Opening the Barn Door:
Evidentiary Issues in Employment Law

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The purpose of this presentation is to explore how some common pleading, discovery, and trial tactics in employment cases can backfire against the party making them.

I. Claims for Damages: Be Strategic to Prevent Invasive Discovery & Prejudicial Evidence.

A. Lost Wages - Seeking a Complete vs. Partial Recovery:

1. *Duty to Mitigate through Reasonable Diligence to Seek and Maintain Alternate Employment*

The duty to mitigate damages, "rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 & n. 15 (1982) (footnote omitted). Thus, employers will argue, a plaintiff must use reasonable diligence to attain substantially similar employment and, thereby, mitigate damages. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). There is a statutory requirement to exercise reasonable diligence to attain substantially similar employment as a prerequisite to obtaining back pay. *42 USCA § 2000e-5. See also Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 935 (5th Cir. 1996); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1045 (5th Cir. 1998) (citing *Sellers v. Delgado Coll*., 902 F.2d 1189, 1193 (5th Cir. 1990)); *Schaeffer v. Warren Cty., Mississippi*, No. 3:14-CV-945-DPJ-FKB, 2017 WL 5709640, at *2 (S.D. Miss. Nov. 27, 2017), aff'd, 744 F. App'x 871 (5th Cir. 2018).

In nearly every case where an employee is seeking lost wages, the employer will plead "failure to mitigate" as an affirmative defense. When an employer does so, it is permitted to conduct discovery into Plaintiff's efforts to find a replacement job (including the reasons why a plaintiff did not keep a replacement job), and ultimately present that evidence at trial. This is because termination or resignation from a replacement job could operate to cut off the back pay award, depending on the reasons for the termination or resignation. *See e.g. Patterson v. P.H.P. Healthcare Corp*., 90 F.3d 927, 937 (5th Cir. 1996) (back pay cut off for the period after plaintiff was fired from replacement job because of excessive absences & excess use of the company phone); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684 (2d Cir. 1998) (voluntarily quitting a job does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment); *Thurman v. Yellow Freight Systems, Inc*., 90 F.3d 1160 (6th Cir. 1996) (back pay not cut off in case where there was no evidence that the plaintiff acted willfully or committed a gross or egregious wrong); *Brady v. Thurston Motor Lines, I*nc., 753 F.2d 1269 (4th Cir. 1985) (employee's discharge for cause due to willful violation of company rules operated to cut off back pay).

Discovery and presentation at trial of this information may, in certain cases, be extremely damaging to a plaintiff – both to their chance of prevailing in the lawsuit, and in their personal and professional lives. In such cases, Plaintiff's counsel should weigh the option of limiting the request for lost wages. By limiting the claim for damages to a particular time period (e.g., before

the separation from the replacement job), a plaintiff can prevent the introduction of harmful evidence, and arguably even prevent discovery into the subject in the first place. *See, e.g. Vasquez v. SCI California Funeral Services, Inc*., CV152427DSFPLAX, 2016 WL 9450068, at *1 (C.D. Cal. Sept. 28, 2016) ("Defendants move to preclude Vasquez from presenting evidence, testimony, or argument about any claim to lost wages after January 22, 2014 due to a failure to mitigate damages. Because Vasquez has indicated he is not seeking economic damages extending beyond January 22, 2014, the motion as to economic damages is DENIED as moot.").

2. Availability for Employment Post-Discharge: Self Employment as Mitigation

Discovery for purposes of the affirmative defense of mitigation can open a plaintiff up regarding self-employment efforts post-discharge. In some instances, the terminated employee may mitigate damages not by searching for employment, but by becoming self-employed. *Powers v. Northside Indep. Sch. Dist.*, No. A-14-CV-01004-SS, 2018 WL 8261314, at *2 (W.D. Tex. Feb. 16, 2018). *See, e.g., Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir. 1988) ("we conclude that a self-employed person is 'employed' for the purposes of mitigating damages if establishing a business of his own was a reasonable alternative to finding other comparable employment."); *Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1471 (11th Cir. 1985) (finding setting up a business to provide future employment after two to two and one half years of active job searching was mitigation of damages).

In that event, a defendant may seek to obtain discovery of any self-employment efforts and business income during any period where a plaintiff seeks wage damages. This right to discovery creates—in some instances—circumstances where a plaintiff may prefer not to open their financial records. Unrelated issues may arise, such as compliance with tax filing obligations, that can be damaging to credibility, embarrassing, may give rise to civil or criminal penalties unrelated to the employment claims being pursued, or may create prejudice that could affect a plaintiff's success in the case.

Discovery of income tax returns ordinarily requires an affirmative showing of need by a defendant. The Fifth Circuit notes that "[i]ncome tax returns are highly sensitive documents; courts are reluctant to order their routine disclosure as a part of discovery." *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993) (citing *SEC v. Cymaticolor*, 84 Civ. 4508, 106 FRD 545, 547 (S.D.N.Y. July 8, 1985) (disclosure of tax returns for purposes of discovery ordinarily demands that the requesting party demonstrate relevancy and compelling need)). There is a split in authority regarding whether the party moving to compel production of tax returns has the burden to show both relevancy and a compelling need, or whether, once the movant shows relevancy, the burden shifts to the party resisting discovery to establish that the information sought is otherwise readily obtainable. *See Frey v. Bd. of Supervisors of Louisiana State Univ. & A & M Coll.*, No. CV 16-489-JJB-EWD, 2017 WL 5457992, at *2–3 (M.D. La. Nov. 14, 2017) (discussing split in jurisprudence as to burden for obtaining tax returns). *Compare Southern Filter Media, LLC v. Halter*, C.A. No. 13-116, 2014 WL 3824023, at * 3 (M.D. La. Aug. 4, 2014) (citing *Butler v. Exxon Mobil Refining and Supply Co.*, C.A. No. 07-386, 2008 WL 4059867, at * 2 (M.D. La. Aug. 28, 2008)) (this court "will only compel production where the requesting party 'demonstrates both: (1) that the tax information is 'relevant' to the subject matter of the action; and that there is a 'compelling need' for the information because the information contained in the tax returns is not 'otherwise readily

obtainable' through alternative forms of discovery, such as depositions or sworn interrogatory answers.'") *and Landry v. Haye*, 12-cv-2766, 2013 WL 6157920, at * 3 (W.D. La. Nov. 21, 2013) (granting motion to compel production of tax returns based on defendants' need for the documents to evaluate plaintiff's claim of economic loss and defendants' uncontroverted assertion that the information containing in the tax returns was not obtainable through alternate forms) *with FDIC v. LeGrand*, 43 F.3d 163, 172 (5th Cir. 1995) (for post-judgment discovery of income tax returns, "[s]ome courts have applied a two-part test in determining whether returns should be produced. The party seeking production of the documents must show their relevance to the inquiry. Then, the burden shifts to the party opposing production to show that other sources exist from which the information contained in the income tax returns may be readily obtained.") (internal citation omitted). *See also, Rafeedie v. LLC, Inc.*, 10-CA-743, 2011 WL 5352826, at * 2 (W.D. Tex. Nov. 7, 2011) ("The Fifth Circuit has suggested that the party seeking to discover tax returns must show the relevance of the tax returns, and then the burden shifts to the party opposing production to show other sources exist from which the information contained in the returns may be readily obtained.").

