UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Shannon Miller, Jen Banford, and Annette Wiles, Plaintiffs, vs. The Board of Regents of the University of Minnesota, Defendant.	File No. 15-CV-3740 (RHK/LIB) Duluth, Minnesota May 25, 2017 8:01 a.m.

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography; transcript produced by computer.

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Okay. The matter on the Court's calendar at this time is Shannon Miller and others against the Board of Regents of the University of Minnesota, Civil File No. 15-3740.

Let's start with the appearances for the plaintiffs.

MR. MARK: Your Honor, Donald Chance Mark, Jr., on behalf of the plaintiffs. And I am accompanied today by my partner Sharon Van Dyck, who will be presenting argument.

THE COURT: Good morning to both of you.

MR. MARK: Thank you, Your Honor.

THE COURT: For the defendant?

MS. BAZIS: Good morning, Your Honor. Jeanette Bazis from the Greene Espel law firm representing the University.

MR. PRAMAS: Timothy Pramas with the University's Office of the General Counsel also here representing the University.

THE COURT: Good morning to both of you.

MS. BAZIS: Good morning.

THE COURT: Okay. We're here on a motion to exclude expert testimony. Are we ready to proceed?

MS. BAZIS: Good morning, Your Honor.

THE COURT: Good morning.

MS. BAZIS: As Your Honor well knows, the plaintiffs have the burden of proof to show by a preponderance of evidence that Dr. Lopiano's proffered testimony is admissible. And we submit that they haven't done so.

And as you well know as well, Rule 702 allows a witness qualified as an expert by knowledge, skill, experience, training, or education to testify as to scientific, technical, or other specialized knowledge where that knowledge will assist the trier of fact.

So our touchstones I will review very briefly for admissibility under Rule 702 and Daubert. Is it helpful to the jury, that is, is it relevant to the issues to be decided? Does it concern a matter that is beyond the jury's knowledge and experience? And if it is within the jury's knowledge and experience, Your Honor, as you know, it's subject to exclusion because it's not helpful. If it is relevant and it is helpful and outside the jury's knowledge and experience, does it usurp the jury's role as the fact-finder?

Plaintiffs acknowledge that credibility is not the proper subject of expert testimony, and they also acknowledge that an expert can't speak to a person's intent or their motive or their motivation or their state of mind.

Nor can experts speak to alleged indicators of discrimination or retaliation. I refer Your Honor to a case called Kotla, K-o-t-l-a. It's a 2004 California case, 115 Cal.App.4th 283. But that collects federal cases and it concludes that testimony that certain facts in evidence were indicators of retaliation and discrimination were inadmissible and found the admission of that expert testimony to be reversible error. And this expert report is rife with all of those things.

If we get past the helpfulness and the relevance thresholds, then we look to Rule 403 and whether the probative value is outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay and a waste of time, and needlessly presenting cumulative evidence.

So I am going to walk through each of the parts of Dr. Lopiano's report and talk about why it fails those threshold tests.

So in Part 1 Lopiano, Dr. Lopiano, describes the inequities in women's versus men's sports before the passage of Title IX 45 years ago. She talks about the continuing inequities after Title XI's passage in college sports generally and she compiles or aggregates data of about 2,000 two- and four-year universities, talking about participation opportunities for men and women and the number of male and

female coaches.

Then she pronounces that athletes and athletic departments are afraid to raise their voices in protest for fear of retribution and she cites surveys about what coaches believe about their institution's biases.

And all of this, Your Honor, is completely irrelevant to the issues at hand, which is whether these three plaintiffs, Ms. Miller, Ms. Banford, and Ms. Wiles, suffered from discrimination on the basis of various protected classes.

Plaintiffs' only retort to this is that it's background from which to assess evidence of discrimination and retaliation. Courts consistently reject this, Your Honor, and we cite a number of cases in that regard: Coleman, which concerned race discrimination in the software sales industry generally; Rowe Entertainment, which barred admission of testimony regarding institutional racism in the concert promotion industry; and Sunbeam, which found reversible error in allowing testimony about age and sex discrimination in the broadcast news industry. Each court found that it was irrelevant to the individual discrimination cases at hand.

