

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT – 2<sup>ND</sup> DIVISION  
CIVIL ACTION NO. 01-CI-2882

MELINDA J. MASSARONE

PLAINTIFF

vs.

**PLAINTIFF’S MEMORANDUM *CONTRA*  
DEFENDANTS’ MOTION *IN LIMINE***

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, et al

DEFENDANTS

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Defendants’ motion *in limine* is without merit and, in large part, repeats arguments also set forth in their memo supporting their frivolous motion for summary judgment.

This memorandum will set forth some general evidentiary principles and then address defendants’ arguments.

**1. General Evidentiary Principles**

The Supreme Court has recently reiterated the minimal standard for assessing the relevancy of proffered evidence. “The law of evidence tilts heavily toward admission over exclusion, for there is an inclusionary thrust in the law that is powerful and unmistakable.” *Tuttle v. Perry*, Ky., 82 S.W.3d 920, 922 (2002), *quoting* Lawson, Kentucky Evidence Law Handbook § 2.05 at 53 (3d ed.). “Relevancy is established by any showing of probativeness, however slight.” *Tuttle, supra*. The Court further advised as follows:

An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. ... It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.

*Tuttle*, 82 S.W.3d at 922, *quoting* *Turner v. Commonwealth*, Ky., 914 S.W.2d 343, 346 (1996).

Also instructive is the court's admonition in *Robinson v. Runyon*, 149 F.3d 507, 512 (6<sup>th</sup> Cir. 1998), an employment discrimination case like this one where the employer argued that evidence of discriminatory acts by it should have been excluded as irrelevant:

Neither the appellate nor the district court is permitted to consider the weight or sufficiency of the evidence in determining relevancy and "even if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth."<sup>1</sup>

The Supreme Court in *Meyers v. Chapman Printing Co.*, Ky., 840 S.W.2d 814 (1992), made several observations applicable to the evidentiary issues raised by defendants' motion. First, the Court held that statements by the employer's managing agent that women in general and the plaintiff in particular were unfit for work were admissible and probative of sex discrimination. 840 S.W.2d at 822. Second, the Court held that testimony supporting the inference that the employer's sexually demeaning attitude towards women pervaded the entire employment atmosphere in the form, among other things, of conversation by and with other employees on the job reporting the managing agent's hostility towards women was both admissible and probative. *Id.* at 822-823. Furthermore, the Court rejected a hearsay objection as to this evidence, observing that it was relevant to show why the plaintiff "believed she was working in sexually hostile work environment and consequently suffered emotional distress." *Id.* at 823.

The Court of Appeals in *Kentucky Center for the Arts v. Handley*, 827 S.W. 2d 697, 701 n.5 (1992), observed that a plaintiff may show discrimination by a variety of means including "that there has been a general attitude of discrimination throughout the employment climate."

Finally, as courts have repeatedly cautioned, a "plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by 'evidentiary rulings that keep out probative

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<sup>1</sup> Quoting *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344 (6<sup>th</sup> Cir. 1992).

evidence because of crabbed notions of relevance or excessive mistrust of juries.” *Robinson*, 149 F.3d at 513, *quoting Riordan v. Kempiners*, 831 F.2d 690, 698 (7<sup>th</sup> Cir. 1987); *see also Aman v. Cort Furniture*, 85 F.3d 1074, 1082 (3d Cir. 1996); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8<sup>th</sup> Cir. 1988)(same).

KRE 403 authorizes the trial judge “to weigh the probative value of evidence against the potential harmful effects of its admission and to exclude the evidence when the former is *substantially outweighed* by the latter.” Lawson, Kentucky Evidence Law Handbook § 2.10 at 57. The “judicial authority to exclude relevant evidence is an extraordinary power that is intended to be used ‘sparingly’ by trial judges.” *Id.* “[T]he language of Rule 403 plainly manifests a tilt of the law toward admission over exclusion.” *Id.* “In weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission.” *Id.* The trial judge must “look at the evidence in the light most favorable to its proponent, ‘maximizing its probative value and minimizing its prejudicial effect.’” *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 360 (6<sup>th</sup> Cir. 1997).