The existence of a separate, personal business enterprise may be grounds to discover a plaintiff's income tax returns during a post-discharge period in which the plaintiff claims lost wages. This is particularly true where there is no other evidence of income (such as a W2 or 1099) – for example, if the plaintiff operates his or her business as a pass-through sole proprietorship. Reliance on such documents by an expert on damages could also be a factor in their discoverability. *See, e.g., Frey v. Bd. of Supervisors*, 2017 WL 5457992, at *4 ; *see also Gondola v. USMD PPM, LLC*, 15-cv-411, 223 F.Supp.3d 575, 589 (N.D. Tex. May 27, 2009) (sustaining objection to producing tax returns in part and requiring plaintiffs to either sign IRS authorization form or provide copies of "any 1099s for income after their termination by Defendant and a copy of any documents reflecting any rental income, income from any self-employment, or distributions from any 401(k) or other retirement or investment account after their termination by Defendant," in response to defendant's effort to discover income from any source related to plaintiffs' claim for back and front pay and plaintiffs' duty to mitigate their damages) (citing *Jackson v. Unisys, Inc.*, No. 08-3298, 2010 WL 10018, at *2-3 (E.D. Pa. Jan. 4, 2010) ("As W–2s do not contain 'substantial irrelevant' confidential information such as investment income, spousal income, etc., they are a preferable form of discovery.' In the interest of balancing Plaintiff's privacy interests against the Federal Rules' call for broad discovery, the Court finds that Plaintiff's W–2s will suffice for the information sought ... in the income tax returns.")).

In the context of a Fair Labor Standards Act claim, where the activities of the employee seeking wages are alleged to extend beyond the ordinary work day, discovery of self-employment activities is may also be within the scope of discovery (since evidence that a Plaintiff is engaging in such activities may undermine a claim that they are working significant additional hours).

3. *Availability for Employment Post-Discharge: Change of Career, Other Activities, Retirement*

Because "back pay is not an automatic remedy, but is equitable in nature and may be invoked in the sound discretion of the district court," *Sellers v. Delgado Community College*, 839 F.2d 1132, 1135-36 (5th Cir. 1988) (citing *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 226 (1982)), and because successful employment discrimination plaintiffs have a statutory duty to mitigate damages by using reasonable diligence to obtain substantially equivalent employment, *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990) ("*Sellers II*"), "the reasonableness of a Title VII claimant's diligence 'should be evaluated in light of the individual characteristics of the claimant and the job market.' " *Sellers II*, 902 F.2d at 1193 (quoting *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983)).

Applying these precepts, a plaintiff's post-discharge activities, including any change of career, return to school, or devotion of time to a personal obligation such as care of sick family member, that is potentially inconsistent with the standard for mitigation can be discoverable during any period where wage damages are sought. *See, e.g., Overman v. City of East Baton Rouge*, 656 Fed.Appx. 664, 671-72 (5th Cir. 2016) (Vacating award of back pay by district court for determination whether decision to attend school full-time is consistent with duty to mitigate damages under Title VII); *see also Overman v. City of E. Baton Rouge*, No. CV 13-614-EWD, 2017 WL 2126908, at *4 (M.D. La. May 15, 2017) (denying plaintiff summary judgment on mitigation issue on remand and setting damages for trial).

The Texas Whistleblower Act, similar to federal and state discrimination laws, permits a successful plaintiff to receive "compensation for wages lost during the period of suspension or termination." Tex. Gov't Code § 554.003(b)(2). This includes back pay for wages lost during suspension or termination, *Dallas County v. Glasco*, 05-03-01330-CV, 2004 WL 1202008, at *4 (Tex. App.—Dallas June 2, 2004, no pet.), and the opportunity to seek front pay when job reinstatement is not feasible, *City of Houston v. Levingston*, 221 S.W.3d 204, 232 (Tex. App.—Houston [1st Dist.] 2006, no pet.). However, a plaintiff must use reasonable diligence to mitigate damages, which includes looking for employment that is substantially equivalent to the job from which the plaintiff was discharged. *Office of the Attorney Gen. of Texas v. Rodriguez*, 08-14-00054-CV, 2017 WL 4586128, at *20 (Tex. App.—El Paso Oct. 16, 2017, pet. filed) (citing *Gulf Consol. Intern., Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983)); *City of Laredo v. Rodriguez*, 791 S.W.2d 567, 571–72 (Tex. App.—San Antonio 1990, writ denied).

Documents and information related to the decision to take retirement benefits, not as a temporary measure during a search for employment, but as a *de facto* retirement, are likely discoverable as grounds to challenge entitlement to wage damages for lost employment. *Powers v. Northside Indep. Sch. Dist.*, No. A-14-CV-01004-SS, 2018 WL 8261313, at *2 (W.D. Tex. Jan. 19, 2018), reconsideration denied, No. A-14-CV-01004-SS, 2018 WL 8261314 (W.D. Tex. Feb. 16, 2018) (citing, *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (plaintiff "clearly [was] not entitled to back pay after [starting to receive Social Security and early retirement benefits] ... because, by his own admission, he stopped looking for work")).

4. *Availability for Employment Post-Discharge: Physical or Elective Inability to Work*

A plaintiff's medical records and disability applications are relevant and discoverable for those plaintiffs who assert a disability as part of their claims, or who apply for disability-related benefits during a period for which back pay damages or reinstatement are being sought. *See, e.g., Tanner v. BD LaPlace, LLC,* No. CV 17-5141, 2018 WL 3528023, at *2 (E.D. La. July 23, 2018) (stating, with respect to the discovery of ten years of medical records, "The defendant correctly contends that the plaintiff's medical history is relevant to determining if he was qualified for the job, an essential element of an ADA claim."), citing *Cannon v. Jacobs Field Servs. North America, Inc.*, 813 F.3d 586, 590 (5th Cir. 2016).

