

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01814-WDM-MJW

DEBBIE ULIBARRI, *et al.*,

Plaintiffs,

v.

CITY & COUNTY OF DENVER,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW REGARDING THE ADMISSIBILITY OF
EVENTS OCCURRING OUTSIDE THE STATUTE OF LIMITATIONS**

Plaintiffs, by and through their attorneys, Paula Greisen and Laura Schwartz of King & Greisen, LLC, Carrie Ann Lucas, Kevin W. Williams, and Andrew Montoya of the Colorado Cross-Disability Coalition, and Amy Robertson of Fox & Robertson, P.C., hereby submit this Memorandum of Law Regarding the Admissibility of Events Occurring Outside the Statute of Limitations¹ and state as follows:

I. INTRODUCTION

This is a prison conditions and disability discrimination case involving three deaf pretrial detainees, Shawn Vigil, Roger Krebs, and Sarah Burke. The evidence at issue concerns Mr. Vigil and events that occurred between August 17, 2005 and August 27, 2005, a ten-day period of time. Mr. Vigil was held at the city jail from August 17, 2005 to August 25, 2005, and then transferred to the Denver County Jail ("DCJ"). Plaintiffs' complaint was filed on August 28,

¹ At the conclusion of the *Daubert* Hearing on April 21, 2011, the Court ordered Plaintiffs to submit their position in writing regarding the admissibility of events occurring outside the statute of limitations.

2007. Between August 17 and August 27, 2005, Defendant City & a County of Denver (“the City”) classified Mr. Vigil without ascertaining how to effectively communicate with him. As a result, the City isolated Mr. Vigil in administrative segregation because of his deafness. Without evidence about the City’s many missteps that resulted in this unwarranted isolation, the jury will have no meaningful understanding of how Mr. Vigil came to be housed in Building 6 without any means of effectively communicating with other inmates, his jailers, or his family. This same evidence also provides necessary background as to Denver’s role in Mr. Vigil’s eventual suicide. The jury needs to hear this evidence in order to fully appreciate the City’s practices as regards deaf inmates, a defining issue in this litigation.

Relying on the dismissal of several claims as beyond the statute of limitations, the City argues that evidence about those events is automatically barred because it is irrelevant to the claims remaining in the case. In sum then, Denver is arguing for a per se exclusionary rule which relies entirely on a liability determination rather than the Federal Rules of Evidence. The admissibility of evidence is not so constrained.

As discussed below, under Rule 401 relevant evidence is always admissible, and the same is true here. Moreover, the City cannot argue, in good faith, that Rule 403 nonetheless bars its admissibility.

II. ARGUMENT

A. Evidence Regarding Mr. Vigil’s Booking, Intake and Classification as a Deaf Inmate is Relevant, and therefore Admissible as to the Remaining Ulibarri/Vigil Claims.

Contrary to Denver’s assertion, all of the challenged evidence remains relevant as background evidence providing an understanding of individual plaintiffs’ claims that remain at

issue and to the organizational Plaintiffs' claims for injunctive relief. As this Court noted in its Order on Motion for Certification of Rule 54(b) Judgment, "there is significant factual overlap between the dismissed claims and the pending claims." ECF No. 293 at 4. Moreover, this Court has previously held that "it is reasonable to infer that other deaf persons detained will have some of the same difficulties as the detained Plaintiffs here." *Order on Pending Motions* at 42.

It is axiomatic that evidence relating to events that occurred outside the statute of limitations is admissible as "relevant background evidence." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002) (quoting *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977)). Under the Federal Rules of Evidence, "all relevant evidence is admissible," albeit subject to certain constraints provided by other rules and judicial decisions. *See Fed. R. Evid.* 402. Relevancy then, is key in determining the admissibility of evidence.

