IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

SELINA OWENS,

Plaintiff,

v.

ENIS RAGLAND,

Defendant.

OPINION AND ORDER

03-C-369-C

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Trial is scheduled to begin in this case on May 12, 2004. Defendant has filed a motion seeking permission to "admit evidence of plaintiff's past sexual behavior." In his motion and brief, defendant divides this evidence into two categories: (1) "evidence of incidents before 1997 that would only be relevant during the damages phase at trial" and (2) "evidence of incidents after 1997 that would be relevant as to both liability and damages."

As defendant recognizes, in any civil case involving "alleged sexual misconduct," Fed. R. Evid. 412 prohibits the defendant from introducing evidence of the plaintiff's past sexual behavior, even if it is relevant, unless "its probative value substantially outweighs the danger of harm" to the plaintiff. Rule 412 reverses the standard of Rule 403, which permits a judge to exclude relevant evidence only if the danger of unfair prejudice substantially outweighs

its probative value.

Defendant appears to concede that Rule 412 applies to sexual harassment lawsuits. E.g., Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002). Defendant also appears to concede that the evidence he wishes to introduce would be considered evidence of "other sexual behavior" of plaintiff or of her "sexual predisposition" within the meaning of Rule 412(a). However, defendant argues that the evidence is relevant during the liability phase of trial to show that "plaintiff had other significant stressors in her life at this time that might explain why she felt upset and harassed." Similarly, defendant contends that the evidence will be relevant during the damages phase to "counter the claim that plaintiff's mental health problems were caused by defendant's alleged comments."

Even under the Rule 403 standard, I could not conclude that the evidence defendant wishes to submit would be admissible during the liability phase. It is true that plaintiff will have to prove that defendant's alleged conduct was "unwelcome." Robinson v. Sappington, 351 F.3d 317, 328 (7th Cir. 2003). However, it is questionable whether evidence that plaintiff had other "stressors" in her life during the time of the alleged harassment would shed any light on whether she welcomed defendant's behavior. Although defendant's argument is not entirely clear, he appears to be suggesting that plaintiff only "thought" defendant was harassing her when in fact it was other events in her life that created this perception. But even if plaintiff *was* overly sensitive to defendant's behavior because of other

issues that she was experiencing, evidence showing her greater sensitivity would not tend to disprove that she did feel harassed.

If plaintiff's perception of harassment was objectively unreasonable, defendant may be able to avoid liability because plaintiff will be unable to prove that defendant's conduct was severe or pervasive. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986). However, this element will be determined by examining the evidence of defendant's conduct. Harassment does not become more or less objectively severe depending on the alleged victim's current situation in life. In any event, whatever marginal relevance this evidence might have does not outweigh the unfair prejudice that it would cause plaintiff. E.g., B.K.B. v. Maui Police Department, 276 F.3d 1091 (9th Cir. 2002) (concluding in sexual harassment case that evidence of plaintiff's sexual behavior with others was not probative on issue of welcomeness and was unfairly prejudicial). Defendant's motion will be denied as to the evidence he wishes to introduce during the liability phase.

I will stay a decision on defendant's motion with respect to the evidence he wishes to introduce during the damages phase. If plaintiff prevails on liability and wishes to recover damages for emotional distress, she will have to prove that it was defendant's harassment and not other events in her life that caused her injuries. Before the damages phase begins, I will hold an in camera hearing pursuant to Rule 412(c)(2) to determine whether defendant's evidence will be admitted. However, defendant should note that to meet the

demanding standard of Rule 412, he will have to do more than itemize a list of plaintiff's life experiences that *may* have caused her emotional distress during the time relevant to this case. In his motion, the only evidence defendant cites to support his argument is a deposition from plaintiff's psychiatrist (which is not part of the record) in which the psychiatrist allegedly testified that these other experiences *could* cause "long-lasting mental health problems." This is insufficient. Before I will admit this evidence, defendant will have to make a strong showing that the other events *did* contribute to whatever emotional distress plaintiff claims she felt, if not cause them.

ORDER

IT IS ORDERED that defendant Enis Ragland's motion to admit evidence of plaintiff Selina Owens's past sexual behavior is DENIED as to evidence related to liability. I will hold an in camera hearing pursuant to Fed. R. Evid. 412(c)(2) before the damages phase begins to determine whether any or all of defendant's evidence may be admitted to show that

plaintiff's emotional distress was not caused by defendant's conduct.

Entered this 28th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge