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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-2612-B

MICHELLE MOOR

vs.

BINGHAM MCCUTCHEN, LLP

MEMORANDUM OF DECISION AND ORDER ON: 1) DEFENDANT'S MOTION TO STRIKE; 2) PLAINTIFF'S MOTION TO STRIKE; AND 3) DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Michelle Moor ("Moor") brought this action against her former employer, Defendant Bingham McCutchen, LLP ("Bingham"), alleging sexual harassment, constructive discharge, and retaliation by Bingham. The claims arise from events on and after December 14, 2007 at Bingham's annual associates' holiday luncheon ("the Holiday Party") where Moor alleges she was drugged. Before the court are the following motions: 1) Defendant Bingham McCutchen, LLP's Motion to Strike Inadmissible portions of Plaintiff's Summary Judgment Submissions; 2) Plaintiff Michelle Moor's Motion to Strike Portions of Defendant's Summary Judgment Submissions; and 3) Defendant's Motion for Summary Judgment. For the following reasons, the Defendant's Motion to Strike is **ALLOWED** in part and **DENIED** in part, the Plaintiff's Motion to Strike is **ALLOWED** in part and **DENIED** in part, and the defendant is granted leave to refile its exhibits as discussed in the court's order and analysis of the Plaintiff's Motion to Strike.

Notice sent
11/24/2010
I. S. B.
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DISCUSSION

I. DEFENDANT'S MOTION TO STRIKE

A. Expert Evidence: Dr. Pape and Moore's Affidavits

The court has broad discretionary power with respect to expert testimony. *Commonwealth* v. *Dockham*, 405 Mass. 618, 628 (1989). The court is not persuaded by Bingham's arguments that Dr. Brian Pape's affidavit is speculative, and finds Dr. Pape qualified as an expert. The affidavit lists the witness's education and qualifications as a toxicologist, and Dr. Pape adequately grounds his conclusions upon Moor's symptoms and surrounding circumstances. Dr. Pape is qualified to suggest that the facts indicate drug-alcohol interaction and to point out that other tests could have been performed. Bingham's objections go to the weight of the evidence which is a matter of credibility inappropriate for a summary judgment motion.

Julie A. Moore's affidavit similarly qualifies her as an expert. Bingham challenges her testimony based on a lack of reliability; however, the plaintiff correctly identifies the more flexible standards applicable to a non-scientific expert. The court finds that Moore's affidavit detailing her experience and sources of standard employment practices sufficiently qualifies Moore as an expert. Again, Bingham's objections as to how certain standards in the field of human resources and employment law apply to Bingham pertain to the weight of the evidence and must fail. However, Bingham correctly identifies that Moore's conclusion that the plaintiff's report of date rape to Bingham management constituted a claim of "harassment, gender-based discrimination or a sexually hostile workplace," is an unqualified conclusion of law infringing

upon the realm of the factfinder. Thus, the court grants Bingham's Motion to Strike on this limited issue.

B. Dr. Lavoie's Affidavit, Dr. Chen's Affidavit, Dr. Kosinski's Supplemental Affidavit, and Mr. Shaw's Deposition

Dr. Megan Lavoie's affidavit is properly based on her personal knowledge. Bingham's objections go to weight, and its Motion to Strike as to Lavoie's affidavit is denied.

Although Dr. Phyllis M. Chen lacks an independent memory of her treatment of the plaintiff, she possesses personal knowledge of her own usual routine and practice. Here, her affidavit detailing her process in making treatment decisions is relevant, properly founded, and helpful to elucidating the facts. Bingham's Motion to Strike Dr. Chen's affidavit is denied.

Dr. Katherine Kosinski's supplemental affidavit is properly grounded upon her personal knowledge of the facts in this case and clarifies her original affidavit. It is not improper speculation for her to criticize, directly or indirectly, the methodology of the tests performed or to suggest that other tests may have yielded different results. Bingham's objections go to weight and must fail.