**2. Walsh’s Statements and Conduct Directed At Others Is Material, Relevant and Admissible**

Walsh’s gender-biased statements regarding Massarone specifically and women on the police force are admissible to prove sex discrimination. *Meyers*, 840 S.W.2d at 822. That she learned of these statements through discussion in the workplace does not affect their admissibility, as the Court also held in *Meyers*. Moreover, Walsh’s discriminatory acts directed at other women are probative, admissible evidence of sex discrimination. *White v. Rainbo Baking Co.*, Ky.App., 765 S.W.2d 26, 30 (1988). It is evidence probative of a discriminatory

atmosphere in the workplace, a cornerstone of Massarone's proof. *Handley*, 827 S.W.2d at 701 n.5.

It is for a jury to decide and assess whether Walsh innocently pursued a romantic interest in other police officers or whether, as those officers regarded, he sought to use his job to sexually harass and coerce the women. Contrary to defendants' argument, evidence of sexual harassment directed at others is probative on Massarone's sex discrimination that led to her discharge from employment claim. *White, supra; EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 897-898 (9<sup>th</sup> Cir. 1994)(evidence of past instances of sexual harassment directed at other employees probative of gender-based discharge case).

The evidence of Walsh's rape of Phillips is not too remote, contrary to defendants' arguments. First, it is difficult to conceive of an act more probative of Walsh's attitude that women are inferior to men and that it is perfectly fine and acceptable to perpetrate sex crimes on them than this. This is very powerful evidence of discriminatory intent. Second, Kentucky courts have held that incidents of sexual misconduct some twenty years removed from the specific incidents at issue in the case is admissible to prove intent. *Commonwealth v. English*, 993 S.W.2d 941, 943-945 (1999). Furthermore, the Court advised that the issue of "temporal proximity is more significant with respect to evidence offered to prove a common scheme or plan than to evidence offered to prove ... motive [or] intent[.]" 993 S.W.2d at 944. "Neither Rule 404 nor Rule 401 mentions temporal proximity as a condition of admissibility" and "[t]emporal remoteness generally is held to go to the weight of the evidence, but not to render it inadmissible per se." *Id.* Third, in *Cooley v. Carmike Cinemas*, 25 F.3d 1325, 1331 (6<sup>th</sup> Cir. 1994), the court affirmed the admission, in an age discrimination case, of age-biased statements made more than twenty years before the plaintiff's termination, because the statements "help to

reveal [the employer's managing agent's] state of mind and reflect a deep-rooted, ongoing pattern that is anything but isolated." Similarly, in *EEOC v. Farmer, supra*, the court affirmed admission of testimony regarding a supervisor's sexual harassment at another employee more than twenty years before plaintiff was discharged giving rise to her gender discrimination claim. 31 F.3d at 897-898.

The evidence of Walsh's rape of Phillips is especially powerful evidence in support of Massarone's discharge claim. First, rape is perhaps the most extreme form of sexual harassment. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9<sup>th</sup> Cir. 2002); *see also Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 809 (7<sup>th</sup> Cir. 2000)("physical, intimate, and forcible character of the acts at issue persuades us that a factfinder could deem [plaintiff's] work environment hostile.").

Secondly, courts have recognized that "sexual harassment may be symptomatic of gender-based hostility, the employer or supervisor using sexual harassment primarily to subordinate women, to remind them of their lower status in the workplace, and to demean them." *EEOC v. Farmer*, 31 F.3d at 898; *see also Gregory v. Daly*, 243 F.3d 687, 700 (2d Cir. 2001)(same). Accordingly, Walsh's rape of Phillips is very, very powerful and probative evidence supporting Massarone's discrimination claim.

