

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

JENNIFER ELLER,

Plaintiff,

v.

PRINCE GEORGE'S COUNTY PUBLIC
SCHOOLS, et al.,

Defendants.

Case Number: 18-cv-03649-TDC

**PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE AND
QUESTIONING OF PLAINTIFF'S PAST EXPERIENCES OF SEXUAL AND
PHYSICAL ASSAULT**

Pursuant to Federal Rule of Civil Procedure 7(b), Local Rule 105, and Federal Rules of Evidence 104(a), 401, 403, and 412, Plaintiff Jennifer Eller, by and through her undersigned counsel, respectfully moves this Court for an order to prevent Defendant Prince George's County Board of Education from adducing any evidence concerning Ms. Eller's past experiences as a victim of sexual and physical assault, and for other and further relief as the Court deems just and proper.

Dated this 7th day of September, 2022.

Respectfully submitted,

/s/ Lori B. Leskin

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: September 7, 2022

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Pursuant to Federal Rule of Civil Procedure 7(b), Local Rule 105, Federal Rules of Evidence 104(a), 401, 403, and 412, Plaintiff Jennifer Eller ("Plaintiff" or "Ms. Eller), by and through her undersigned counsel, respectfully moves *in limine* to prevent Defendant Prince George's County Board of Education ("Defendant" or "BOE") from adducing any evidence concerning Ms. Eller's past experiences as a victim of sexual and physical assault, and for other and further relief as the Court deems just and proper. As explained below, such evidence is inadmissible under the Federal Rules of Evidence and relevant case law.

INTRODUCTION

Defendants have identified and disclosed an expert, Dr. Marcellus R. Cephas, who speculates that prior traumatic (and deeply personal) experiences in Ms. Eller's life could have resulted in Ms. Eller's post-traumatic stress disorder ("PTSD") diagnosis. And during Ms. Eller's deposition Defendant's counsel engaged in an extended, traumatic, and arguably abusive line of questioning regarding Ms. Eller's prior experiences as a victim of sexual and physical assault—experiences that happened years, if not decades, prior to her experiences of discrimination,

harassment, and hostile work environment at Prince George's County Public Schools ("PGCPS") and her manifestation of the symptomatology associated with severe PTSD in 2016.

As explained more fully in Plaintiff's concurrently filed motion *in limine* to exclude expert testimony of Dr. Marcellus R. Cephas, Dr. Cephas's testimony regarding Ms. Eller's past trauma experiences should be excluded as speculative, unreliable, and because it would most likely confuse and mislead, rather than aid, the jury. Separately, because the introduction of evidence concerning Ms. Eller's prior experiences as a victim of sexual and physical assault would only serve to embarrass and harass Ms. Eller, and any probative value it may have (which is difficult if not impossible to identify) is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, and misleading the jury, the Court should grant the instant motion *in limine*.

BACKGROUND

Plaintiff Jennifer Eller, a transgender woman, was employed as a teacher within PGCPS from 2008 to 2017. *See Eller v. Prince George's Cnty. Pub. Sch.*, No. CV TDC-18-3649, 2022 WL 170792, at *1 (D. Md. Jan. 14, 2022). Ms. Eller worked as a reading and English teacher at three schools within PGCPS, namely, Kenmoor Middle School, Friendly High School, and James Madison Middle School. *Id.* Prior to the years of hostility at issue in this litigation, Ms. Eller was a well-functioning adult. Following years of discrimination, harassment, physical attacks, and retaliation, however, Ms. Eller was forced to resign on August 18, 2017.

Of relevance here, on October 18, 2016, Ms. Eller took unpaid leave pursuant to the Family and Medical Leave Act ("FMLA") because of the profound mental health effects of the sustained harassment she had experienced. *Id.* at **4, 8. During her FMLA leave in 2016, Ms. Eller was, for the first time, diagnosed with PTSD as a result of the hostile work environment she had experienced at PGCPS. *Id.*

On November 18, 2019, at the behest of Defendants, Dr. Cephas conducted an independent medical examination of Ms. Eller and thereafter Defendants disclosed an expert report authored by Dr. Cephas. Notwithstanding the uncontested fact that Ms. Eller was first diagnosed with PTSD in 2016, and notwithstanding her work with mental health professionals for years prior to treat other conditions, such as her gender dysphoria and attendant anxiety and depression, Dr. Cephas queried whether the hostile work environment Ms. Eller experienced at PGCPs was the “worst trauma” for her. Ex. A at 5; JR 512 (Ex. 35 at 151:22-152:12).¹ Dr. Cephas went on to speculate that prior traumatic (and deeply personal) experiences in Ms. Eller’s life could have resulted in Ms. Eller’s PTSD. Ex. A at 17-18; *see also* JR 506, 514 (Ex. 35 127:19-128:5, 159:6-13). This includes “several instances of assault and sexual abuse that had happened prior to [Ms. Eller] describing herself in a hostile work environment.” Ex. A at 18. To be sure, Dr. Cephas *does not* definitively attribute causation of Ms. Eller’s PTSD to these prior traumatic experiences but rather speculates that they *may* have caused some of Ms. Eller’s PTSD symptoms.