James Shaw's statement that Moor stated she "kicked and kicked and she was fine" is inadmissible hearsay. The plaintiff offers the statement for its truth, but none of the exceptions she argued apply. The statement does not qualify as an excited utterance because there is no indication that Moor observed her alleged drugging. The state of mind exception is inapplicable because the plaintiff is using the statement to suggest that she was attacked and her state of mind is not at issue. Thus, the statement must be stricken from the record. The remainder of Shaw's

testimony, however, including statements regarding his concern and suspicions that Moor had been attacked, is based on his personal knowledge and is admissible.

C. Moor's Deposition and Affidavit

The court does not find a contradiction between Moor's deposition and affidavit as argued by the defendant. Bingham's Motion to Strike as to the relevant portions is denied on these grounds.

Bingham challenges Moor's statements regarding the extent to which her drugging was a precursor to a sexual assault as speculative and improper opinion testimony. A lay witness may "give expression to that which she has seen, heard, or experienced," *Commonwealth* v. *Allen*, 40 Mass. App. Ct. 458, 461 (1996), and testify as to her "opinions or inferences which are rationally based on [her] perception." Mass. G. Evid. 701(a). However, lay opinion may not tread into the realm of expert opinion which requires special knowledge and qualifications. See *Jones* v. *Spering*, 334 Mass. 458 (1956). The court concludes Moor exceeded the limits of permissible testimony when she stated: "I think it's general knowledge in society that roofie'ing is usually a precursor to a sexual assault." Similarly inadmissible is her statement: "I think generally when you pick a female victim at a social party, it's very, very likely that it is a date rape drug." This court will disregard Moor's general statements about society's common knowledge due to the danger of invading the realm of expert opinion and the role of the factfinder. The defendant's Motion to Strike is allowed only as to these two statements.

Bingham argues that Moor's statements regarding her conversations with Employee A about Employee A's alleged rape and regarding subsequent conversations during which Moor conveyed details of the conversation with Employee A to others at Bingham are inadmissible

hearsay. However, Bingham has conceded for the purpose of summary judgment that Employee A told Moor that she thought she had been raped by Employee B and that Moor reported to Bingham management that Employee A had told her she was raped by Employee B. (See Defendant's Statement of Facts ¶¶ 27 & n.3, 32 & n.5.) As such, Bingham's Motion to Strike these statements from the summary judgment record is denied.

Bingham also argues that Moor made statements unsupported by evidence identifying Employee B as a potential suspect. However, in the record, Moor merely indicates the existence of Employee B without identifying him. Indeed, Moor to-date does not know Employee B's identity and has not claimed otherwise.[1/] There may be a dispute of fact as to what Moor stated to Bingham management regarding Employee B, but the court finds at least sufficient evidence on the record to deny Bingham's Motion to Strike as to these statements.

II. PLAINTIFF'S MOTION TO STRIKE

A. Superior Court Rule 9A(b)(5)

The court takes guidance from *Dziamba* v. *Warner & Stackpole LLP*, 56 Mass. App. Ct. 397 (2002), where the Appeals Court called Superior Court Rule 9A(b)(5) "an 'anti-ferreting' rule designed to assist a trial judge in the all-too typical situation in which the parties throw a foot-high mass of undifferentiated material at the judge." *Id.* at 399. Like Judge Fabricant in *Dziamba*, this court, while not in precisely the same way, is faced with a situation in which the anti-ferreting aspects of Rule 9A(b)(5) are being thwarted by "factual assertions buried deeply in argument . . . and . . . woven into argument [in such a way as will make] it unnecessarily and

[1]The court further notes that Bingham has gone to great lengths to protect the identity of Employee B, as it arguably should; however, both parties unnecessarily and regularly refer to another former employee of Bingham by name. The court recommends that both parties be more sensitive regarding such disclosures in future practice.

unreasonably difficult to identify which facts [are] genuinely in dispute." *Id.* at 400-01. This court, as others have done, will rely upon Justice Kass's comments, *id.* at 401, as support for the action it will take here: "Adoption of an anti-ferreting rule is . . . a pragmatic and reasonable response to the propensity of lawyers to file literally mounds of affidavits, depositions, interrogatories, and depositions in support of, or in opposition to, summary judgment. Both formulation of such rules and administering them in a fashion so that they have bite find support in the cases."

