IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JANIS WAITE,

Plaintiff,

v.

WOOD COUNTY WISCONSIN,

Defendant.

OPINION AND ORDER

16-cv-643-wmc

This case is set for a jury trial commencing January 8, 2017, to resolve plaintiff Janis Waite's remaining sex discrimination and retaliation claims against her former employer, Wood County. In advance of the final pretrial conference scheduled for December 21, the court issues the following opinion and order on the parties' respective motions in limine.[1]

OPINION

I. Plaintiff's Motions in Limine (dkt. #46)

A. MIL No. 1: Exclude Decision of Hearing Officer Kraft and Testimony that Arbitrator Upheld Discharge

Plaintiff's first motion seeks to exclude the decision of Warren P. Kraft, who acted as the impartial hearing officer upholding Waite's discipline. At that time, Kraft was an attorney for Murphy Desmond, S.C., and he is now the human resources director for Wood County. Plaintiff argues that "[t]he probative value of the decision is outweighed by its prejudicial effect and the time that would be spent addressing the biased process by which the decision was issued." (Dkt. #46 at 1-2.) Primarily, plaintiff complains that: (1) she

[1] The court recognizes that the parties did not have the benefit of the court's summary judgment decision in crafting their motions in limine because all three were filed on the same day.

and her labor representative were required to select a hearing officer (to be paid by the County) from a County list, instead of being able to select (and split the cost) of a labor arbitrator and (2) "[t]he hearing was not a legal process and the officer was not bound by the rules of evidence." (*Id.* at 1.)

The defendant agrees the hearing officer's decision should be excluded with the caveat that then none of the impartial hearing officer process evidence should be admitted, because "[a]llowing testimony regarding the Impartial Hearing process opens the door to . . . allowing evidence of the conclusion of the process." (Dkt. #63 at 1-2.)[2] Additionally, defendant argues Waite's labor representative Spiegelhoff's testimony about his tape recording of a meeting with HR Director Reed is irrelevant. (*Id.* at 3.)

The court agrees with the parties that the hearing officer's ruling upholding Waite's discipline should be excluded, along with any evidence as to Wood County's Complaint Resolution Process, including how the officer was selected. As for testimony given under oath during that process, however, its use for impeachment, refreshing recollection or the statement of a party opponent would be perfectly appropriate with a reference to the specific circumstances under which the testimony was elicited. (For example, counsel might preface its introduction with the statement "You recall giving testimony on this with subject under oath previously.") Accordingly, this motion is GRANTED consistent with the structures set forth above.

[2] Defendant further explains that by 2013, correctional officers were no longer subject to a collective bargaining agreement, so that Waite's complaints were handled through the resolution process outlined by Wood County, which provided for the selection of an impartial hearing officer from a list maintained by the County. (*Id*. at 2-3.)

B. MILs Nos. 2 & 3: Exclude Evidence of Discipline between 2002 and June 2009; Exclude Evidence of Waite Flashing Male Officer in 2006

Plaintiff seeks to prevent defendant from offering evidence of disciplinary actions, counselling and warnings before 2009, which she argues are "too remote" in time, making their probative value outweighed by the trial time required to present and dispute this evidence. (Dkt. #46 at 2.) Similarly, she seeks to exclude evidence regarding an incident in 2006 where she and a female lead flashed a male officer who had exposed himself, as well as the resulting discipline. (*Id.*) Defendant responds by arguing that "all Evidence Prior to 2012 regarding job performance should be excluded" for the same reason, consistent with its first motion in limine (which seeks to exclude evidence before September 14, 2012). (*See* dkt. #48 at 2-3.) However, defendant argues in the alternative that "[i]f the Court admits any evidence of job performance prior to 2012, the jury will have an incomplete picture of Waite's work history/performance portrayal that would be prejudicial to Wood County," at least (apparently) without admitting it all. (Dkt. #63 at 3.)

While plaintiff Waite argues that "[t]he court's [summary judgment] opinion recognized the relevance of her 2009-2011 evaluations" (dkt. #66 at 2 (citing dkt. #53 at 3)), the court prefaced that discussion by emphasizing its uncertainty about the relevance

of events earlier in her employment (dkt. #53 at 2).[3] As indicated previously, the focus of trial should be the events in 2012 and 2013 that gave rise to her sex discrimination and retaliation claims. Much of plaintiff's personnel record predates these events and is simply of limited or no relevance to the issues to be tried. Having said that, recognizing the risk of delay and confusion to the jury from admitting evidence of pre-2012 discipline and performance evaluations, because plaintiff disputes that her October 2012 evaluation accurately reflected her job performance, *some* evidence predating this evaluation is relevant to whether she was meeting her employer's legitimate expectations. The yet unanswered question is when its arguable relevance is outweighed by the potential prejudice and delay. Since the court cannot offer a bright (or even fuzzy) line without specific examples, it will hear argument from the parties at the final pretrial conference as to where the line should appropriately be drawn.[4] Accordingly, this motion is RESERVED and both sides are admonished not to introduce pre-2012 evidence of plaintiff's performance and evaluations without advance approval by the court.

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[3] (*Compare* dkt. #53 at 3 ("Waite's annual evaluations from 2009-2011 indicate that her job performance met or exceeded requirements, but her October 24, 2012 annual review specified that she '[n]eed[ed] some improvement to meet requirements' regarding organizational ability, job knowledge and dependability, and criticized her for 'not complet[ing] her daily tasks in a timely manner,' 'repetitively ask[ing] basic questions that she knows the answers [to],' and 'us[ing] the maximum number of six days allowed for the 4th year in a row." (internal citations omitted)) *with id.* at 1 ("The parties detail -- and dispute -- much of Waite's employment history, including events within a few years of her hiring. Because the relevance of earlier events is unclear, the court will focus its attention on the key events surrounding Waite's employment and firing.").)

[4] In fairness, the defendant does identify three specific examples in its opposition. (Dkt. #63 at 4.) By way of guidance, the "Monk-E-Mail" incident from 2006 appears too remote to be relevant and inflammatory enough to be prejudicial unless either party opens the door. Similarly, potential evidence regarding alleged romantic interest by plaintiff's supervisors in 2005 and 2007 also appears too remote and prejudicial.

C. MIL No. 4: Exclude References to ERD's Initial Determinations

The parties appear to agree that "all ERD/EEOC" determinations "are not relevant." (Dkt. #46 at 2; dkt. #63 at 5.) Since the court agrees, this motion is GRANTED as unopposed.

D. MIL No. 5: Possible Evidentiary Issues

Plaintiff raises two potential evidentiary issues for pre-trial resolution. *First*, she seeks a ruling that certain statements made by Jochimsen, her immediate supervisor in 2013, are relevant to demonstrate intentional discrimination -- more specifically, statements about being ordered by the sheriff to discipline Waite, others wanting Waite fired, and her belief that she was used to terminate Waite. (Dkt. #46 at 3.) The County responds that each of these statements are hearsay and not subject to the party opponent exclusion from hearsay because the statements were made after Jochimsen ceased working for Wood County. (Dkt. #63 at 5.)[5]

The rule against hearsay excludes statements made outside the court from being considered for the truth of the matter asserted. *See* Fed. R. Evid. 801(a)-(c). As defendant notes, statements made or attributable to an "opposing party" are not hearsay. *See* Fed. R. Evid. 801(d)(2). This would include statements "made by an individual who is an agent

[5] While plaintiff merely notes that she "will present evidence" about these statements (dkt. #46 at 3), the County "[p]resum[es]" that Waite "is referring to Exhibits 76 (October 13, 2017 text between Angela Jochimsen and Anne Arndt) and 89 (February 9, 2016 Facebook notification e-mail from Anne Arndt to Janis Waite") (dkt. #63 at 5). Without seeing these exhibits, the court cannot definitively rule on their admissibility. If their descriptions are accurate, defendant appears to be correct that they are hearsay if offered for the truth asserted (rather than state of mind) but the court will take up this challenge in reviewing the parties' objections to exhibits. In this opinion and order, the court will address the underlying statements, some of which could be presented through the testimony of Jochimsen, who is on both parties' proposed witness lists, or Arndt, who is on plaintiff's. (*See* dkt. ##47, 49.)