Plaintiffs rely on Estes, but they fully admit that that did not involve industry-wide testimony about discrimination. It was focused solely on that defendant

employer's discriminatory practices and policies. That's a separate question.

So we submit that it's not relevant at all, part one, and that its admission is substantially outweighed by the danger of undue prejudice to the jury, diverting the jury's attention away from the issues in the case, confusing the jury, and utterly wasting the jury's time and the Court's time.

Part 2 describes model management practice with regard to how to approach athletic program budget cuts. But the question here, Your Honor, is not whether UMD leadership used best practices in addressing UMD's budget shortfalls. It's whether UMD discriminated against the plaintiffs. Comparing the University's practices and procedures to what other universities in the ideal world would do has nothing to do with the discrimination issues in this case.

I mentioned the Sunbeam case concerning industry-wide discrimination. There's a nice quote in that case, citing Elrod vs. Sears Roebuck, 939 F.2d 1466, which is an Eleventh Circuit case, where the Eleventh Circuit writes, (As read) "No matter how medieval a firm's practices, no matter how mistaken the firm's managers, federal discrimination law does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior."

There's another case called Naeem, N-a-e-e-m, vs. McKesson Drug. That's 2001 Westlaw 114183, Northern District of Illinois. The judge there writes, "The law is clear that an employer's conduct need not be fair and need not represent good employment practice; it need only be nondiscriminatory." And as I always tell my clients, you can let go of an employee for any reason or no reason, just not an unlawful reason.

So these model practices about budget reductions simply has no relevance. It's going to confuse the jury. It's going to be prejudicial.

Then in Part 2 Dr. Lopiano launches into a closing argument for Ms. Miller, judging without credibility the reasons communicated for the University's decision not to offer Ms. Miller a new contract.

She says that UMD chose the weakest five-year period in her career to allege slippage in the competitive performance of women's hockey. These happen to be the five years prior to her nonrenewal.

And then she spends five pages detailing a slew of excuses about why Ms. Miller's competitive performance in those last five years was lacking and compares Miller's win/loss record to the men's hockey.

Her climax is that no director and no athletic director in their proverbial right mind would terminate

Miller based on a rationale of slippage. This is not the stuff of expert testimony. Experts, as we all know, can't make credibility determinations.

And just as importantly, none of it relies on any specialized knowledge. Ms. Miller can offer the jury all the excuses she wishes for her slippage in performance those last five years at UMD. All Ms. Lopiano is doing is parroting what Ms. Miller has told her.

And, of course, any fact witness can testify as to the relative win/loss records, success records of the men's hockey coach versus the women's hockey coach. Those statistics are available and Ms. Lopiano adds absolutely nothing to the discussion.

Parts 3, 4, and 5, Your Honor, again are model professional practices opinions: Whether UMD conformed to model professional practices to deal with individual player adjustment challenges and adverse team chemistry, with regard to its annual student athlete surveys and student athlete exit interviews, and whether it conformed to model practices in handling parent or student athlete complaints about the coaches.

Once again, briefly, plaintiffs have utterly failed to meet their burden of showing relevance. The issue isn't whether UMD engaged in model practices. It's whether it engaged in unlawful discrimination.

She really just uses these model practices opinions as a launching pad for credibility determinations. She writes that the absence of model practices and procedures "leads me to conclude that UMD administrators were only interested in using student athlete evaluations, exit interviews, and complaints for the purpose of terminating the employment of these coaches rather than advancing their professional growth or properly responding to instances of coaching misconduct." That is barred from expert testimony, Your Honor.

They can present evidence, if they wish and if they have any, that plaintiffs were treated differently than other coaches who were not in their protected classes with respect to surveys and exit interviews and handling of coach complaints. But if all the coaches were treated the same, even if it wasn't model practice, that tells the jury absolutely nothing.

We think it's going to distract the jury from the issue at hand. They're going to be thinking did the University comply with model practices. It's simply not the issue. It's going to prejudice the University. It should be excluded both under 702 and 403.

Part 6 is the 50-page opinion about whether UMD complies with Title IX equity in athletics requirements, offering male and female student athletes the same

opportunities in terms of summer scholarships they cite, sufficient resources for recruiting, optimal summer camp and game scheduling, things like that.