Although Bingham's Statement of Facts cites to the record, the inclusion of exhibits, especially exhibits containing sensitive material, not cited or relied upon in Bingham's summary judgment memorandum is improper. While it is possible that some judges may prefer deposition transcripts submitted in their entirety, standard practice dictates inclusion of only supporting documents identified with specificity, a practice of which Bingham is likely well aware. Such practice serves the purposes of providing the nonmoving party with sufficient notice as well as relieving the court's considerable burden. Furthermore, particularly sensitive facts, such as a person's mental health history, which Bingham does not use to support any arguments whatsoever, should be treated particularly delicately, erring on the side of exclusion short of good cause.[2/] The burden is on the offering party to show relevant context, and Bingham has not met this burden. Thus, all uncited portions of Exhibits 5-17 and 24 must be stricken. Uncited portions of Exhibit 13 and 17 and Paragraphs 7 and 8 of the Defendant's Statement of Facts discussing Moor's personal and family information shall also be stricken because Bingham never

[2]Doing otherwise in an attempt to improperly influence the judge would be both unprofessional and unethical, at least in this court's opinion.

relied upon them in its summary judgment motion and memorandum. Similarly, Exhibit 13Q and Paragraphs 70 and 71 of the Defendant's Statement of Facts relating to the plaintiff's demand letter shall be stricken because, although Bingham's Opposition suggests reasonable arguments that such evidence could support, Bingham did not raise such arguments in its summary judgment materials.

B. Other Evidence Challenged As Inadmissible

For the reasons stated in the defendant's Opposition, the court denies the plaintiff's Motion to Strike Exhibits 3 and 4 and Paragraph 74 of the Statement of Facts. Bingham may properly cite the MCAD's determination, on the facts as pled by the plaintiff, that the alleged drugging at the holiday party was not "sexual" within the meaning of Chapter 151B.

The court finds Josephine Deang's deposition testimony properly founded upon personal knowledge and denies the plaintiff's Motion to Strike as to such testimony.

Bingham has remedied any potential authentication defects in Dr. Christopher P. Holstege's Expert Report, Dr. Katharine Kosinski's Affidavit, and the photograph of Moor with its submissions accompanying its opposition, and the court therefore denies the plaintiff's Motion to Strike as to these documents.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On or before December 10, 2010, Bingham shall resubmit all of its summary judgment exhibits in accordance with the court's order below. The court will postpone its decision concerning summary judgment until after receipt of the defendant's exhibits to its Rule 56 motion.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

1. The Defendant's Motion to Strike is **ALLOWED** as to the statement in Julie A. Moore's affidavit that Moor's report of date rape to Bingham management constituted a claim of "harassment, gender-based discrimination or a sexually hostile workplace" and any briefing references thereto; as to James Shaw's statement that Moor stated she "kicked and kicked and she was fine" and any briefing references thereto; and as to Moor's two statements mentioned above regarding her opinion on drugging as a precursor to sexual assault and any briefing references thereto. The Defendant's Motion to Strike as to all other evidence is **DENIED**.

2. The Plaintiff's Motion to Strike is **ALLOWED** as to the uncited portions of Exhibits 5-17 and 24; as to the uncited portions of Exhibit 13 and 17 and Paragraphs 7 and 8 of the Defendant's Statement of Facts; and as to Exhibit 13Q and Paragraphs 70 and 71 of the Defendant's Statement of Facts to the extent they rely on Exhibit 13Q. The Plaintiff's Motion to Strike as to all other evidence is **DENIED**.

3. On or before December 10, 2010, the defendant must refile all exhibits relied upon in its summary judgment motion and memorandum in accordance with this ruling. The court will postpone its decision of summary judgment until after receipt of the defendant's exhibits to its Rule 56 motion.

Elizabeth M. Fahey
Justice of the Superior Court

DATED: November 23, 2010