. . . *during the period of the agency*," if "within the subject matter of the agency." *Young v. James Green Mgmt., Inc.*, 327 F.3d 616, 623 (7th Cir. 2003) (emphasis added). As such, Jochimsen can certainly testify at trial about being directed to terminate Waite, and possibly that others speaking as defendant's agents wanted Waite fired, because the statements she would be recounting would fall under this hearsay exclusion. *See* Fed. R. Evid. 802(d)(2)(D). The same may not be said for Jochimsen's text message saying she had been used to terminate Waite, since defendant rightly points out that that statement was made after Jochimsen resigned from the sheriff's office. At trial, she *might*, of course, be able to testify about such a belief, if she subscribes to it and has a rational basis to believe it. *See* Fed. R. Evid. 701(a) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is[] rationally based on the witness's perception."). Finally, the court will reserve on the text message's possible use to refresh recollection or impeach.

The *second* potential evidentiary issue relates to evidence surrounding Jochimsen's own resignation, which Waite argues shows the same discriminatory course of conduct by the defendant. (Dkt. #46 at 3-7.) Waite asserts that after the sergeant positions were eliminated, Jochimsen was not selected to be a lieutenant and her work was closely scrutinized as a way to look for reasons to discipline her. For example, plaintiff represents that Jochimsen found "fabricated documents concerning alleged performance failures that had no merit in her personnel file" and that she was faulted for not performing unrequested duties. (*Id.* at 3-4.) Plaintiff further argues that: "[t]he conduct Jochimsen was subjected [to] was calculated to cause her to quit or to justify the termination of her employment"; "Waite was subjected to the same kind of scrutiny and mode of operation to justify the

termination of her employment; and "Sheriff Reichert and Ted Ashbeck engaged in the same type of harassment of both Waite and Jochimsen for the purpose of getting them to quit or terminate their employment." (*Id.* at 5.) Plaintiff contends this evidence is admissible under Rule 404(b) as evidence of "motive, plan, pattern or method of operation." (*Id.*)

Defendant responds that "Jochimsen's testimony does not support [Waite's attempt to equate her termination and Jochimsen's resignation]." (Dkt. #63 at 6.) Instead, the County represents that Jochimsen testified that the main reasons she left were the pay cut following the elimination of her sergeant position and the related deprivation of her ability to serve as a "law enforcement officer, a sworn deputy." (*Id.*) At the same time, the County acknowledges that Jochimsen first encountered between three and six disciplinary forms in her Sheriff's Department personnel file -- that had not been included in her "official" file from human resources -- which she believed had been completed after she had been removed as sergeant. (*Id.* at 6-7.) Nevertheless, defendant points to Jochimsen's deposition testimony where she purportedly equivocates when asked if she thought that the accusations of mistakes were being used as pretext to get rid of her, and defendant argues that she worked for another month before resigning with no disciplinary forms filed against her.[6] (*Id.* at 7-8.) The County would further fault Waite for failing to develop her

[6] The testimony cited is as follows:

> Q: My question was that, in your own mind you were certain that the mistakes that they were contending you made were pretexts to give them a basis to terminate your employment?
> A: Yes and no, because there was that week's time frame where it was literally single day, Ted would call me in and be like, you did this wrong, you did this wrong, you did this and you didn't do that. But we had a conversation on the 29th is when he said they agreed to

request with a "propensity-free chain of reasoning" (*id.* at 8-9 (quoting *U.S. v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014))), and then argues that "Jochimsen's resignation . . . bears no relationship to Waite's circumstances or theory of the case," such that "[i]t appears related only to show propensity or character," making it "far more prejudicial than probative" (*id.* at 9).[7]

As an initial matter, Rule 404 prevents evidence of "other act[s]" from being used "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but permits that evidence for other purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(1)-(2). The Seventh Circuit has recognized that "[o]ther-acts evidence may be relevant and admissible in a discrimination case to prove, for example, intent or pretext." *Manuel v. City of Chic.*, 335 F.3d 592, 596 (7th Cir. 2003) (citing Fed. R. Evid. 404(b) and *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 n.5 (11th Cir. 1989)).

However, Rule 403 still authorizes exclusion "if [the evidence's] probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay." *Id.* (quoting Fed. R. Evid. 403).