5. *Availability for Employment Post-Discharge: Physical Inability to Work Caused by Defendant's Discrimination*

Where a plaintiff's failure to obtain employment is caused by his physical and psychological inability to obtain employment, which in turn is caused by the defendant's discriminatory actions including the failure to provide medical treatment, the plaintiff is unable to exercise reasonable diligence to find work, and is excused from the requirement of seeking mitigating employment. *Breazell v. Permian Trucking & Hot Shot, LLC*, No. 7:15-CV-199-XR, 2017 WL 3037432, at *3–4 (W.D. Tex. July 18, 2017) (noting the "factual oddity" of a circumstance where plaintiff's inability to work, such that any exercise of diligence would not have led to new employment or any earnings, was caused by the defendant discriminatorily refusing medical care), citing *Gamboa v. Henderson*, 240 F.3d 1074 (5th Cir. 2000) (relying on *Gotthardt v. Nat'l R.R. Passenger Corp*., 191 F.3d 1148, 1155 (9th Cir. 1999)).

The court in *Breazell,* focusing on *dicta*, noted that although the Fifth Circuit reversed an award of back pay for a Title VII plaintiff unable to work after her termination due to fibromyalgia because back and front pay awards "str[uck] [the court] as inappropriate [where] the plaintiff claim[ed] that she is unable to work because she is disabled," the *Gamboa* decision nonetheless "acknowledged an exception … that would allow the plaintiff to recover these damages if she carried the burden to show that the disability from which she suffered was caused by the defendant's wrongful conduct." *Breazell,* 2017 WL 3037432, at *3–4.

B. Emotional Distress Damages:

Defendant employers often argue that to recover more than nominal damages for emotional harm, the plaintiff must provide "proof of actual injury," citing cases such as *Carey v. Piphus*, 435 U.S. 247, 248 (1978) (Section 1983 claims) and *Picou v. City of Jackson, MS*, 48 F. App'x 102 (5th Cir. 2002) (citing, *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 n. 11 & 940 (5th Cir.1996), cert. denied, 519 U.S. 1091 (1997)).

Cases that follow *Vadie v. Miss. State Univ.*, 218 F.3d 365, 376-77 (5th Cir.2000), *cert. denied,* 531 U.S. 1113 (2001), and *cert. denied*, 531 U.S. 1150 (2001), state that there must be a "specific discernable injury to the claimant's emotional state," proven by evidence of the "nature and extent" of the harm. *Id.* at 376 (quoting *Patterson*, 90 F.3d at 938 & 940). "'[H]urt feelings,

anger and frustration are part of life', and [are] not the types of harm that" can support an emotional damages award. *Id.* (quoting *Patterson*, 90 F.3d at 940).

Thus, defendants frequently maintain that a plaintiff's testimony alone may be insufficient; corroborating testimony or medical or psychological evidence may be required. *Id.* at 377 ("'[A] plaintiff's testimony, standing alone, can support an award ...; however, the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated'," and " 'conclusory statements that the plaintiff suffered emotional distress'" will not support an award for emotional distress (quoting *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir.1996), *cert. denied*, 520 U.S. 1116 (1997))). Evidence of emotional harm may include "sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." *EEOC Policy Guidance No. 915.002* § II.(A)(2) (14 July 1992) (noting the EEOC typically requires medical evidence before a claimant may seek emotional damages during conciliation negotiations).

There are a number of cases with similar holdings. For example, the Fifth Circuit has held that a plaintiff's emotional distress evidence consisting of testimony that she felt "ostracized," was "hurt," embarrassed, humiliated, and ridiculed; and that the events "affected [her] marriage," along with her husband's testimony that on more than one occasion the plaintiff came home "very upset and distraught," and that the events "badly affected us as a family," were insufficient to establish injury. *Picou v. City of Jackson, MS*, 48 Fed. Appx. 102 (5th Cir. 2002). *See, also*, *Patterson*, 90 F.3d at 939-41 (uncorroborated testimony that racial slurs made plaintiff feel "frustrated", "real bad", "hurt", "angry", and "paranoid" were too vague); *Cousin v. Trans Union Corp.,* 246 F.3d 359, 370-71 (5th Cir. 2001) (testimony of frustration, irritation, anger, and upset insufficient), *cert. denied,* 534 U.S. 951 (2001); *Brady v. Fort Bend Cnty,* 145 F.3d 691, 718-20 (5th Cir. 1998) (uncorroborated testimony that plaintiffs: could not "accept it mentally"; were "highly upset"; experienced it as "the worst thing that has ever happened to me"; and "didn't feel like the same person" were insufficient without specific manifestations of emotional harm and any evidence they sought medical treatment), *cert. denied,* 525 U.S. 1105 (1999); *but see Migis v. Pearle Vision, Inc.,* 135 F.3d 1041-47 (5th Cir. 1998) (uncorroborated but detailed "testimony of anxiety, sleeplessness, stress, marital hardship and loss of self-esteem" justified jury award of $5,000); *Farpella-Crosby v. Horizon Health Care,* 97 F.3d 803, 809 (5th Cir. 1996) (affirming jury award of $7,500 based on uncorroborated testimony that hostile work environment made her feel "very embarrassed, very belittled," "about two inches high," and "pretty stupid"). *See also Saldana v. Zubha Foods, LLC*, No. SA:13-CV-00033-DAE, 2013 WL 3305542, at *6–7 (W.D. Tex. June 28, 2013) (collecting cases and awarding $3,000 based on testimony of two months of sleeplessness, anxiety, stress, and headaches). Thus, plaintiffs very often turn to medical records or treatment for mental distress to provide corroboration of mental distress or emotional anguish damages.

As a result of cases like these, seeking emotional distress damages, in some courts, will expose the plaintiff to invasive discovery into of medical records - evidence that would not otherwise be relevant or discoverable in the typical employment case. Some judges may even permit an independent medical examination of the plaintiff. While these types of discovery requests are usually resisted by plaintiff's counsel (a subject for another paper), there are no

guarantees. Plaintiff's counsel should, therefore, refrain from automatically pursuing emotional distress damages in every case. Plaintiffs must be counseled about the risk of invasive discovery.

If, for whatever reason, a plaintiff decides that this type of exposure is intolerable, he/she may decide to forgo seeking emotional distress damages. Doing so can prevent the discovery from taking place. *See e.g. Wolgast v. Tawas Area Sch. Dist. Bd. of Educ.*, 15-CV-10495, 2015 WL 13660458, at *3 (E.D. Mich. July 27, 2015) ("Because Plaintiff has clarified that he is not pursuing a claim for damages resulting from emotional injuries, Plaintiff's medical records are not relevant to Defendants' defense, and are thus not discoverable."); *Miller v. Am. Intern. Group, Inc*., 8:10CV172, 2010 WL 4316085, at *1 (D. Neb. Oct. 25, 2010) ("since the plaintiff is not seeking emotional distress damages, the defendants have agreed they will not subpoena plaintiff's medical records").