The evidence of Walsh's rape of Phillips should not be excluded pursuant to KRE 403. First, the evidence is powerful and its probativeness must be viewed at its maximum at this stage. *Sutkiewicz, supra*. Second, its temporal remoteness is much less ( 8 – 9 years) than the acts at issue in *English, Cooley*, and *EEOC v. Farmer*, all of which were twenty years or greater. Third, Walsh's rape of Phillips is of a piece with conduct he directed at Massarone, at Root, at Bradley, at Davis and with his comments about the general inferiority of women and specifically as police

officers. Accordingly, evidence regarding Walsh's rape of Phillips and his sexual misconduct directed at other women officers is properly admissible.

Defendants misconstrue and misstate the import of the letter that they refer to as the "Anonymous Letter." First, the letter is probative as to the *Faragher/Ellerth* affirmative defense that LFUCG claims it is entitled to. LFUCG claims to have a policy of investigating even anonymous complaints against police officers.<sup>2</sup> Obviously, this "policy" is implicated by the letter, which identifies a number of people, including Phillips, possessing information. However, LFUCG's investigation was limited to speaking with Walsh, who presumably denied any wrongdoing.

Two material conclusions can be drawn from LFUCG's reaction to the letter. First, the jury could conclude that LFUCG's "investigation" is unworthy of that title and thus conclude that LFUCG departed from its standard procedures to investigate anonymous complaints of misconduct against police officers, including Walsh. An employer's departure from its supposed or purported procedures can be probative of its discriminatory intent. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures, too, may be relevant, particularly if the factors usually considered important by the decision-makers strongly favor a decision contrary to the one reached."). Thus, LFUCG's failure to make even a passing attempt at a meaningful investigation suggests a ratification by it of Walsh's misconduct. Second, while LFUCG asserts that it has a policy prohibiting discrimination or harassment in any form in the workplace, its failure to adequately investigate seriously undermines the application, if any, of the policy to Walsh. LFUCG may indeed have had a policy applicable (and truly applied) to lower-level employees. The issue here

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<sup>2</sup> A copy of this policy is attached hereto and marked exhibit A.

is its true and actual application to Walsh and its entitlement to the *Faragher/Ellerth* defense it asserts. Indeed, LFUCG's failure to adequately investigate may preclude its assertion of the *Faragher/Ellerth* affirmative defense. The Supreme Court held in *Bank One v. Murphy*, Ky., 52 F.3d 540, 545-546 (2002), that the employer's failure to follow its procedures with regard to a prior complaint of misconduct could preclude it from asserting the affirmative defense.

Finally, an employer may be liable for sexual harassment if it "knew or should have known of the harassment in question and failed to take prompt remedial action." *Sharp v. City of Houston*, 164 F.3d 923, 929 (5<sup>th</sup> Cir. 1999). This standard was not disturbed by *Faragher* or *Ellerth*. "An employer can be liable...where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct but failed to stop it." *Ellerth*, 118 S.Ct. at 2267. Thus, the letter is probative as to whether LFUCG knew or should have known of the regime of sexual harassment and discrimination instituted and maintained by Walsh, given that it supposedly had a policy of investigating even anonymous complaints about police officers' misconduct. Defendants essentially concede that Walsh's misconduct was notorious, wide-spread and long-lasting; the jury should be able to assess why LFUCG professes ignorance.

Defendants' character evidence argument is completely meritless. If evidence of statements betraying discriminatory animus, evidence of acts betraying discriminatory animus and other evidence indicating a discriminatory atmosphere in the workplace were inadmissible then *Meyers*, *Handley* and *White* would have been decided the opposite of what they were. Defendants cite zero authority for their proposition that evidence proving discrimination is inadmissible character evidence.