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stop looking for reasons to terminate me.

(Jochimsen Dep. (dkt. #65) 31:10-23 (objection omitted).)

[7] Specifically, defendant argues that Jochimsen did not report sex discrimination as a motive, nor differential discipline compared to male colleagues as the County's plan and pattern; while Waite was disciplined, Jochmisen's position was eliminated; *and* Jochimsen was replaced by another woman. (Dkt. #63 at 9.)

In particular,

> it's not enough for the proponent of the other-act evidence simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it. Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence *only* when its admission is supported by some propensity-free chain of reasoning. . . . Rule 404(b) excludes the evidence if its relevance to "another purpose" is established *only* through the forbidden propensity interference.

Gomez, 763 F.3d at 856 (first emphasis added) (internal citations omitted). The Seventh Circuit further directed district courts to "not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but [rather] *how* exactly the evidence is relevant to that purpose . . . without relying on a propensity inference." *Id.* Still, "even if other-act evidence is relevant without relying on a propensity inference, it may be excluded under Rule 403" for the reasons discussed above. *Id.* at 856, 857 n.4.

Because it was incumbent on plaintiff to explain *how* the evidence concerning Jochimsen's resignation is relevant to a non-propensity purpose, she needed to articulate a rationale connecting the similar courses of conduct without relying on a propensity inference. She has not met this burden. While she argues that this evidence shows "motive, plan, pattern or method of operation," she is principally inviting the jury to conclude that because the Sheriff's Department treated a different female employee in an allegedly similar manner, that makes it more likely that the Sheriff's Department treated

plaintiff improperly.[8] Accordingly, this motion is GRANTED IN PART and DENIED IN PART as set forth above.

II. Defendant's Motions in Limine (dkt. #48)[9]

A. MIL No. 1: Prohibit Introduction of Time-Barred Claims

Defendant's first motion in limine addresses a similar line-drawing question as plaintiff's second and third motions. For the reasons already discussed above at length, the court will RESERVE on this motion and hear argument at the pretrial conference.

B. MIL No. 2: Preclude Proof of Claim through Rumor, Hearsay, and Self-Serving Documentation

Defendant asks the court to preclude plaintiff from relying on hearsay, information from "the rumor mill," and self-serving documents. (Dkt. #48 at 3-5.) Waite argues that the court's summary judgment opinion already addressed these concerns and that any disagreements about admissibility of evidence at trial would be minimal, in part because the parties were exchanging their exhibits pre-trial. (Dkt. #66 at 2.) Plaintiff is correct that the court reminded the parties at summary judgment that: (1) hearsay is not as simple as pointing to an out-of-court statement and shouting "hearsay!"; (2) lay witnesses are capable of testifying about opinions based on their perception; and (3) "self-serving" is not

[8] Further, plaintiff basically asks the court (as she would no doubt seek to ask the jury) to conclude that because Jochimsen and she were subject to the same course of conduct and because they are both female, the latter must be the cause of the former. However, that is insufficient.

[9] At the end of defendant's opposition to plaintiff's motions in limine, it included objections to three of plaintiff's proposed exhibits. (*See* dkt. #63 at 9-10.) Consistent with the Second Amended Scheduling Order (dkt. #68), the court will take up these (and any other exhibit objections) at the final pretrial conference.

an appropriate basis to disparage otherwise admissible evidence. (Dkt. #53 at 1-2 n.1.) However, by way of further guidance, the court will address the four examples of evidence the County wishes to exclude.

First, the County identifies Waite's claim that other correctional officers had locked themselves in cells with prisoners without receiving discipline, arguing that at the time Waite got locked in the cell "people had only 'heard' about others locking themselves in cells and no one had specific information and no incidents had been reported." (Dkt. #48 at 4.) In her declaration, Waite testified that she provided specific examples of Correctional Officers Crane and Zager locking themselves in cells. (*See* Waite Decl. (dkt. #27) ¶ 59.) Waite may lay the foundation to establish that she knew about these occurrences from her observations at work and put the sheriff on notice about these instances. If not, awareness by others might also support her claim that discipline for such events was lax until she was singled out for discipline.