C. Proof of Emotional Distress Damages: Special Issues

1. *Expert Medical Testimony*

Expert testimony of a retained medical specialist, usually a psychologist or psychiatrist, may be offered by either the plaintiff or the defendant to either establish or rebut claims of particularized injury. Claims of post-traumatic stress syndrome (PTSD), depression, or other recognized psychological conditions are examples of the type of particularized injury that counsel for a plaintiff may seek to admit, while causation (or lack thereof) often is the element of the claim of interest for the defense. One party or the other may oppose an expert's testimony under the standards for admission of such testimony. Among other things, the testimony must relevant in that it must assist the trier of fact to understand the evidence or determine a fact in issue in the particular case. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993); *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 352 (5th Cir.2007) (quoting *Daubert*, 509 U.S. at 593); Rule 702(d) (requiring that "expert has reliably applied the principles and methods to the facts of the case").

Motions to exclude expert testimony are handled by the court in its role as gatekeeper under Rule 702, Fed. R. Evid. *See e.g.*, *Johnson v. BAE Sys. Land & Armaments, L.P.*, No. 3:12-CV-1790-D, 2014 WL 1714487, at *26 (N.D. Tex. Apr. 30, 2014) (conditionally admitting expert testimony regarding emotional distress of plaintiffs relating to RIF); *Pipitone v. Biomatrix, Inc.,* 288 F.3d 239, 244 (5th Cir.2002). A court's analysis is flexible in that "[t]he relevance and reliability of expert testimony turns upon its nature and the purpose for which its proponent offers it." *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir.2010) (citation omitted). "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the [trier of fact's] consideration." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir.1987). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; *Johnson*, 2014 WL 1714487, at *25.

In *Johnson*, the court allowed testimony of the expert over objection of the defendant corroborating mental anguish and emotional distress recounted by the plaintiffs with the expert's acknowledgement that there could be multiple sources "for what they are dealing with," on grounds that the degree of causation was a proper subject of cross-examination. *Id.*at *32. The expert's testimony that the plaintiffs each had good memory and judgment "at the time of the psychological assessment" was permitted as not invading the jury's role at the time of trial. *Id.* And the expert's recounting of incidents that the plaintiffs had heard was admissible for the fact of their occurrence and their consideration in forming the expert opinion, not to prove the truth of the incidents recounted. *Id.*at *33. Finally, the court held that the expert psychologist's opinion that the plaintiffs were truthful to him *during their interviews* and were not malingering also was admissible. *Id.*at *34.

However, noting that expert testimony about plaintiffs' truthfulness or credibility could cross the line into inadmissibility by, for example, invading the province of the jury, the *Johnson* memorandum opinion denying the BAE's motion to strike the expert also clarified that materially-different testimony offered at trial would be subject to timely objection and a different ruling, stating, "In no event will plaintiffs be permitted to offer Dr. Ainslie's testimony merely to bolster a plaintiff's credibility as a witness at trial." (citing *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir.2005) (noting that expert witnesses may not improperly bolster account given by fact witnesses) and *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 882–84 (8th Cir.1998) (holding expert's testimony impugning the "psychiatric credibility" of plaintiff inadmissible under Rules 403 and 702 as a "thinly veiled comment on a witness' credibility")).

Regardless of the *Johnson* decision's warning against extending the scope of the expert's testimony at trial, the defendant in such circumstance must anticipate the effectiveness of corroborative medical testimony of an expert recounting his opinion of: the truthfulness of the plaintiffs during a medical exam, the specific incidents on which the expert relied to conclude that mental distress resulted, his opinion based on his extensive experience that such incidents are casual in nature, and his opinion that the plaintiffs perceptions were truthfully described and were injurious. Moreover, without a request for a limiting instruction at trial (and perhaps, even with such an instruction), the effect of such evidence will be without restriction as to purpose.

2. Collateral Causes of Distress: e.g., Impact on Credit Rating from Lost Wages

A plaintiff who contends that the loss of income has caused them to default on their financial commitments, creating emotional distress and loss of financial status, may open the door to discovery of the financial circumstances and history of the plaintiff. A plaintiff should take care that such records do not reveal activities that the plaintiff would prefer remain confidential.

II. The Kitchen Sink: Tailoring the Claim

Frequently plaintiffs file discrimination claims with an eye towards preserving all possible claims that may be asserted, regardless of whether the claims are in conflict or might open up discovery of issues that could preclude recovery on an alternate theory. One example of this is the claim of a disability or disability discrimination, which puts the ability of the plaintiff to

perform the essential functions of the job in issue. With respect to mental or emotional conditions, there are significant considerations as to whether to place the extremely personal aspects of one's "self" in issue. Particularly in the circumstances of plaintiffs in high-level management or professional positions, the overarching question is whether the individual's career path can withstand the potential negative fallout from disclosure of such matters. With respect to all plaintiffs, the disclosure of such matters can be life-affecting. Consequently, thoughtful review of the potentially life-changing impact of the assertion of a mental, emotional, or other disability should be considered. This is particularly so in light of the fact that mental or emotional conditions may have multifaceted and/or historical causes that may be painful to disclose in a public forum.

The medical records and disability applications may be relevant and discoverable for those plaintiffs who assert either a disability as part of their claims, or who apply for disability-related benefits during a period for which back pay damages or reinstatement are being sought. *See, e.g., Tanner v. BD LaPlace, LLC,* No. CV 17-5141, 2018 WL 3528023, at *2 (E.D. La. July 23, 2018) (stating, with respect to the discovery of ten years of medical records, "The defendant correctly contends that the plaintiff's medical history is relevant to determining if he was qualified for the job, an essential element of an ADA claim."), citing *Cannon v. Jacobs Field Servs. North America, Inc.*, 813 F.3d 586, 590 (5th Cir. 2016). Privileged communications between a patient and physician or psychotherapist may be waived when the patient's mental condition is placed in issue. *Stogner v. Sturdivant*, No. 10-125, 2011 WL 4435254, at *5 (M.D. La. Sept. 22, 2011)("Courts have routinely held that, by putting one's medical condition at issue in a lawsuit, a plaintiff waives any privilege to which he may have otherwise been entitled as to his privacy interest in his medical records."); *Butler v. Louisiana Dept. of Public Safety & Corr.*, No. 12-420, 2013 WL 2407567, at *3 (M.D. La. May 29, 2013)("If the Court determines, however, that proof of the elements of Plaintiff's causes of action requires the use of the privileged material, then the Court is proper to conclude that the psychotherapist-patient has been waived."). Medical information and social security benefit information have been held relevant and proportional discovery for an ADA disability discrimination claim. *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 319 F.R.D. 220, 232 (N.D. Tex. 2016).

