**NO. 04-932**

ORDER

AND NOW, this 8th day of December, 2006, upon consideration of the parties motions in limine and responses thereto, for the reasons stated in the accompanying memorandum opinion, it is hereby ORDERED that:

1) Defendants' motion to preclude evidence relating to certain damages (Document No. 50) is DENIED;

2) Plaintiffs' motion to preclude evidence that plaintiff Sams was caught sleeping in July, 2003 (Document No. 52) is DENIED;

3) Plaintiffs' motion to preclude evidence that defendants' cars were firebombed (Document No. 53) is GRANTED;

4) Plaintiffs' motion to preclude evidence of discipline following plaintiffs' terminations (Document No. 54) is DENIED; and

5) Plaintiffs' motion to preclude evidence whether dogs can discern race (Document No. 55) is GRANTED.

BY THE COURT:

\s\ TIMOTHY R. RICE
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U.S. MAGISTRATE JUDGE