Plaintiffs acknowledge, I think, by their silence that plaintiffs cannot bring a cause of action under Title IX for employment discrimination. We cite a myriad of cases in our brief on that point.

They argue simply that the testimony is relevant because it addresses whether plaintiffs' reported Title IX concerns were justified for the purposes of their Title IX retaliation claim. But that's irrelevant too because the standard isn't whether plaintiff acted reasonably -- I'm sorry. The standard is only whether they acted reasonably and in good faith in reporting a Title IX violation. It's not whether there was an actual Title IX violation.

Miller can speak to the alleged facts about what she believed were inequitable treatment of, you know, women's hockey versus men's hockey. All Lopiano does is parrot her testimony.

It's also unreliable and it's not based on sound methodology. Ms. Lopiano references the EEO manual in determining Title IX compliance. And even a cursory look at that manual, Your Honor, it makes clear that all of the elements have to be examined to determine whether there's Title IX compliance, and she admits very clearly that she

hasn't and cannot examine many of those factors that go into Title IX compliance. So even by her own admission -- she says she helped draft that manual -- her method isn't reliable, it's not sound.

Also, Your Honor, it should be excluded under 403. This testimony would easily consume a week of trial, this 50 pages of presentation of evidence about the relativities in men's versus women's sports and all of the sports at UMD.

So -- oh, I'm sorry. The other piece in this section, it walks through the contracts of the three coaches and what their compensation was over the years and what the compensation of the men's coaches were and then reaches the ultimate conclusion under the Equal Pay Act and Title VII that UMD failed to provide equal employment agreements or to equally compensate male and female head coaches.

THE COURT: What were the differences in salary?

MS. BAZIS: Pardon me?

THE COURT: Generally what were the differences in the salaries between women and men, the coaches?

MS. BAZIS: Ms. Banford's exceeded the men's baseball coach. She had both a head softball coach salary that exceeded the men's head coach salary and then she also had a $15,000 augmentation on top of that. So she exceeded the men's salary by over $15,000 every year in issue.

Ms. Wiles' salary was between 2.1 and 2.8 percent

lower than the men's basketball coach. And this is in our summary judgment briefs, of course.

And Ms. Miller, she started out above the men's hockey coach and then after he won the national championship his exceeded hers. So it depends on what year you're talking about. So by the time she left, his did indeed exceed hers. I don't remember the figures, Your Honor.

So, yes, she usurps the function of the jury by coming to that ultimate conclusion. And the compensation figures are what they are. There's no requirement for any specialized knowledge. The jury can see the contracts. They can submit a demonstrative. There's no need for testimony on that.

Part 7, very briefly. All she does is catalog all the evidence as described to her by her clients and reach the ultimate conclusion that there was discrimination and retaliation. There's nothing left of that. It's ultimate opinion usurping the function of the jury, not at all helpful. This is the function of the jury. It's solely the function of the jury.

And then Part 8. Essentially she says most athletic directors are men, therefore they will discriminate. They're not going to hire the plaintiffs because they have sued the University. This, again, takes no specialized knowledge and is not the subject of expert

testimony. It's certainly within the realm of a jury's knowledge. It's pure speculation, Your Honor.

And it certainly begs the question: Would she, as an AD at a Division I or Division II school, have refused to hire plaintiffs because they sued their former employer? Of course she would say she would not be deterred from hiring them, but she ascribes discriminatory and retaliatory motives to every other athletic director in D-I and D-II athletics. There's just simply no basis. It's not sound, it's not reliable, it's going to confuse the jury, and it's going to prejudice the University.

And if you don't have any questions, I'll sit down.

THE COURT: Thank you.

Counsel.

MS. VAN DYCK: Your Honor, what the University does not say is what the guts of a lot of this report contains.

First and foremost, this report is not evidence and there's been no proposal by the plaintiffs to submit this report as evidence. What is evidence is whatever testimony Donna Lopiano gives, is permitted to give during the trial.

What the report is intended to do under the Federal Rules of Procedure is to provide all the factual

basis for any opinion that the expert wants to give because every expert opinion under Rule 702 and under Daubert must be supported by facts that are -- evidentiary facts that are admissible in the record, it has to explain the methodology used to arrive at conclusions that the expert gives. All of those things are contained and perhaps a little long-winded in the report, but they're all there and they're required to be there under the federal rules.

