

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

<b>EQUAL EMPLOYMENT</b>	:	<b>CIVIL ACTION</b>
<b>OPPORTUNITY COMMISSION,</b>	:	
<b>Plaintiff,</b>	:	
	:	
<b>KARI WASYLAK,</b>	:	<b>NO. 06-01758</b>
<b>Intervenor,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>SMOKIN' JOE'S TOBACCO</b>	:	
<b>SHOP, Inc.,</b>	:	
<b>Defendant.</b>	:	

**MEMORANDUM AND ORDER**

**STENGEL, J.**

**September 27, 2007**

This is a sexual harassment and retaliation case. Plaintiff/intervenor Kari Wasylak alleges that her supervisor, Darryl Wormuth, sexually harassed her and created a hostile work environment. Wasylak further alleges that Smokin' Joe's terminated her in retaliation for lodging a sexual harassment complaint. The defendant maintains that Wasylak did not experience sexual harassment and that she abandoned her job and was eventually terminated for refusing to cooperate in the sexual harassment investigation several weeks after she stopped showing up for work.

On August 23, 2007, I denied the plaintiff's Third Motion in Limine to Exclude Evidence of Sexual History and Marital Status and granted the defendant's Cross Motion pursuant to Rule 412. As a result, the defendant may be permitted to introduce evidence

at trial regarding the plaintiff's discussions of sexual activity in the workplace for the limited purpose of showing that she may not have been offended by certain remarks attributed to her supervisor. Evidence of her marital status may also be introduced for the limited purposes discussed with counsel at oral argument. On September 4, 2007, plaintiff filed a Motion for Reconsideration and the defendant responded in opposition on September 7, 2007. For the reason stated below, I will deny the plaintiff's Motion for Reconsideration.

#### **I. STANDARD FOR A MOTION FOR RECONSIDERATION**

A motion for reconsideration has two primary purposes: "to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) cert. denied, 476 U.S. 1171 (1986). The motion should be granted "if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . .; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing N. River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). See also Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995) ("Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly"). The motion should not be granted if the moving party is merely

asking the court to “rethink” what it has already rightly or wrongly decided. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

## **II. DISCUSSION**

This court denied the plaintiff's Motion in Limine to Exclude Evidence of Sexual History and Marital Status because the evidence sought to be introduced is relevant and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. FED. R. EVID. 412(b)(2). Now, the plaintiff requests that this court re-examine its' decision to deny her Motion in Limine or "at a minimum, revise the overly broad statement" in paragraph (3) of the Court's Order permitting the defendant "to introduce evidence at trial regarding plaintiff's sexual conduct in the workplace and her marital status at the time she was employed with defendant."

The plaintiff's Motion for Reconsideration does not even state the standard for reviewing a motion for reconsideration. Regardless, the plaintiff's motion does not meet the high standard necessary to succeed on such a motion. The plaintiff failed to present (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . .; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Rather, the plaintiff is attempting to use this motion as a means of rearguing her original Motion in Limine.

The plaintiff contends that if the court does not reverse its earlier decision the jury will hear a great deal of highly prejudicial, personally invasive and legally irrelevant

evidence about the plaintiff which will preclude her from having a fair trial. The plaintiff makes a procedural and a substantive argument as to why the court erred in denying her Motion in Limine.

As a procedural matter, the Plaintiff argues that the defendant did not follow the mandatory procedural safeguards of Rule 412(c) which states:

- (1) A party intending to offer evidence under subdivision (b) must--
  - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
  - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
- (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412(c).

The plaintiff claims that the defendant never notified Ms. Wasylak of the hearing, did not provide a specific description of the evidence to be offered and failed to file the motion under seal. In fact, the Defendant did notify the plaintiff of its Response and Cross-Motion when it served a copy upon counsel and counsel was not prevented from bringing the plaintiff to the oral argument.

Second, the defendant absolutely provided the plaintiff with a specific description of the evidence to be offered with respect to the plaintiff's sexual history and marital status. The defendant clearly stated in his Memorandum of Law in Support of its Response and Cross-Motion that he intended to present the following evidence at trial:

(a) Plaintiff was not married at the time she worked at Smokin' Joe's; (b) Plaintiff called Mr. Wormuth "peaches" and "big daddy"; (c) Plaintiff flirted with her supervisor whom she now accuses of harassment; (d) Plaintiff dated a co-worker while employed by the defendant; (e) Plaintiff spoke about her sexual relationship with Mr. Gelatko with co-workers in the workplace. Further, this court specifically restated the defendant's intentions in its Memorandum Opinion.

Third, the hearing before the court was sealed. However, the plaintiff failed to file her Motion in Limine under seal and therein went into detail about the plaintiff's behavior within the workplace and about the illegitimacy of her child. Subsequently, the defendant did not file his less descriptive Response and Cross-Motions under seal. Now, the plaintiff is seeking to penalize the defendant for not following the same procedural rules which she has failed to respect.

The overarching purpose of Rule 412, and of the procedures outlined in subdivision (c), is to protect alleged victims against the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details." Sheffield v. Hilltop Sand & Gravel Co., Inc., 895 F. Supp. 105, 109 (E.D. Va. 1995); See Advisory Committee Note. In this case, the defendant did no more harm to the plaintiff by not filing his Response and Cross-Motion under seal than the plaintiff did to herself by not sealing her Motion in Limine. Thus, the defendant did not violate the purpose of these procedural safeguards because he did not invade the

plaintiff's privacy, embarrass her or stereotype her any more than she already did to herself.

Finally, the proposed evidence in this case is likely admissible and therefore the failure to follow the procedural requirements for admission was harmless. See Beard v. Southern Flying J, Inc., 266 F.3d 792, 801 (8th Cir. 2001)(stating that the failure to follow the procedural requirements for Rule 412(c) was harmless because the evidence was already deemed admissible).

Substantively, the plaintiff argues that the court failed to recognize that Rule 412 establishes a more stringent standard for the party proffering the evidence by requiring that the evidence's probative value "substantially outweigh" its prejudicial effect. In support of her Motion for Reconsideration, the plaintiff does not cite an intervening change in the controlling law, new evidence or the need to correct a clear error of law or fact. Rather, the Plaintiff attempts to reargue the issues of prejudice to the plaintiff that will result from the admission of this testimony. This motion should not be granted because the moving party is merely asking the court to "rethink" what it has already decided. See Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

Here, the plaintiff's discussion in the workplace of her sexual conduct is clearly relevant to the defendant's theory that because the plaintiff was single, dating a co-worker, and talked about her sexual conduct in the workplace, she may not have been

offended by Mr. Wormuth's comments and inquiries. The probative value of this evidence outweighs the danger of harm to the plaintiff.

#### **IV. CONCLUSION**

After considering the parties' motions, I will deny the plaintiff's Motion for Reconsideration. An appropriate order follows.

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<b>SHOP, Inc.,</b>	:	
<b>Defendant.</b>	:	

**ORDER**

**AND NOW**, this 27<sup>th</sup> day of September, 2007, upon consideration of the Plaintiff's Motion for Reconsideration (Document #114), and defendant's response in opposition thereto, it is hereby **ORDERED** that said Motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel \_\_\_\_\_  
LAWRENCE F. STENGEL, J.