III. Affirmative Defenses: No Free Lunch.

A. <u>After-Acquired Evidence:</u>

Under the "after-acquired evidence" doctrine, a plaintiff's claim for reinstatement or front pay is defeated if "there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it." If successful, the defense also limits back pay to the period "from the date of the unlawful discharge to the date the new information was discovered." *McKennon v. Nashville Banner Publ'g C*o., 513 U.S. 352, 362 (1995).

As an initial matter, it should be noted that a plaintiff can prevent introduction of this type of evidence by limiting his/her claim for damages. *See e.g. Wilson v. K.T.G. (USA), Inc*., 16-CV-02508-TMP, 2018 WL 8334843, at *2–3 (W.D. Tenn. Nov. 21, 2018) ("Wilson's remedies

are therefore not affected by the after-acquired evidence defense as he only seeks back pay for the limited period he was suspended, which ended well before the discovery of the conviction. Accordingly, the court grants Wilson's motion to the extent it seeks to exclude evidence of the misdemeanor conviction.").

Pleading this defense can come with unintended consequences. The crux of the defense is that the employer "would have fired" the employee for the newly-discovered wrongdoing. It is not enough to show that the employee's conduct violated the employer's stated policies. The employer must also demonstrate, by a preponderance of the evidence, "that its actual employment practices would have led to the employee's termination." *Martin v. Helena Chem. Co*., 2:13-CV-251-J, 2014 WL 12576293, at *4 (N.D. Tex. Sept. 3, 2014).

By pleading this defense, the employer opens itself up to discovery about what it "would have" done had it known about the bad act. For example: this defense is frequently raised in situations where a plaintiff is found to have been dishonest of something on his/her job application. If the employer claims that it would have fired the plaintiff for this dishonesty, it should be prepared to turn over other employees' applications, and disclose how it has handled dishonesty in other situations. *See, e.g. O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 759–60 (9th Cir. 1996) ("The inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not. As the Supreme Court stated in Price Waterhouse, "proving that the same decision would have been justified ... is not the same as proving that the same decision would have been made." *Id.* at 252 (internal quotation marks omitted).")

Discovery may include inquiries such as:

- Production of the resumes or applications of other employees at the company. Are there any errors omissions on the resumes used by C-suite executives at the company, or on the decision-maker's in the case? If so, is the company now planning to fire that person?
- Who else has been fired for committing this same offense?
- How seriously does the company really take this issue? What steps does it take to confirm the accuracy of information contained in resumes and applications?
- Has it ever made exceptions, or overlooked anyone else's resume inaccuracies?
- ...and so on...

Unless the company has acted with 100% consistency with regard to the type of wrongdoing at issue, the employer risks looking like it is willing to "say anything" (true or not) to win, or like it is vindictive against the plaintiff employee. None of these are good looks in front of a jury. Illustrative cases include:

- *Garza v. Mary Kay, Inc.*, 309-CV-0255-B, 2010 WL 3260175, at *8 (N.D. Tex. Aug. 17, 2010) ("MKI points to its discovery Garza collected and removed confidential documents from MKI. In response, Garza presents evidence MKI has never terminated

an employee for such behavior previously.") (denying MKI's motion for summary judgment on the after-acquired evidence defense).

- *Williamson v. Ball Healthcare Services, Inc.,* CV 14-0552-CG-C, 2016 WL 4257554, at *8 (S.D. Ala. Aug. 11, 2016) (Plaintiff discovered evidence that the decision-maker *herself* was dishonest during her application process, but was not fired for it).
- *Day v. Finishing Brands Holdings, Inc.*, 13-1089, 2015 WL 2345279, at *33 (W.D. Tenn. May 14, 2015), on reconsideration in part, 13-1089, 2015 WL 4425847 (W.D. Tenn. July 17, 2015) (because the employer could not provide any examples of other employees that it had terminated for similar misconduct, there was a disputed questions of fact as to whether the plaintiff's newly discovered action would truly have resulted in his termination).
- *Neumeyer v. Wawanesa Gen. Ins. Co.,* 14CV181-MMA RBB, 2015 WL 1924981, at *24 (S.D. Cal. Apr. 24, 2015) (Defendant's argument, with regard to evidence that the plaintiff vandalized company property, that "[h]ad [it] known on September 1, 2011 what it knows now, it would certainly have fired [plaintiff] that day" was belied by the fact that it continued to employ the plaintiff even after knowing that he was a suspect in said vandalism).
- *Turnes v. AmSouth Bank,* 36 F.3d 1057, 1062 (11th Cir.1994) (AmSouth's argument that the plaintiff had poor credit, and that this would have precluded his being hired was contradicted by Plaintiff's evidence that other individuals had been hired despite similarly poor credit records. The court held that: "'clear credit' may not have actually been a requirement for employment at AmSouth.").

B. The *Faragher/Ellerth* Defense:

This defense provides that an "employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." *Vance v. Ball State Univ*., 570 U.S. 421, 424, (2013).

Pleading this defense can lead to waiver of attorney-client privilege, as well as detailed discovery into an employer's training history, its meetings and discussions about prevention of workplace issues, its knowledge of a bad actor's prior history, its knowledge of other bad acts, and more.

Strikingly, this defense is often pled in boilerplate fashion, even though it only applies in a small subset of cases (e.g., harassment cases involving coworker harassment and no tangible employment actions). Defendants should beware of doing this, as it can lead to serious unintended consequences. *See e.g. Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 894 (M.D. Tenn. 2010) ("Of course, Reitz's hostile environment claim has already been dismissed. The City no longer needs to press its *Faragher–Ellerth* defense, and the plaintiff no longer needs to examine the depth of the defendant's investigative efforts. But this is irrelevant. Once the privilege is waived, waiver is complete and final.").

Below are some examples of cases in which the pleading of the *Faragher/Ellerth* defenses resulted in discovery into, or introduction at trial of "other victim" evidence:

- *EEOC v. SunTrust Bank*, 2014 U.S. Dist. LEXIS 62466 (M.D. Fla. May 6, 2014). Defendant in a sexual harassment case sought to preclude the EEOC from relying on other victim evidence— evidence by non-party former employees regarding alleged harassment—at trial. The court found that the evidence was relevant to the defendant's *Ellerth/Faragher* affirmative defense and admitted it.
- *Morris v. City of Colorado Springs*, Civ.A. 09-CV-01506, 2010 WL 1655591, at *1 (D. Colo. Apr. 23, 2010) (allowing discovery of information and documents concerning other allegations of sexual harassment made by females against [harasser], because they were relevant to the issues of the *Faragher/Ellerth* affirmative defense, which requires the employer to establish reasonable care in preventing sexually harassing behavior. "If, for example, [harasser] had a known propensity to treat women differently than men, Defendant's use of this defense might be affected.").