So the real question becomes not whether or not this report should be admitted into evidence, but whether the information and the topics that Donna Lopiano is being proffered to give as evidence in this court are proper under Rule 702 and are proper under Daubert. And the answer to that is yes and the only way you get there really is to take a look at the totality of what it is she's qualified to do, what the claims are in this case, what's required to prove a claim, and whether or not what she can offer will support and assist the jury.

There's no argument here that she's not qualified. There couldn't be. She has years and years of experience as an athletic director in a university. She trains athletic directors. She knows probably more about gender equity in the university sports context than almost anybody in the country. And that's the context in which whether or not she has the expertise to be of assistance to the jury has to be

evaluated.

The purpose of some of the things objected to are not to pinpoint UMD and say there's an industry-wide discriminatory way of treating women coaches. The purpose is to give a background and facilitate how do you analyze whether or not a protected class of, in this case, women coaches in a Division I and Division II sports context is discriminatory or not. And with that background I want to address the arguments that have been made today.

Section 1 of her report -- mind you, the way she structured her report, she answered questions that had been asked of her, proffered to her by my co-counsel. What the argument here ignores is the analysis that she did.

Part 1 is history and context of Title IX. Title IX has to do with discrimination in universities, frankly. We're not bringing a Title IX case and we've conceded this. The only Title IX case that is in front of this Court with these three women is whether or not there's been retaliation for reporting protected conduct.

Well, the evidence in the case -- and this will be briefed more fully in the summary judgment motion. The evidence in the case is that these three women reported repeatedly instances of unfairness in the budgets of their respective sports. They reported repeatedly unfairness in terms of the kind of benefits their student athletes had,

how often jerseys got renewed, whether or not they had the same recruiting budgets.

Particularly with respect to ice hockey, it was a one-on-one comparison. Both were Division I sports. They were the only Division I sport in the University of Minnesota-Duluth and the budgets were significantly different.

Donna Lopiano looks at the budgets, looks at how they're constructed all under the rubric and the method of analysis that is required by Title IX. Why does she do that? Because that's how you analyze equity and how you put together a budget. That's how equity is analyzed by the Office of Civil Rights. Those things have to be equal. These women were complaining that they weren't, that there was no equality.

Retaliation is part of the claim brought here and the whole deal with respect to how the budgets were constructed, how their salaries were evaluated, the method of evaluation with respect to their employment all has to do with sections of Title IX that are very specific in terms of telling courts and, frankly, universities how it is that they're supposed to balance these things. These women reported them. The theory is that they were retaliated against for doing so. That's all legitimate. That's all background information. That's all information a jury would

not have.

We watch Division I sports hockey. Some people know more or less about that than other people. But what most of us don't know is how budgets are put together, how they are required by law to be balanced. And it's not simple and it's not straightforward and it's not $20 over here and $20 over here. The method of analysis is very specific and Donna Lopiano is qualified, can and will testify about how those analyses must be made.

These women were reporting discrimination with respect to that. Our theory is that they were -- and there's evidence to support that -- they were discriminated because of that. Thus, those types of discussions with respect to the benefits and the finances, those are sections of Title IX that are absolutely appropriate and helpful to the jury and Donna Lopiano is totally qualified to discuss those things.

In a Title IX class action case, which this is not, there are a list of things that -- they are usually brought by students and there are a list of things that go into an analysis of whether or not there's discrimination.

One of those is the quality of the coaches that they have and there's a method of analyzing, how do you analyze objectively, not whether you like the coach or not, but objectively whether or not there is discrimination. And

part of that whole analysis is exactly what Donna Lopiano does in Sections 2, 3, 4.

If you look at the tables, she quantifies how historically at the University of Minnesota-Duluth, not nationally, UMD, she quantifies how these things are done. She does it, for instance, in Table 3, the differences in how budgets are constructed; Table 7, recruiting budgets; comparative salaries, how do you -- how is there discrimination in a salary.

It's more than just a dollar amount. What is the experience level of the two coaches? That makes a difference in any profession in terms of what you get paid. When did they come on? What was their contract? Were the contracts equal? How can you tell if a contract is equal? Are the men getting six-year contracts and the women only getting annual renewals so they're up for renewal every year?

There's a whole system in which these things are analyzed in terms of gender equity. The Office of Civil Rights has set forth guidelines for how that's done and that's what Donna Lopiano brings to the table.

The argument has been made that it's not a best practices situation. If you look at Sections 2, 3 -- what, is it? -- 3, 4, and 5, 3 is handling what are best practices in --

THE COURT: 3, 4, and 5 of what? Of her report?

MS. VAN DYCK: Of her report. Section 3 addresses best practices for handling financial -- for institutions handling financial challenges; 4, best practices for handling student exit interviews; and 5, best practices for handling student complaints. Why are those in there? They're in there because these are the three defenses that have been raised by UMD to our clients' claims of discrimination based on gender.

They've said, first, that there were financial challenges facing the University and so it justified letting the head coach go because she was getting paid too much and we couldn't afford her.

And yet Table 3 in the report looks -- in that section of the report looks at here's the amount of money they saved by getting rid of Donna Lopiano [sic], the $69,000, and you add it by -- you add to it the amount that they saved by letting go her assistants. You put that whole thing together, $119,000.

Well, where did that money go the next year? What did they do with it? Did it save them their money? No. She tracks the money and she says this much went to men's hockey and the rest of it went to increase the salaries of the Division II men's coaches. This is the kind of analysis she has done.

In the financial section, which includes this that I just described to you, best practices is a way to demonstrate pretext and that's the -- plaintiff must demonstrate in the shifting burden, in the McDonnell Douglas test must demonstrate if the University proffers a legitimate reason for what they've done, then the plaintiff must give evidence of pretext. Well, how do you do that?

There's no question the University had financial issues. So how do you prove that there's pretext? They're not going to tell you that. There's almost never direct evidence of pretext in a discrimination case. You make inferences. You make inferences from what's the evidence in the environment and how is this -- what's a reasonable way for this to be handled.

What Donna Lopiano offers is evidence that in this very specialized group of universities -- there's only 35 similar positions to what Shannon Miller's were in the country that exist. How is this handled? What's an appropriate way to handle it?

And then when you have an appropriate way to handle it, then the jury can decide, well, if the University did it this way and they said this is the way they wanted to handle it, is it pretext or is it not? And the jury then gets to decide that question. By having information on how -- what would be the proper way to do it from an

educator who teaches athletic directors and counsels universities on how to handle exactly these kinds of crises will be helpful to the jury.

She does the same thing with student exit interviews and handling student complaints. Those are Sections 4 and 5 in the report. Why do we even need to discuss that? Because with respect to Plaintiff Annette Wiles, the offered legitimate reason is that she was having trouble with her students, that there were reports on student surveys that were negative about her, that there were complaints about her from students who had left to go to other schools.

Again, there are universal ways that most schools handle things like student surveys, student exit interviews. There's a way that that's generally handled, how they're appropriately used and how they are not.

THE COURT: Does she testify quite a bit?

MS. VAN DYCK: A lot.

THE COURT: Always for the students or --

MS. VAN DYCK: I believe most of the time for the coaches, yes, because she's a gender equity specialist. She testifies, but also part of her business is consulting schools on how to handle these problems. So she works with schools.

THE COURT: Just asking how many times she's

testified and on what side is she on.

MS. VAN DYCK: She's generally on the plaintiff's side.

THE COURT: Now, you're not assuming we are going to put that report into evidence?

MS. VAN DYCK: No. I think that was my first point. We are not putting the report into evidence.

THE COURT: You're right, you're not.

MS. VAN DYCK: And we would never propose to.

THE COURT: I didn't say you had. I just wanted to make sure.

MS. VAN DYCK: No, no, no, no. We would never do that. And we have conceded that some of the language in it goes over the line and that can be managed. The credibility issues, they're inappropriate.

THE COURT: It can be managed because the report is not in evidence. She's going to have to just testify.

MS. VAN DYCK: Correct, she's going to have to testify. And she's not going to be allowed to do that, and part of that will be controlled by the questioner and part of it will be controlled by objection and she has -- she knows to obey and to do those things. That's how that's generally handled and that's appropriate. So that won't be a problem.