Second, the County argues that Waite's other testimony "about what other co-workers did and did not do in their jobs[] is in large part based upon the rumor mill and hearsay." (Dkt. #48 at 4.) Plaintiff would likewise be able to testify to her observations of her colleagues and their performance. Otherwise, defendant's objection is well taken, unless she has the testimony of eye witnesses, or someone is able to testify to what other colleagues said under an exception to or exclusion from the bar against hearsay, again including awareness of a generally lax approach to discipline.

Third, the County identifies Waite's claim that her colleagues were asked to watch and report upon her as also being "based upon speculation and rumor," which is likely a

reference to paragraph 57 of Waite's declaration. (Waite Decl. (dkt. #27) ¶ 57.)[10] If Waite had intended to call Trzinski to testify at trial, Trzinski could likely testify about what Ashbeck's direction as the statement by a party opponent. Without Trzinksi's testimony, the court would be presented with hearsay-within-hearsay, although what Trzinski allegedly told Waite may likely fall under the party-opponent hearsay exclusion because Trzinski worked for the County when she made the statement and it concerned the scope of her employment.[11] Both sides should be prepared to direct the court to relevant case law on the application of this exclusion to double hearsay at the Final Pretrial Conference.

Fourth, the County challenges exhibit 3 to plaintiff's declaration, in which Waite purports to detail her colleagues' actions and statements. The log itself is obviously hearsay because it is a statement made outside the court and apparently offered for the truth of the matters asserted. Still, plaintiff would likely be able to testify about her observations of her colleagues once a proper foundation was laid, and use the log to refresh her memory as necessary. Likewise, plaintiff *may* be able to testify as to their statements under an

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[10] Specifically, Waite testifies:

> [t]he Department solicited complaints about me from other correctional officers. C.O. Trzinski told me on February 16, 2013 that she had been called into Lt. Ashbeck's office and was told that 'if [Waite] said the F-Bomb word again that she was to tell him immediately as it was non[sic] tolerable and unacceptable behavior.

(Waite Decl. (dkt. #27) ¶ 57 (alterations in original).)

[11] Additionally, if she had been asked to report on Waite's use of profanity, she would have been involved in the "decisionmaking process affecting the employment action." *Simple v. Walgreen Co.*, 511 F.3d 668, 672 (7th Cir. 2007).

exception or exclusion to the rule against hearsay.[12] As a result, defendant's motion is DENIED in substantial part and GRANTED so far as it (1) "request[s] that Plaintiff testify regarding personal knowledge" and (2) seeks to exclude from evidence plaintiff's log itself and any purported statements that are barred by the rule against hearsay.

C. MIL No. 3: Preclude Evidence of Male Colleagues' Disciplinary Matters

Defendant's third motion seeks to preclude evidence of incidents resulting in discipline of male correctional officers, arguing that the other correctional officers' actions were "dissimilar," "in dissimilar time frames, and under dissimilar circumstances." (Dkt. #48 at 5-8.) As plaintiff points out (dkt. #66 at 3), this motion was addressed by the court's summary judgment decision. (*See* dkt. #53 at 21-23 (comparing defendant's treatment of similarly-situated male correctional officers who were punished less harshly than plaintiff for similar or worse infractions).) This motion is, therefore, DENIED without prejudice to consideration of some specific instance(s) defendant maintains the court should not admit at trial.

D. MIL No. 4: Preclude Admission of Non-Causal Related Evidence

Defendant next seeks to exclude "non-causal related evidence." (Dkt. #48 at 8.) First, it argues that "the he-said/she-said testimony preceding September 2012 is inconsequential in this matter." (*Id.*) Because this touches on the line-drawing at issue in plaintiff's second and third motions, as well as defendant's first motion in limine, the court

[12] To the extent the parties are uncertain as to whether a specific statement is excepted or excluded from the rule against hearsay, they should be prepared to raise their questions with the court at the Final Pretrial Conference, when they are likely to get a more informed and reasoned ruling than would be possible with a jury in the box.

RESERVES on this portion of defendant's request.