Cases finding a waiver of attorney-client privilege in cases where an employer has relied on the *Faragher/Ellerth* affirmative are also numerous. An incomplete but illustrative list:

- *Mir v. L-3 Communications Integrated Sys., L.P.*, 315 F.R.D. 460, 470–71 (N.D. Tex. 2016) ("courts have held that, where a defendant relies on an internal investigation to defend against a plaintiff's claims of sexual harassment and of retaliation and has cited to the investigation to show that it exercised reasonable care to promptly correct any harassing behavior, the defendant has waived any applicable privilege or work-product protection with respect to the investigative report and any underlying documents.")
- *Williams v. U.S. Envtl. Servs., LLC*, No. CV 15–168–RLB, 2016 WL 617447, at *5 (M.D. La. Feb. 16, 2016) ("Plaintiff would be prejudiced by Defendant's invocation the Faragher-Ellerth defense "if she could not assess the full measure of [Defendant's] response in light of what it learned from its investigation...Therefore, Defendant waived any privilege that may have applied to the emails described in entries 2 through 10 by placing its internal investigation at issue.").
- *Angelone v. Xerox Corp.*, No. 09 CV 6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011) ("when a Title VII defendant affirmatively invokes a Faragher-Ellerth defense that is premised, in whole in or part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.").
- *McKenna v. Nestle Purina PetCare Co.*, No. 2:05–cv–0976, 2007 WL 433291, at *4, 2007 U.S. Dist. LEXIS 8876, at *11 (S.D. Ohio Feb. 5, 2007) (noting that waiver extends "to documents which constitute evidence of the investigation of the claim of harassment or discrimination").

- *Jones v. Rabanco, Ltd.*, No. C03–3195P, 2006 WL 2401270, at *4, 2006 U.S. Dist. LEXIS 58178, at *10–11 (W.D. Wash. Aug. 18, 2006) ("This Court has held that the Faragher-Ellerth defense raised by Defendants early in this matter will cause any investigation and remedial efforts into the discrimination alleged in this case ... to become discoverable, despite any attorney-client privilege that may have normally attached to such communications.")
- *Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005) (If Defendants assert as an affirmative defense the adequacy of their pre-litigation investigation into Walker's claims of discrimination, then they waive the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation.)
- *Jones v. Scientific Colors, Inc.*, 00 C 0171, 2001 WL 845650, at *1 (N.D. Ill. July 26, 2001) ("Scientific Colors had impliedly waived any work product privilege and opened the door to discovery by asserting-as an affirmative defense to plaintiff's racial harassment claims-that it has exercised reasonable care to prevent and promptly correct harassing behavior").
- *McGrath v. Nassau County Health Care Corp.*, 204 F.R.D. 240, 246 (E.D.N.Y. 2001) (granting discovery of lawyer's handwritten investigative notes; "the Court finds that it would be unjust to allow [the defendant] to invoke the Faragher-[Ellerth] defense under these facts while allowing it to protect the very documents it relies on to assert that defense")
- *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y.1999) (granting discovery of statements given to outside lawyer because the defendant "waived the attorney-client privilege by asserting the adequacy of its investigation as an affirmative defense")
- *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1096, 1099 (D.N.J.1996) (granting discovery of all documents underlying an outside lawyer's investigation, including interviews, because it would be "fundamentally unfair" to not find waiver of privilege and work-product protection when the defendant argued that it had conducted an appropriate investigation).

C. The Kolstad / "Good Faith" / "Rogue Manager" Defense:[1]

The *Kolstad* or "good faith" defense gives an employer the opportunity to defeat a claim for punitive damages. It is named after the case *Kolstad v. ADA*, 527 U.S. 526 (U.S. 1999) in which the defense was developed. In that case, the Supreme Court recognized that punitive damages might be awarded for a Title VII violation "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The Court

[1] Whether an employer acts in "good faith" is a distinct inquiry from whether an employer established the *Ellerth/Faragher* affirmative defense...Put differently, a policy adopted in good faith can be unreasonable or unsuitable to the circumstances, such that the defendant can satisfy the *Kolstad* good faith inquiry, but not prong one of the *Ellerth/ Faragher* defense." *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 467 (5th Cir. 2013) (internal citations omitted).

held, however, that an employer may not be held vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.

Like the *Faragher/Ellerth* defense, the *Kolstad* defense is often asserted in boilerplate fashion, despite the fact that it only applies in a small subset of cases (e.g., those involving vicarious liability for the acts of a rogue, non-management employee). *See e.g. Cooke v. Stefani Mgmt. Services, Inc.*, 250 F.3d 564, 569 (7th Cir. 2001); Dodoo v. Seagate Tech., Inc.,235 F.3d 522 (10th Cir. 2000); *Scudiero v. Radio One of Texas II, LLC,* 4:12-CV-1088, 2015 WL 6859146, at *4 (S.D. Tex. Sept. 30, 2015) ("...the employer can avoid *vicarious* punitive damages liability if it demonstrates that it made a good faith effort to comply...") (emphasis added). The *Kolstad* good-faith defense cannot, however, apply where a plaintiff proceeds on a theory of direct liability, e.g. where the corporate designee to receive employee complaints has final decision-making authority and acts with malice or reckless indifference to the employee's federally protected rights. If the plaintiff demonstrates that the "malfeasing agent [of the employer] served in a 'managerial capacity' and committed the wrong while 'acting in the scope of employment," there is no *Kolstad* defense. *Rubinstein v. Adm'r of the Tulane Educ. Fund,* F.3d 392, 405 (5th Cir. 2000) (c*iting Kolstad*, 527 U.S. at 545). *See also E.E.O.C. v. Stocks, Inc*., 228 Fed. Appx. 429, 431 (5th Cir. 2007) ("EEOC has established vicarious liability by showing that the retaliatory actions were taken by management-level employees acting within the scope of their employment").

To stick to this defense angle, the employer must be willing to throw the bad manager under the bus. The nature of the defense is that the *company* did everything it could to prevent discrimination, but a rogue bad actor broke the rules. It means that defense counsel should not represent the individual manager (either directly, or via Tex. Disc. R. Prof. Conduct 4.01), since doing so would violate Tex. Disc. R. Prof. Conduct 1.06(b). The rogue manager's interests (e.g., maintaining his or her innocence and professional reputation) would be materially and directly adverse to the interests of the company (e.g., proving that the manager disobeyed company rules).