I wanted to touch a little bit on the last section

because it's slightly different. It's the only thing in the proposed testimony of Donna Lopiano in which reliability has been raised, which is really the appropriate -- this motion, this type of motion, is generally used for things like foundational reliability where there's simply no basis for the opinion.

The other things, relevance, prejudice, that's generally, in my experience, handled in a motion in limine when you get closer to trial where you want to limit and make sure people don't stray.

That has to do with the future employment opportunities. Donna Lopiano opines that basically Shannon Miller, for example, will not be able to get an equivalent job. Why is it that she's qualified to make that determination?

In a discrimination suit like this in which -- with respect to the plaintiffs, there's not a question of whether or not they're capable of doing the kind of job they did. They did it and they did it well and, in fact, in public press reports the University admits that they did it well. So the question -- it's not a situation where they've been injured and they aren't going to be able to do what they did, so can they do any other kind of job.

Basically what the University argues is that Donna Lopiano was not a vocational rehab expert, so she doesn't

have the qualifications to give an opinion about whether someone like Shannon Miller is going to be able to get equivalent employment. But that makes no sense in the context of this case.

When you're in a field like she is, in the top of her field, and there are only 35 other positions similar to yours in the country and you're let go and everybody knows you're let go, her ability to find another job is limited to a pool of 34. Are those jobs available to someone like Shannon Miller at the age of -- in her mid 50s? The answer to that question in Donna Lopiano's learned opinion is no. This is a pool of 35 jobs.

Is Shannon Miller going to be able to get some other kind of job? Sure, but that's not the issue that's at issue in this case. So training as a vocational rehab person where, okay, someone isn't able to do a job, they're going to have to do something different, what can they do, what are they qualified to do, what's the availability, that's simply not at issue in this case.

And Donna Lopiano, I can't think of anyone more qualified to talk about what's the nature of the job. It's a tiny little pool and is there any ability for her to -- availability for her to get the same job later. Questions about whether or not there have been mitigation of damages, whether they've tried to get other jobs, what jobs they've

been able to get, that all goes to weight. Those are cross examination questions. But certainly her foundational reliability and her knowledge of what kind of job was this, how many are there out there that these women could get, she's imminently qualified to do that.

THE COURT: Okay.

MS. VAN DYCK: If there's no further questions, thank you.

THE COURT: Thank you.

MS. BAZIS: I didn't bring my stop watch, Your Honor, so you'll have to tell me when I'm out of time.

THE COURT: We just turn off the lights.

(Laughter)

MS. BAZIS: Then I'll get it. I think I can read those cues. I'll be brief, Your Honor. I don't have a lot new to say here.

All right. She started by talking about -- Ms. Van Dyck started by talking about on the Title IX compliance section whether men's and women's sports were treated equally in terms of resources. Again, there's not a question about whether there was an actual violation. Plaintiffs need not prove an actual violation. Again, it's going to consume -- it would consume easily a week's worth of trial. It doesn't matter, simply, whether the plaintiffs were wrong or whether they were right. It's simply whether

they reported in good faith what they thought was a Title IX violation.

Ms. Miller can testify as to what she observed. Witnesses can be cross-examined about those relative resources. We don't need Ms. Lopiano to do what here is a half-baked analysis. The numbers about scholarships and things like that are going to be what they are.

Ms. Van Dyck refers you to Table 3 and Table 7. If you look at Table 3, which is on page 21, that table is simply the difference between UMD salary expenditures on men's and women's sport coaching staffs in the 2014-15 and 2015-16 academic years. That has nothing to do with whether these plaintiffs were discriminated against. This is the entire coaching staff, men's sports, women's sports, assistant coaches. That's simply not relevant to any issue in the case.

And then she points us to Title -- I'm sorry, Table 7, which is on page 56 of her report. That table tells us the number of UMD undergraduate student population and athletic population percentage comparisons by gender in 2012-13 through 2014-15. Again, what does that have to do with whether these plaintiffs were discriminated against because they're women, because they're LGBT, because they're Canadian, or because one of them in one case is over 40? Absolutely nothing.