In addition, during Ms. Eller’s deposition, counsel for defendant engaged in a prolonged (and arguably abusive) line of questioning asking Ms. Eller to relive in excruciating detail these prior traumatic experiences that are completely unconnected to Ms. Eller’s experience at PGCPs. JR 34-36 (Ex. 1 at 127:2-136:13).

¹ Citations to “JR [#]” refer to the Joint Record submitted in relation to the parties’ cross-motions for summary judgment. A redacted version of the Joint Record is available at ECF Nos. 105-108 and the unredacted sealed copies of redacted portions of the Joint Record are available at ECF Nos. 110-113. The transcript of the deposition of Ms. Eller is Exhibit 1 of the Joint Record and the transcript of the deposition of Dr. Cephas is Exhibit 35 of the Joint Record.

Citations to Exhibit A refer to Dr. Cephas’s expert report which is attached as Exhibit A to the Declaration of Omar Gonzalez-Pagan in support of Plaintiff’s Motion *In Limine* to Exclude Expert Testimony of Dr. Marcellus R. Cephas, filed concurrently herewith.

Prior to the filing of this motion, Plaintiff’s counsel reached out to Defendant’s counsel in an effort to avoid the need for judicial resolution of this issue. Defendant refused to stipulate to the requested relief.

LEGAL STANDARD

A motion *in limine* seeks to “exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). “Such motions are designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions.” *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prod. Liab. Litig.*, No. 1:17-MD-2775, 2021 WL 3917194, at *1 (D. Md. Sept. 1, 2021) (quoting *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013) (cleaned up).

“Evidence that is not relevant is generally not admissible.” *Id.* (citing Fed R. Evid. 402). “Evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence.” *Humbert v. O’Malley*, No. CIV. WDQ-11-0440, 2015 WL 1569182, at *2 (D. Md. Apr. 6, 2015) (citing Fed R. Evid. 401). But, “Federal Rule of Evidence 403 clarifies that the Court ‘may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.’” *United States v. Slagle*, No. 15-MJ-392-SAG, 2015 WL 5897740, at *1 (D. Md. Oct. 6, 2015) (quoting Fed. R. Evid. 403).

Furthermore, evidence of “a victim’s sexual behavior” “is not admissible” *unless* “its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” Fed. R. Evid. 412(a) and (b)(2).

ARGUMENT

I. The Court should preclude Defendants from adducing any evidence concerning Ms. Eller’s prior experiences as a victim of sexual assault because it is not relevant.

Evidence of past physical and sexual abuse is of no relevance to the issues at hand. This case concerns claims of hostile work environment, constructive discharge, and retaliation. One of

the harms that Ms. Eller experienced as a result of the years of discrimination, harassment, and even violence she experienced while at PGCPS is the development of complex, chronic PTSD. Defendants have not established—indeed, they cannot establish—any connection between Ms. Eller’s PTSD diagnosis and prior experiences as a victim of sexual and physical assault.

What is more, the introduction of such evidence is contrary to the letter and spirit of Federal Rule of Evidence 412 and Maryland’s Rape Shield Law, Md. Code Ann., Crim. Law § 3-319. Both Rule 412 and Maryland’s Rape Shield Law proscribe the introduction of evidence of a victim’s sexual conduct or behavior. *See* Fed. R. Evid. 412(a) (prohibiting the admission of “evidence offered to prove that a victim engaged in other sexual behavior”). Moreover, although originally targeted at evidence relating to rape victims’ prior consensual sexual experiences in criminal trials, it is now established that the standards apply in civil cases, *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab’y*, 171 F.R.D. 179, 181 (D. Md. 1997) (“[T]he Advisory Committee Notes make it clear that Rule 412 applies in civil cases in general”), and that they extend not just to prior consensual sex, but sexual assaults as well, *Westley v. State*, 254 A.3d 106, 126 (Md. Ct. Spec. App. 2021) (holding that “based on the plain language, purpose, and context of the Rape Shield Statute, ‘prior sexual conduct’ within the scope of subsection (b) includes all sexual conduct, whether willing or not”). Ultimately, the intent of both Rule 412 and Maryland’s Rape Shield Law is:

[T]o protect victims of sexual offenses from the introduction of humiliating evidence about their past, except in the rare circumstances when such evidence was necessary to a defendant's legitimate defense, for the purposes of: (1) encouraging victims of sex crimes to report them; (2) avoiding further trauma to victims who do report such crimes; and (3) avoiding confusing juries and diverting their attention from the defendant's guilt or innocence with the introduction of evidence of limited or no probative value, but which is highly prejudicial or inflammatory.