By voluntarily introducing evidence that the bad manager *knew* the rules and broke them anyway, the company also risks shooting itself in the foot. If a jury is not inclined to see things the company's way on the issue of agency, it will have the tools it needs to render a punitive damages verdict. *See, e.g. Ancira Enters., Inc. v. Fischer*, 178 S.W.3d 82, 94 (Tex. App.-Austin 2005, no pet.) (there was legally sufficient evidence to support the award of punitive damages where human-resources director who fired the plaintiff "was aware of at least the general requirements of anti-discrimination law" and employer had promulgated a manual stating that no employee would be subject to retaliation for reporting sexual harassment). In *Ancira*, the firing manager testified at length about how the employer's "zero tolerance policy [against sexual harassment] actually takes the legal protections several steps further," and how the "Team Manual explicitly states that no employee is to be subjected….to retaliation for reporting such conduct." *Ancira* at *9. The jury returned a verdict for the plaintiff. The company appealed, arguing that punitive damages were inappropriate, but as the Court noted, there was no dispute that the decision-maker was employed in a managerial capacity and was acting in the scope of employment, and "was knowledgeable regarding company anti-discrimination policies and their relationship with underlying law, and that the Team Ancira policy manual expressly prohibited

retaliation against employees." The Court concluded: "this evidence would enable a reasonable juror to infer a firm belief and conviction that Tackett actually was aware of the risk that retaliating against Fischer would violate Fischer's legal rights." *Id. See also Edwards v. Aaron Rents, Inc.,* 482 F. Supp. 2d 803, 816 (W.D. Tex. 2006) (upholding punitive damages based on evidence that supervisor who fired plaintiff was aware that discrimination on the basis of gender was unlawful, and that Defendant's own policies prohibited gender discrimination); *Tesmec USA, Inc. v. Whittington*, 10-04-00301-CV, 2006 WL 827849, at *7 (Tex. App.—Waco Jan. 18, 2006, pet. denied) (upholding punitive damages where "Both Owen and Denny acknowledged that they were aware that it was against the law to discriminate or retaliate against an employee").

Like *Faragher/Ellerth*, this defense can also result in the waiver of privilege if the employer includes an attorney's investigation, equal pay audit, or the like as evidence of its "good faith efforts." *See, e.g.* Malin v. Hospira, Inc., 08C4393, 2010 WL 3781284, at *2 (N.D. Ill. Sept. 21, 2010). In that case, Plaintiff sought discovery of Defendant's investigation of plaintiff's EEOC charge, arguing that defendant waived any privilege over those documents by asserting that it "made good faith efforts to comply with all applicable anti-discrimination and FMLA laws" as an affirmative defense. The Court agreed that "the manner in which the investigation and its results could become relevant in this case if Hospira planned to claim at trial that because of its investigation and resulting action, it was complying with all applicable laws." *Id.* It further observed that: "One cannot assert the attorney/client privilege to keep an opponent from discovering facts about an investigation when the investigation is to be used at trial as a defense to defeat the opponent's allegations." *Id.* In this case, the file was ultimately not turned over to the plaintiff, because the defendant decided that it would not, after all, rely on that argument in its defense.

Using this defense will also open the door to wide-ranging discovery on the precise nature of the company's "good faith efforts" – not only its response to the particular incident(s) at issue in the lawsuit, but also what it had done to prevent violations from happening (e.g. issues like adequacy of training, specific prevention efforts, visibility of efforts to employees, protection of those who report wrongdoing, past handling of other complaints, and the like). This will include discovery into other bad acts that predate the subject of the plaintiff's suit, since the employer's awareness of those issues goes directly to the question of what it knew and when, and how that knowledge could have been used to prevent the subject of the plaintiff's suit.

IV. Witness Testimony: Prepare Your Witnesses to Avoid Unintended Fallout.

A. <u>The "cheerleader" witness causes problems on both sides.</u>

1. Cheerleader Plaintiffs:

Evidence that a plaintiff has misbehaved/underperformed in other roles throughout their career should normally be inadmissible under Rule 404.[22] But a plaintiff who takes the stand and

[2] *See, e.g., Sanders v. Dalcraft LLC*, No. 3–09–CV–0307–P, 2009 WL 1392602, at *2 (N.D. Tex. May 18, 2009) (rejecting argument that employment records from plaintiff's former employer "may show

overenthusiastically proclaims his own prominence, experience, or incorruptibility can open the door to evidence of that sort. A number of cases have found that a plaintiff's past employment records could reasonably bear on the credibility of his allegations regarding his own qualifications and performance history. *See, e.g. Wagoner v. J.P. Morgan Chase Bank, N.A.*, 1:11-cv-01054 (S.D. Ind., Jan. 15, 2014) (plaintiff sought to exclude evidence about her performance in positions other than the one from which she was terminated, arguing that it was impermissible character evidence. Such evidence could not be used to prove that because plaintiff may have underperformed in other positions, she also underperformed in the position from which she was terminated, as to allow it would violate Rule 404(b). If, however, plaintiff opened the door by presenting evidence of her satisfactory performance in previous positions, then defendant could rebut such evidence). *See also Levitin* v. *Nationwide Mut. Ins. Co*., 2:12–CV–34, 2012 WL 6552814 (S.D. Ohio Dec.14, 2012); *Valentine v. Remke Markets, Inc.*, No. 1:10–CV–922, 2012 WL 893880, at *3–4 (S.D. Ohio Mar.15, 2012); *Serrano v. Cintas*, No. Civ. A. 04–40132, 2006 WL 585714, at *1–2 (E.D.Mich.Mar.9, 2006).

2. Cheerleader Defendants:

Company reps can also go too far - by giving a glowing review of the company's compliance with EEO polices, stating that the company or a particular supervisor would "never" discriminate/harass, etc. This opens to the door to so-called "other victim" evidence (i.e., evidence that other employees besides the plaintiff were also discriminated against). *See e.g. Bateman v. Therapeutic Innovations, Inc*., 2007 WL 460828 (W.D. Vir. 2007) ("The court, therefore, will preliminarily exclude any evidence of sexually suggestive e-mails, photographs, or dating profiles that the Plaintiff did not witness during her term of employment with the defendants. The court will reconsider this ruling if the Defendants raise an affirmative defense or otherwise open the door to this evidence.").