There's been a mischaracterization of our defense here, so I'll clarify. And you'll see this in our summary judgment brief. The reason given by the University for not giving Ms. Miller another contract when hers expired in June 2015, what it was, she asked that it be couched as financially motivated, which the University did.

The rationale was they were not getting an appropriate return on investment on her salary. She was the highest-paid women's hockey coach in the country. She had a dismal last five seasons and the University couldn't justify keeping her on and wanted to take the women's hockey program in a new direction. That's what the rationale was, the legitimate reason for not renewing her contract.

So they're pointing to Ms. Lopiano's testimony about that, okay, well, this $60,000 savings that the University had in hiring a new female gay coach, by the way, Your Honor, that just went over to the men's. Well, that has nothing to do with anything, A; and B, you can't look at a budget like that. It's simply confusing and misleading testimony and, again, mischaracterizes the legitimate reason offered by the University.

Again, with regard to the model practices, it's an extreme distraction for the jury. It's going to focus them on the wrong issue. Whether UMD did the same thing as a model -- some fictitious model university with respect to

student athlete interviews, surveys, parent and student complaints about Coach Wiles is simply not at issue. It's whether their actions were motivated by her gender or her sexual orientation.

And on Section 8, again, what Ms. Lopiano says is ADs are men at these 34 other institutions and therefore they're not going to hire Ms. Wiles. There's nothing based on her specialized knowledge that gets her to that conclusion. She just pretends to reach into the minds of these other ADs and said she sued the university, so they would never hire under those circumstances. That's simply not the subject of expert testimony. It's prejudicial.

And imagine the line around the courthouse, Your Honor. If you can sue your former employer and then claim damages because you sued your former employer, you are going to have a line around this courthouse with people suing.

Unless you do have questions, I can sit down. Thank you.

THE COURT: I will take the motion under advisement.

Is her final report -- does she have a final report?

MS. VAN DYCK: This is the report submitted I believe in January.

THE COURT: Okay. No changes in that, then?

MS. VAN DYCK: Not in that, no.
THE COURT: Okay.
MS. VAN DYCK: There has been some additional discovery taken since then, so there may very well be a supplemental report.
THE COURT: That's sort of changing --
MS. VAN DYCK: That will be --
THE COURT: That's really changing the first report?
MS. VAN DYCK: Correct. And it hasn't been submitted yet because the final depositions, literally we just got the transcripts within the last week and a half.
THE COURT: Okay. A couple other topics that I want to take up here briefly.
Trial date. As I understand it, you're scheduled for -- I had it right here. Marc, do you know what that date is?
LAW CLERK: The September trial calendar.
THE COURT: September?
LAW CLERK: I think so.
THE COURT: Everybody is --
MS. BAZIS: Trial-ready date is September 1st in your order, Your Honor.
MR. MARK: Correct, it is.
THE COURT: Everybody is going to be ready to go

on September 1st? Because I am going to be ready to go on September 1st or whatever date we pick. I don't care what day we pick. Well, I do care, but one thing we are going to do, either today or the next week I'm going to set a trial date and once that date is set, it isn't going to change. I don't care whether -- if anybody has got vacations or anything else, have that in mind. I'll lay the day out and you can make some objections to it, but once we put it in writing in final form, it's going to be there. So witnesses have to be obviously advised in advance, et cetera. Everybody understand that?

MR. MARK: Plaintiff understands, Your Honor, and is anticipating --

THE COURT: Anybody have any general ideas of how long this case is going to take to try?

MR. MARK: Well --

THE COURT: I'm not going to hold you to it. I just want to get your gut right now. You know a lot better than I do.

MR. MARK: We've indicated probably three trial weeks, three to four weeks.

THE COURT: Does that include the other side too?

MR. MARK: I think that's the entirety of the case.

THE COURT: Everybody agree?

MS. BAZIS: Well, Your Honor, your ruling on this motion can make a real difference in that. Plaintiffs have listed 76 or so witnesses on their persons with knowledge list, their disclosures. If they're going to call that many people, I think it's going to be more than a month.

THE COURT: I don't think they're going to call that many people, but we'll deal with that later.

MS. BAZIS: Then I think three weeks sounds about right, 15 trial days. Do you agree, Tim?