Walsh's racist statements and conduct are also relevant and admissible. Courts have recognized that discriminatory conduct of a type than that specifically directed at the plaintiff is admissible to prove discriminatory intent and a discriminatory atmosphere in the workplace. *Carr v. Allison Gas Turbine Division of General Motors*, 32 F.3d 1007 (7th Cir. 1994)(reversing a defense verdict and entering judgment for plaintiff and observing that instances of racial harassment directed at a co-worker was proof toward sustaining claim of sexual harassment claim by plaintiff); *Hafford v. Seidner*, 183 F.3d 506 (6<sup>th</sup> Cir. 1999)(holding that religious discrimination was proof toward sustaining plaintiff's claim of race discrimination); *Hicks v Gates Rubber Co*, 833 F.2d 1406, 1415-17 (10<sup>th</sup> Cir. 1987)(holding that "incidents of racial harassment which may, by themselves, be insufficient to support a racially hostile work environment claim can be combined with incidents of sexual harassment to prove a pervasive pattern of discriminatory harassment in violation of Title VII."). Furthermore, since defendant LFUCG claims to have a policy, which prohibits all forms of discrimination, entitling it to an affirmative defense, the prevalence and notoriety of Walsh's racist conduct calls into serious question whether, in fact, LFUCG had any such "policy." Again, the Court's analysis in *Bank One v. Murphy*, calls into question LFUCG's entitlement to assert the affirmative defense.

Alternatively, a question exists as to whether LFUCG's policy applied to Walsh; a jury should be able to consider whether lower-level employees were punished while the chief got away with whatever he wanted to do. Similarly, the unlawfully retaliatory action taken against Arty Greene is probative as to the existence of LFUCG's claimed policy. Walsh directly participated in this retaliation. A jury can find that LFUCG did not have a policy applicable to Walsh.

The punitive retaliation taken against Sgt. Greene is probative to the second element of the affirmative defense. Assuming *arguendo* that LFUCG would be entitled to assert the defense at all and could substantiate its first element, Massarone would still be entitled to present proof as to why she did not go outside the police department to protest Walsh's misconduct and the hostile work environment it created. Massarone would be entitled to present evidence "to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints." *Leopold v. Baccarat, Inc.*, 239 F. 3d 243, 246 (2<sup>nd</sup> Cir. 2001). Accordingly, relevant to this issue is the testimony and proof regarding Sgt. Greene, testimony from Asst. Chief Ulysses Berry that commanders under Walsh would not go around Walsh regarding his misconduct because they would jeopardize their jobs, that from Lt. Mark Barnard, Sgt. David Lyons, Det. Paul Williams regarding Walsh's retaliatory actions toward them and his actions to destroy any record that in any way cast doubt on his actions.

Evidence regarding the favoritism to Walsh's family members is probative to showing that the Urban County Government had a policy of tolerating whatever he wanted to do. Privileges were granted him to abuse employees and to grant special benefits for himself and his family. It is a sad story but it is the evidence in the case.

Defendants' oft-repeated arguments for exclusion under KRE 403 are best answered by the court's observations and ruling in *Robinson v. Runyon, supra*. First, the court observed that the inflammatory nature of discrimination evidence is precisely why it is probative of discriminatory motives. 149 F.3d at 515. Further, the court observed:

... in nearly every discrimination case there are often instances of extremely offensive remarks, caricatures, and jokes. Those shocking messages, offensive though they may be to the court and to the jury, comprise the signature element of a discrimination case. If we confined our considerations solely to defendants exclaiming, "I hate \_\_\_\_\_," we would effectively remove the inferences permissible in circumstantial cases such as the one at bar.

149 F.3d at 515.

Second, the court observed that “even in cases of shaky evidence, ‘vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking’ such evidence, not exclusion.” *Id.*

Some of the evidence to be presented in this case is shocking and offensive. Walsh’s misconduct was shocking and offensive, as were the gender discrimination and harassment that it caused. Defendant LFUCG, even while defending Walsh claims ignorance of his conduct and disclaims responsibility therefore, in the face of widespread, notorious and long-lasting misconduct by Walsh. Its policies and actions and liability are directly implicated. The probative evidence subject of defendants’ motion is not substantially outweighed by its prejudicial effect. Accordingly, defendants’ motion should be overruled in its entirety.

### CONCLUSION

For all the foregoing reasons, defendants’ motion should be **overruled** in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing was hand-delivered this \_\_\_\_ day of February, 2003, to the following:

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