B. Disputes Over Whether the Plaintiff Resigned or Was Fired:

In *Mattenson v. Baxter Healthcare Corp*., Case Nos. 04-4270, 04-4331 (7th Cir. 2006), the Court noted that: "Ordinarily such testimony [about the plaintiff's emotional distress] would be irrelevant, because, as we note later, the Age Discrimination in Employment Act does not authorize the award of common law damages. But the employer opened the door to that testimony by its contention that the plaintiff had quit voluntarily. Plaintiff was entitled to testify that he would never have done that, because of the emotional as well as financial damage that leaving Baxter would have imposed (and did in fact impose); and that he quit only because by

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performance deficiencies similar to those relied upon by [the defendant] to justify termination"); *Ireh v. Nassau Univ. Med. Ctr*., CV06–09 LDW/AKT, 2008 WL 4283344, at *5 (E.D.N.Y. Sept.17, 2008) aff'd, 371 F. App'x 180 (2d Cir.2010) (ruling that plaintiff's performance during prior employment not relevant to work performed for defendant and that prior employment records not likely to lead to discovery of admissible evidence as such evidence would be inadmissible under Federal Rule of Evidence 404(a)); *Maxwell v. Health Ctr. of Lake City, Inc.*, 3:05CV1056–J–32MCR, 2006 WL 1627020, at *4 (M.D.Fla. June 6, 2006) (ruling that plaintiff's performance at previous jobs not relevant or reasonably calculated to lead to admissible evidence because Rule 404(a) would exclude such evidence).

consenting to the performance plan he would have been making admissions of inadequate performance that Baxter could use against him after it fired him and he sued."

C. Disputes over Activities Published on Social Media:

"Generally, [social networking site] content is neither privileged nor protected by any right of privacy." *Gondola v. USMD PPM, LLC*, 223 F. Supp. 3d 575, 591 (N.D. Tex. 2016) (quoting *Johnson v. PPI Tech. Servs., L.P.*, 2013 WL 4508128, at *1 (E.D. La. Aug. 22, 2013) and citing *Moore v. Wayne Smith Trucking Inc.*, 2015 WL 6438913, at *2 (E.D. La. Oct. 22, 2015) ("It is settled that information on social media accounts, including Facebook, is discoverable"); see *In re White Tail Oilfield Services, L.L.C.*, 2012 WL 4857777, at *3 (E.D. La. Oct. 11, 2012) (ordering production of all Facebook data through the "download your information" button).

As social media information does not carry unique protection, it is treated similarly to other areas subject to discovery. Generally, therefore, court's may permit discovery of social media records when a requesting party establishes that the information is relevant to an issue in the litigation and that it is proportional to the needs of the case. *See Higgins v. Koch Dev. Corp.*, 2013 WL 3366278, at *2 (S.D. Ind. July 5, 2013) (stating, "[A] court may compel production of a party's Facebook information if the party seeking disclosure makes a threshold relevance showing"); *Higgins v. Koch Development Corporation*, 2013 WL 3366278, at *2 (S.D. Ind. July 5, 2013) (ordering production of social media postings relevant to plaintiffs' claims physical injuries impacted their abilities to enjoy life and engage in outdoor activities); *Jewell v. Aaron's, Inc.*, 2013 WL 3770837, at *3 (N.D. Ga. July 19, 2013) (stating, "[E]ven though certain [social media] content may be available for public view, the Federal Rules do not grant a requesting party a generalized right to rummage at will through information that [the responding party] has limited from public view…"); *Moore v. Wayne Smith Trucking Inc.*, 2015 WL 6438913, at *2 (E.D. La. Oct. 22, 2015) (stating, "However, as with all discovery requests, a Court shall not endorse an extremely broad request"); *Anderson v. City of Ft. Pierce*, 2015 WL 11251963, at *2 (S.D. Fla. Feb. 12, 2015) (stating, "The above-surveyed case law further shows that there is a limit to the breadth of relevance and that unwarranted 'fishing expeditions' should be avoided. This Court sees no such problem here. First, the Plaintiff has put her mental health and quality of life at issue, and the Defendant seeks the social media pictures for that reason. Broadly speaking, this is sufficient grounds. Second, the only way for the Defendant to known whether they are truly relevant is to see and review them").

While social media records may more frequently be held relevant in connection with claims of mental anguish or quality of life issues that rise to a level to interfere with daily activities, it can be more difficult to secure such records in FLSA disputes, for example, without a particularized showing of need. *See Palma v. Metro PCS Wireless, Inc.*, 18 F. Supp. 3d 1346, 1348 (M.D. Fla. 2014) (stating, "This is especially so when Defendant has nothing more than its hope that there might be something of relevance in the social media posts…Although some of the Plaintiffs testified to reading social media at some point during their work day, this does not, in and of itself, transform Plaintiffs' social media posts into discoverable information. Additionally, some of the information Defendant seeks is protected from public view (for

example, private Facebook messages). Defendant's speculation that the social media messages might include a party admission, without more, is not a sufficient reason to require Plaintiffs to provide Defendant open access to their communication with third parties"); *Jewell v. Aaron's, Inc.*, 2013 WL 3770837, at *4 (N.D. Ga. July 19, 2013) (stating, "Defendant has not made a sufficient predicate showing that the broad nature of material it seeks is reasonably calculated to lead to the discovery of admissible evidence…The exemplar evidence of Kurtis Jewell's Facebook activity does not persuade the Court that the Facebook postings will show, contrary to Plaintiffs' claims, that they were not forced to work through their meal periods...Defendant's argument in support of the discovery of every social media posting by 87 plaintiffs over a four year period is supported by nothing more than its "hope that there might be something of relevance" in these plaintiff's Facebook, Twitter, and/or MySpace accounts"). However, where a defendant's particularized showing demonstrates a need for social media because of (i) a dearth of other evidence of a plaintiff's claimed whereabouts, (ii) publicly-available social media postings indicating that private social media may further reveal information relevant to a plaintiff's claim (*i.e.*, at work or somewhere else), and (iii) where a plaintiff's testimony reveals potential credibility issues that social media may flesh out, a court may issue an appropriately-tailored order granting relief. *See, e.g., Shelby et al v. Boxer Property Mgmt. Corp.,* C.A. No. 4:16−cv−01549, Deft's Motion to Compel Social Media Records, Dkt. Entry No. 076 (S.D. Tex. Filed July 20, 2018) and Order on Deft's Motion to Compel Response to Social Media Discovery, Dkt. Entry No. 104 (S.D. Tex, Filed Nov. 5, 2018) (Ellison, J.) (available on PACER).

V. Know In Advance Which Doors You Want to Open & Keep Closed: Last-Minute Strategy Changes Can Cost You.

Even the voluntarily, knowing choice to "open the door" can have unintended consequences. *See e.g. Tinnus Enterprises, LLC v. Telebrands Corp*., 369 F. Supp. 3d 704, 721– 22 (E.D. Tex. 2019). In that case, Defendants raised several objections to a plaintiff's testimony on lost profits, but later decided to solicited testimony from plaintiff on that subject. The plaintiff ultimately won the case, and applied for an award of fees. In rendering its decision on fees, the Court admonished Defendants' counsel for this choice to "open the door" they had previously tried to close, noting: "Defendants' course of conduct throughout this case weighs in favor of enhancement," and "created unnecessary and wasteful work for the parties and the Court."