Defendant also seeks in its MIL No. 4 to exclude evidence of other Sheriff's Department employees' use of profanity, but not Waite's discipline based on the January 31 incident involving profanity and a speakerphone, ostensibly because: (1) others' use of profanity is no longer relevant since the grievance process dismissed this allegation; and (2) "the extensive use of profanity at trial could cause unfair prejudice, misleading the jury on a matter no longer relevant." (*Id.*) Predictably, plaintiff responds that "[t]he prevalence of the use of profanity demonstrates the hypocrisy of the discipline issued to Waite for allegedly swearing." (Dkt. #66 at 4.) As plaintiff also argues, however, the court did partially address this issue at summary judgment. (*See* dkt. #53 at 22 n.19 ("Plaintiff similarly details instances where her colleagues used profanity . . . as support for her retaliation claim, although reliance on some of the logs appear to be hearsay within hearsay and were not considered by the court.").)[13] As discussed above, plaintiff's notes detailing in part her colleagues' use of profanity is inadmissible hearsay and plaintiff will not be able to testify to the statements themselves unless they are excepted or excluded from the rule against hearsay, but the court will not issue a blanket exclusion of other Sheriff Department employee's use of profanity at least as long as defendant intends to use plaintiff's swearing as grounds for discipline. Accordingly, defendant's MIL No. 4 is GRANTED IN PART and RESERVED IN PART.

[13] Plaintiff also cites to page 8 of the summary judgment opinion, addressing Waite having filed a formal grievance that resulted in some of the violations alleged in the Final Written Warning being dismissed, but the reason for doing so is unclear.

E. MIL No. 5: Preclude Testimony Regarding Alleged Content of Recording Claimed by Waite

Following plaintiff's three-day suspension for using office equipment to print and make copies of documents related to a workplace grievance (*see* dkt. #53 at 12 n.10), plaintiff, her union representative and HR Director Reed met on April 30, 2013 (*id.* at 15). Waite claims that the meeting was recorded and that Reed acknowledged giving her permission to use the copy machine by asking her for the copies. (*Id.*) In his August 7, 2013, letter, Reed addressed this recording and informed Waite that, even if she were to be reinstated, the unauthorized recording would be referred to her supervisor for possible disciplinary action, including possible termination. (*Id.* at 28.)

Defendant seeks to exclude the content of this recording as hearsay, noting that it was not produced and plaintiff's counsel represented that the recording no longer exists. (Dkt. #48 at 9.) Plaintiff responds simply that she intends to testify about: the statement made by Reed; his denial of that statement at a County Board meeting; and the subsequent letter. (Dkt. #66 at 4.) She argues that "[t]he evidence is relevant to the defendant's retaliatory motivation whether the tape exists or not," adding that Speigelhoff, her union representative, made the recording and she does not have the recording because Speigelhoff is deceased. (*Id.* at 5.)

As a participant in the meeting, plaintiff would obviously be able to testify as to what Reed said without violating the bar on hearsay because, at the time he spoke, Reed was still employed by the County, making the statement attributable to a party opponent. *See* Fed. R. Evid. 801(d)(2). However, the court has already granted summary judgment to defendant on plaintiff's post-termination retaliation claim. (*See* dkt. #53 at 28-29.)

Because the meeting and the subsequent letter both post-date Waite's employment, the existence of the recording and the related subsequent threat of potential discipline are not relevant to plaintiff's remaining termination retaliation claim. Accordingly, this motion is GRANTED provided defendant understands that it is waiving with prejudice any claim, whether asserted in this case or later, to an independent, non-pretextual reason to "re-terminate" plaintiff based on the recording of that testimony should she prevail on her claim of sex discrimination.

F. MIL No. 6: Preclude Expert Testimony and Medical Records on Damages

In its sixth motion in limine, defendant argues that plaintiff failed to identify an expert witness to testify about her health, so "no expert witness, hybrid fact/expert witness, or any of Waite's treating health care providers should be allowed to testify." (Dkt. #48 at 9.) Defendant further asserts that Waite's mental health records constitute hearsay and the "opinions regarding her treatment and the cause of her treatment have no foundation without an expert witness." (*Id.* at 9-10.) Defendant likewise seeks to preclude plaintiff from testifying that defendant caused any physical or mental condition. (*Id.* at 10.)