Westley, 254 A.3d at 123; *see also* Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendment (“The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process”). Rule 412 provides an exception permitting the introduction of such evidence in a civil case only “if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” Fed. R. Evid. 412(b). This exception does not apply here.

Defendants’ proffered expert here, Dr. Cephas, speculates that the distant prior traumatic and deeply personal experiences in Ms. Eller’s life *might* have resulted in Ms. Eller’s PTSD. Ex. A at 17-18. But as explained in Ms. Eller’s separate motion *in limine* to exclude Dr. Cephas’s expert testimony, these instances of assault and sexual abuse occurred long before the onset of her symptomatology for PTSD in 2016, and before her experiences of discrimination, harassment, and even violence at PGCPS. Indeed, they occurred so long ago that Ms. Eller was able to practice, quite successfully, as an English teacher without any signs of trauma or impairment for three years prior to her transition in 2011 and continued to work as a teacher through years of harassment and even violence at PGCPS. It was not until 2016, *after* enduring five years of discriminatory harassment and violence in her workplace, which gave rise and ultimately led to her PTSD. Given such history, it requires an enormous logical leap - and admissible expert opinion, not speculation - to argue that Ms. Eller’s past experiences of assault and sexual abuse—experiences that are remote in time—are relevant to this case.

Courts should “not permit an open-ended inquiry into prior sexual assaults based on the premise that such assaults *could* cause emotional distress.” *Doe v. Bridges to Recovery, LLC*, No.

2:20-CV-348-SVW, 2021 WL 4690830, at *17 (C.D. Cal. May 19, 2021) (emphasis in original). To the contrary, “courts should only allow such evidence if there is a foundation establishing that the events in question *did* cause emotional distress.” *Id.* (emphasis in original). The case of *Owens v. Ragland*, No. 03-C-369-C, 2004 WL 954808 (W.D. Wis. Apr. 28, 2004), is instructive here. There, the court noted that the defendant needed “to meet the demanding standard of Rule 412.” *Id.* at *2. In order to do so, the court explained, the defendant needed “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.*” *Id.* (first emphasis in original, second emphasis added). As such, the court noted that the defendant needed “to make a strong showing that the other events *did* contribute to whatever emotional distress plaintiff claims she felt, if not cause them.” *Id.* (emphasis in original). Indeed, the court noted that testimony from a “psychiatrist allegedly [] that these other experiences *could* cause ‘long-lasting mental health problems’” was “insufficient.” *Id.* (emphasis in original). Such is the case here.

As further explained in Plaintiff’s separate motion to exclude his expert testimony, Dr. Cephas cannot—and indeed, he does not—provide any conclusion or explanation of how Ms. Eller’s past experiences as a victim of sexual and physical assault connect with her PTSD diagnosis, or anything else for that matter. He only speculates that such instances, which he admits did not occur during the time relevant to this case, *could* have contributed to Ms. Eller’s PTSD. This also differentiates this case from other cases where the defendants had concrete evidence and testimony that a plaintiff’s past traumatic experiences *did* contribute to the plaintiff’s distress.

As in the testimony in *Owens*, such a speculative and barebones assertion is insufficient to seek to introduce evidence of Ms. Eller’s past experiences as a victim of sexual and physical assault. The Court should preclude defendants from adducing any evidence concerning Ms. Eller’s

prior experiences as a victim of sexual and physical assault as it is not relevant to any of the issues at hand.

II. The Court should preclude Defendants from adducing any evidence concerning Ms. Eller’s prior experiences as a victim of sexual and physical assault because any probative value is substantially outweighed by the risk of unfair prejudice, harm to Ms. Eller, confusion of the issues, and danger of misleading the jury.

Even assuming evidence about Ms. Eller’s past experiences as a victim of sexual and physical assault had some marginal relevance to the issues here, such evidence should still be excluded because (a) “its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [and] misleading the jury,” Fed. R. Evid. 403, and (b) its probative value *does not* “substantially outweigh[] the danger of harm to any victim and of unfair prejudice to any party.” Fed. R. Evid. 412(b)(2).