Relevancy is broadly construed, "bounded only by the liberal standard of Rule 401." *United States v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998). Rule 401 deems evidence relevant where it has "any tendency to make the existence of any fact that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) Under Rule 401, a fact is "of consequence" when it provides the fact finder "with a basis for making some inference, or *chain of inferences*, about an issue that is necessary to a verdict." *McVeigh*, 153 F.3d at 1190 (emphasis added). The bar for establishing probative value under Rule 401 is "very low." *Id.* Further, it is indisputable that "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987); *Huddleston v. United States*, 485 U.S. 681, 691

(1988). “Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.” Notes of Advisory Committee on Fed. R. Evid. 401.

There is a long line of cases, spanning multiple jurisdictions, including the Tenth Circuit Court of Appeals, that specifically provide for the admission of evidence about events that occurred outside the statute of limitations in order to fully inform the jury before it is charged with deciding the legal import of the evidence it hears. Thus, providing the jury with this kind of evidence is far from a novel proposition. *See, e.g., Morgan*, 536 U.S. at 105 (holding that evidence relating to events occurring outside the statute of limitations is admissible as “relevant background evidence.”); *Evans*, 431 U.S. at 558 (“A discriminatory act which is not made the basis of a timely charge . . . may constitute relevant background evidence in a proceeding which the status of a current practice is at issue.”); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1146 (10th Cir. 2008) (following *Morgan*); *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232 (10th Cir. 1999) (finding no error in admitting evidence of non-actionable conduct as “relevant background”); *Noland v. McAdoo*, 39 F.3d 269, 271-72 (10th Cir. 1994) (“Although not actionable itself, those events occurring before McAdoo became plaintiff’s supervisor provide relevant circumstantial evidence to explain the events occurring after McAdoo became plaintiff’s boss.”); *Rorie v. United Parcel Serv.*, 151 F.3d 757, 761-62 (8th Cir. 1998) (following *Evans*); *Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003) (allowing evidence of time-barred acts to establish motive in a § 1983 case); *Rivera-Torres v. Ortiz-Velez*, 341 F.3d 86, 98 (1st Cir. 2003) (holding that a trial court’s “prerogative to admit evidence of dismissed claims insofar as it provides relevant background for surviving claims is

firmly established by our precedents”); *Rydzeski v. Curian Capital, LLC.*, 2008 WL 465299, *6 (D. Colo. 2008) (following *Morgan*); *Conrad v. Bd. of Johnson Cnty. Comm'rs*, 2002 U.S. Dist. LEXIS 12421, **7-9 (D. Kan. 2002) (allowing jury to learn about employee evaluations from 1991 in an ADA retaliation case filed in 2000 as evidence that the supervisor “had a history of retaliating against employees who disagreed with her.”).

Powell v. City & County of Denver demonstrates this evidentiary principle at work.

There, this Court relied on Rule 401 and allowed the jury to hear evidence about events that predated the statute of limitations because of its potential relevance:

[E]vidence of events [that occurred] prior to [] [the start of the statute of limitations] may be relevant to plaintiffs’ claims that that the City followed a policy or custom resulting in the violation of their constitutional rights. . . . And, because the statute of limitations presents no bar to relevant evidence of events that occurred more than two years before plaintiffs filed suit, the City’s motion is without merit.

973 F. Supp. 1198, 1205-6 (D. Colo. 1997).

The same rationale obtains here. In order to make liability determinations, it is critical that a jury understand what happened to Mr. Vigil during the entire time of his detention, as it was a continuing course of events that gave rise to the harm alleged by Plaintiffs. In other words, for a jury to understand the total circumstances that affected Mr. Vigil, they must be informed of what happened to him at every stage of his incarceration—and of the City’s actions or inactions regarding his care and treatment. Because the Plaintiffs have alleged that the City has an established pattern and practice of failing to provide reasonable accommodations to deaf inmates, events that occurred prior to August 28, 2005 remain relevant as background evidence to understand the entirety of Plaintiffs’ interactions with Defendant and its representatives. For