MR. PRAMAS: If I could just add, I know the lawyer's answer is it depends; and that's the answer in this case. It depends on whether the summary judgment motion is granted in part or not because that might shorten the trial.

I'd also point out, for the purpose of the trial date, that we proposed to have separate trials for each plaintiff. I think three weeks if it were one combined trial is generally right. If it were trifurcated, I think it would be three one-week trials. So three weeks seems about right.

MR. MARK: We don't agree with that and obviously that's a motion that will be argued at a later time.

THE COURT: I don't really like the idea of three separate trials in the same case, but I haven't heard anything from anybody. If you want to make that motion, you can make it and we will take it up then.

MS. BAZIS: We made the motion, Your Honor.

THE COURT: What's that?

MS. BAZIS: We did file that motion. It was going to be heard today, but Your Honor indicated in an order that you felt like it was premature because of the summary judgment motions.

THE COURT: Okay. We'll get it back on the calendar.

Okay. What else do we have to cover? Marc, what else?

(Court and law clerk confer)

THE COURT: Have there been any -- I assume there have been -- efforts to get this matter resolved outside of the trial, settlement discussions?

MS. BAZIS: There have not been, Your Honor, since the beginning of the case.

THE COURT: I'm sorry. What?

MS. BAZIS: There have not been, Your Honor. We've got a deadline in June to have those discussions and we plan to do that.

THE COURT: In front of Judge Brisbois?

MS. BAZIS: Well, there's a deadline to have discussions between counsel and then there is a settlement conference date.

MR. PRAMAS: Yes, there's a settlement conference

scheduled for July 19th in front of the magistrate judge.

THE COURT: Okay. And I have great confidence in Judge Brisbois, he's done a very effective job in getting cases settled, but oftentimes you have a situation where there have been all sorts of disputes going along the way to this point in your pretrial stuff and sometimes that makes it difficult. Sometimes it makes it difficult for the magistrate judge, who has been in there deciding those issues, to then get in the middle of it and appear to be fair in the settlement process.

I bring it up only in the sense that if you want to go someplace else, you can do that. You can go out and get your own arbitrator or settlor, whatever you want to call him or her, or you can obviously stay with Judge Brisbois. Sometimes the lawyers have thought once the magistrate judge says here's a settlement conference, your hands are tied with respect to any other options. I don't care what the options are. Obviously I would like to see the case get settled, but I'm not going to get involved in that at all. If you want to go somewhere else, you can certainly do that, but otherwise Judge Brisbois will be available and, as I say, he's been very effective.

Do I have a copy of the -- I guess I do. Never mind. What else can we -- yes, sir.

MR. PRAMAS: Your Honor, the plaintiffs' response

to the defendant's summary judgment motion is due June 2nd and our reply is June 9th. There's not yet a hearing date for the summary judgment motion. So I just bring that to the Court's attention to see if we can --

THE COURT: When the briefs get in, I'll give you an order, but I want to take a look at the briefs first.

I can't remember why we're -- I guess we're up here because Brisbois is up here. Would it be tried up here, then?

LAW CLERK: (Nodding.)

THE COURT: At least we can do it in the summertime or the fall.

Okay. What else? Anything else? Any questions? Anything I can advise you about or give counsel?

I'd like to get a copy of -- get a transcript of the arguments here today and the only practical way that I can get it is to have the parties order it and pay for it. It's not -- these are very reasonable rates.

How long would the transcript be? 50 pages?

COURT REPORTER: 40 pages.

THE COURT: I think considering what's gone into this case so far --

MS. BAZIS: We can handle it, Your Honor.

THE COURT: -- you can probably afford that. So if one or both of you would just order it, then we'll get

one and you'll obviously get a copy of it.

MS. BAZIS: We'll take care of it, Your Honor.

THE COURT: Good. One of the really minor expenses, I think, of this trial.

Okay. Well, thank you all for coming up early on a morning. Have a good trip back and a good holiday weekend. We'll see you next time we get together. I don't know when that's going to be.

With that, we are in recess, then. Thank you.

(Court adjourned at 8:50 a.m.)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Lori A. Simpson*

Lori A. Simpson, RMR-CRR