In this case, Defendant *is not* eliciting this evidence to argue that Ms. Eller’s past experiences *actually caused* her PTSD, but rather to elicit speculative testimony that it *might have* caused her distress and PTSD. Indeed, their own expert only speaks in speculative terms and does not go so far as to say that Ms. Eller’s PTSD was caused by these experiences. Thus, the probative value of the evidence solicited is at best limited, or nonexistent at all.

Moreover, the invitation of such rank speculation risks unfair prejudice, confusion of the issues, and the misleading of the jury—and the current political environment should not be ignored in evaluating this issue. It is no secret that transgender people are being attacked in legislatures across the country and that such attacks have made it into national headlines, including the Washington Post, which is a regional newspaper of record for the area from which the jury pool will be drawn. Some of these attacks have preyed on malicious and ill-formed stereotypes about LGBTQ people, and transgender people more specifically. *See, e.g., Casey Parks, Activists Face an Avalanche of Anti-Transgender Bills, The Washington Post* (Mar. 21, 2022),

<https://tinyurl.com/4ew59puy>. For example, some state legislatures are seeking or have prohibited discussion of gay and transgender identities in public schools. These discriminatory and unlawful bills prey on antiquated and dangerous stereotypes that LGBTQ people are “groomers” and therefore should be excluded from public schools. *See, e.g.,* Monica Heese, *Fans of Florida’s ‘Don’t Say Gay’ Bill Have a New Favorite Word: ‘Grooming’*, *The Washington Post* (Mar. 12, 2022), <https://tinyurl.com/awwhdrtw>.

The introduction of the evidence also would play on discriminatory and ill-informed stereotypes about transgender people, such as attempts by opponents of transgender rights to portray transgender people as “mentally ill,” or to argue that the genesis of their transgender identity is unattended childhood trauma. *See* Emily Gibson, et al., *Engagement Report: Engagement with Lesbian, Gay, Bisexual, Transgender and Queer/Questioning + Victims and Survivors* (May 2022), <https://tinyurl.com/u6a62nd8> (noting that “[s]ome victims and survivors were told that their gender identity or sexual orientation resulted from the child sexual abuse they experienced, which severely damaged their self-identity and mental health”).² “Evidence is unfairly prejudicial when there is a genuine risk that the emotions of a jury will be excited to irrational behavior, and this risk is disproportionate to the probative value of the offered evidence.” *PBM Prod., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 124 (4th Cir. 2011) (quoting *United States v. Hammoud*, 381 F.3d 316, 341 (4th Cir. 2004)) (cleaned up). Permitting Defendant to play to these stereotypes by introduction of Ms. Eller’s experiences from long ago creates the unfair prejudice and, confusion of the issues. Simply put, the risk of misleading the jury is enormous.

Furthermore, the evidence at issue is protected by Rule 412 and Maryland’s Rape Shield Law because by its very nature its introduction risks unfair prejudice, harassment, and further

² The report is a publication of the Independent Inquiry into Child Sexual Abuse, which was statutorily commissioned by the government of England and Wales in 2015. *See* <https://www.iicsa.org.uk/about-us>.

harming the victim. Here, there is no question that eliciting such evidence would only serve to re-traumatize and harass Ms. Eller. The burden here falls on Defendant to show that the probative value of the proffered evidence “substantially outweighs the danger of harm to any victim and of unfair prejudice of any party.” Fed. R. Evid. 412(b)(2). As the 1994 advisory committee notes to Rule 412 explain, this “[r]everse[s] the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence,” “raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers,” and “puts ‘harm to the victim’ on the scale in addition to prejudice to the parties.” Thus, because Rule 412 applies here and Defendant cannot satisfy this burden, Defendant should be precluded from adducing any evidence concerning Ms. Eller’s past experiences as a victim of sexual and physical assault.

CONCLUSION

The Court should preclude Defendant from adducing any evidence concerning Ms. Eller’s past experiences as a victim of sexual and physical assault, as such evidence is not relevant and its introduction poses a very real danger of prejudice, harm to Ms. Eller, confusion of the issues, and misleading of the jury.

Respectfully submitted this 7th day of September 2022.

/s/ Lori B. Leskin

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**[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE AND QUESTIONING OF PLAINTIFF'S PAST EXPERIENCES
OF SEXUAL AND PHYSICAL ASSAULT**

Upon consideration of Plaintiff Jennifer Eller's motion *in limine* regarding exclusion of evidence and questioning of Plaintiff's past experiences of sexual and physical assault, it is hereby ORDERED:

1. That Plaintiff's motion *in limine* is GRANTED.
2. Defendant Prince George's County Board of Education is prohibited from adducing any evidence concerning Ms. Eller's past experiences as a victim of sexual and physical assault.

Date

THEODORE D. CHUANG
United States District Judge