example, Dr. Pogrebin opined at the Rule 702 hearing that one of the ways the City initially breached its duty of care was its failure to accurately and fully complete Mr. Vigil's intake questionnaire and its failure to obtain the necessary mental health screening.² While this event occurred outside the statute of limitations and cannot be an independent basis for a damages claim, it is essential for the jury to understand that Mr. Vigil was not evaluated for his risk of suicide at the inception of his incarceration. The jury needs this information to understand that because the initial booking and classification process was so substandard, it adversely infected every subsequent aspect of Mr. Vigil's incarceration at DCJ. Similarly, it is important for the jury to know that the City did not provide a sign language interpreter during Mr. Vigil's pre-August 28th incarceration, and that, as a consequence, he never had the opportunity to understand his surroundings, nor did the City have the opportunity to learn anything about his medical or psychological history. Only this way will the jury understand how complete his isolation and confusion were during his post-August 28th incarceration.

B. The City Can Have No Good Faith Argument That This Relevant Evidence Should Be Excluded Under Rule 403 as Being Unfairly Prejudicial.

Plaintiffs anticipate that the City will argue that even if evidence about events that occurred outside the statute of limitations is relevant, it still must be excluded under Rule 403 as being unfairly prejudicial. The pertinent text of Rule 403 reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .

Excluding relevant evidence under Rule 403 is an "extraordinary remedy and should be used sparingly." *Conrad v. Brd of Johnson Cnty Comm'rs* at **7-8. Rule 403 "tilts in favor of

² The undersigned has ordered but not received a transcript of Dr. Pogrebin's April 20, 2011 testimony.

admissibility.” *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006). In this vein it is “generally believe[d] that the jury is best able to determine the truth when [it has] access to all of the relevant admissible evidence.” *SEC v. Peters*, 978 F.2d 1162, 1171 (10th Cir. 1992).

Unfair prejudice is prejudice that arises from “the tendency of the proffered evidence to lead the jury to render findings ‘on an improper basis, commonly, though not necessarily, an emotional one.’” Notes of Advisory Committee on Fed. R. Evid. 403; *Conrad v. Brd of Johnson Cnty Comm’rs* at **8-9. The probative value of evidence is not substantially outweighed by the danger of unfair prejudice simply because the evidence undermines a party's position. *Id.* at **8-9. A good example of unfair prejudice can be found in a recent Eleventh Circuit Court of Appeals decision where Former Associate Justice Sandra Day O'Connor characterized unfair prejudice as being “visceral or inflammatory.” *United States v. Mateos*, 623 F.3d 1350, 1365 (11th Cir. 2010). While a jury might well find evidence about Mr. Vigil’s incarceration distressing, evidence about the ten days between August 17 and August 25, 2005, is neither visceral nor inflammatory.

A fundamental principle is at work here. At the heart of Plaintiffs’ claims are the City’s negligent and discriminatory practices when incarcerating deaf inmates; Plaintiffs’ claims cannot be fully presented if the very evidence of such negligence and discrimination is deemed unfairly prejudicial under Rule 403:

A plaintiff’s ability to prove discrimination . . . must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Riordan v. Kempiners, 831 F.2d 690, 698 (7th Cir.

1987) (Posner, J.).

C. There is a Simple Remedy.

There is a straightforward remedy for addressing the City's alleged concerns—this Court need only give the jury a limiting instruction stating that events that occurred prior to August 28, 2005, are not actionable in themselves. *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1247-48 (10th Cir. 1999).

CONCLUSION

The United States Supreme Court has already spoken about the dangers of using per se exclusionary rules where questions about relevance and prejudice are involved. “Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (U.S. 2008). Nothing about this case merits such a broad application particularly where the City’s only argument is that because certain claims have been dismissed, all evidence involving those events is automatically barred.

Dated: May 4, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2011, I electronically filed the foregoing **PLAINTIFFS' MEMORANDUM OF LAW REGARDING THE ADMISSIBILITY OF EVENTS OCCURRING OUTSIDE THE STATUTE OF LIMITATIONS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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