Plaintiff responds that she neither intends to call a medical expert nor will she offer medical records into evidence, but will submit evidence of mental anguish and emotional distress caused by defendant's actions, including apparently her counseling records which she previously authorized be released to defendant. (Dkt. #66 at 5.) Therefore, defendant's request to prevent medical expert testimony and records is GRANTED as unopposed.

However, defendant's implicit request to exclude plaintiff's mental health records

on grounds of hearsay or lack foundation without an expert does not fare as well. Assuming the mental health records are accompanied by a certification provided for in Rule 902(11), the records themselves would appear to qualify as records of a regularly conducted activity under Rule 803(6) and the statements attributed to plaintiff in those records would likely be admissible as made for medical diagnosis or treatment under Rule 803(4).[14] Finally, provided timely disclosed under Rule 26(a)(1)(A)(iii), defendant's summary request to prevent plaintiff from claiming monetary damages for any mental condition caused or exacerbated by defendant is summarily rejected. *See Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981) ("[Defendant] suggests that the testimony of medical or psychiatric experts is necessary to establish a compensable emotional injury. While such testimony could have strengthened [plaintiff's] case, its absence from the record is not fatal to his claims.").

Defendant also seeks to preclude plaintiff from producing evidence to support a claim for "front pay" because: plaintiff failed to provide "evidence of diligence in attempting to mitigate her damages for comparable employment"; and plaintiff lacks expert testimony "substantiating a need for payment for further comparable employment four and one-half years post termination." (Dkt. #48 at 10.) In response, plaintiff proposes presenting evidence "concerning her efforts to find other employment, the employment she found, and her lost income and benefits" in the damages portion of trial, while faulting defendant for "cit[ing] nothing to support [its] claim" that she put forward no evidence of her diligence in job hunting. (Dkt. #66 at 5.) Plaintiff further represents that she

[14] The court reserves on what, if any, portions of plaintiff's mental health records would actually be admissible and relevant to her claim for damages based on emotional distress.

produced information about her economic loss during discovery, adding that: (1) an expert is unnecessary to establish front pay; (2) Wood and the surrounding counties are "rural" and "provide limited opportunities for female correctional officers"; and (3) "the Court has indicated it intends to address the issue of front pay at the pretrial [conference]." (*Id.* at 5-6.)

As an initial matter, a Title VII plaintiff "is presumptively entitled to full relief" *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1044 (7th Cir. 1994) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)), such that she is placed, as closely as possible, in the position she would have been in had she not been subject to the inappropriate discrimination, Russel Penzer & Maryam Franzella, Outside Counsel, *Importance of Effective Jury Instructions on Front Pay*, N.Y. LAW JOURNAL, Jan. 3, 2013. Where reinstatement is unavailable or inappropriate in a particular case, the court may award front pay as an equitable remedy, which "is the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been reinstated." *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951-52 (7th Cir. 1998).

Moreover, while the initial burden to establish damages is on plaintiff, once the damages caused by her former employer are established, the burden shifts to the defendant to show *either* a failure to mitigate damages or that damages were less than those claimed. *Hutchison*, 42 F.3d at 1044 (citing *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989)). Failure to mitigate damages requires the defendant to establish that: "(1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising

reasonable diligence." *Id.* (citing *Gaddy*, 884 F.2d at 318).

Here, the parties disagree whether plaintiff provided information about the diligence of her job search. Although both sides would be well advised to file whatever submissions *were* provided by plaintiff beforehand, the court will hear argument at the Final Pretrial Conference about how best to address front pay. Front pay, as an equitable remedy, is a matter for the court to consider. *See Williams*, 137 F.3d at 951 ("The district judge approached front pay as an equitable remedy, deciding it on his own rather than submitting it to the jury. We approve this course of action . . . ."). If front pay is to be considered, the court will hear relevant evidence outside the presence of the jury.

Accordingly, defendant's MIL No. 6 is GRANTED IN PART, DENIED IN PART, and RESERVED IN PART as set forth above.

ORDER

IT IS ORDERED that:

1) Plaintiff's motions in limine (dkt. #46) are GRANTED IN PART, DENIED IN PART, and RESERVED IN PART as set forth above.

2) Defendant's motions in limine (dkt. #48) are GRANTED IN PART, DENIED IN PART, and RESERVED IN PART as set forth above.

Entered this 20th day of December, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge