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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANI CHOPOURIAN,

Plaintiff,
vs.

Civ. No. S-09-2972 KJM KJN

ORDER

CATHOLIC HEALTHCARE WEST, et al.,

Defendants.

On November 8, 2011, the court heard argument on the parties' motions in limine. Lawrence Bohm and Erika Gaspar appeared for plaintiff; Judith Clark Martin and David Ditora appeared for defendant. At the court's request, the parties provided additional briefing and information relating to some of the motions. On December 7, 2011, the court heard argument on defendant's motion in limine number six. On that date, Lawrence Bohm and Erika Gaspar appeared for plaintiff; David Ditora appeared for defendant.

I. Plaintiff's Motions In Limine

The following motions have been decided based upon the record presently before the court. Each ruling is made without prejudice and is subject to proper renewal, in whole or in part, during trial. If a party wishes to contest a pretrial ruling, it must do so through a proper motion or objection, or otherwise forfeit appeal on such grounds. *See* Fed. R. Evid. 103(a);

1 *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 (9th Cir. 2001) (“Where a district
2 court makes a tentative in limine ruling excluding evidence, the exclusion of that evidence may
3 only be challenged on appeal if the aggrieved party attempts to offer such evidence at trial.”)
4 (alteration, citation and quotation omitted). In addition, unless otherwise stated below,
5 challenges to expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.
6 579 (1993) are denied without prejudice. Should a party wish to renew a *Daubert* challenge at
7 trial, it should alert the court, at which point the court may grant limited voir dire the day before
8 such expert may be called to testify.

9 A. Plaintiff’s Motion In Limine One (ECF No. 112)

10 Plaintiff seeks to exclude evidence that she violated medical privacy laws by
11 incorporating patient information into a log book of procedures, event reports, an infection log,
12 and a journal she began to keep shortly before she was terminated. She also asks to bar any
13 testimony by Doris Frazier, defendant’s expert on the Health Insurance Portability
14 Accountability Act (HIPAA), about plaintiff’s alleged violations of federal law. Plaintiff avers
15 she maintained these records in part because of her concerns about patient safety and care and
16 has not disclosed the material except to her lawyers, who in turn provided it to defendant during
17 discovery. Declaration of Ani Chopourian, ECF No. 113 (Chopourian Decl.) ¶¶ 4-11. She
18 argues she is protected by the whistleblower provisions of HIPAA, the evidence is not relevant
19 to any issue in the case, and is prejudicial.

20 Defendant counters that plaintiff’s actions were clear violations of HIPAA and of
21 Mercy General’s policies regarding patient information; that she is not entitled to whistleblower
22 protection; and that Frazier is not a HIPAA expert *per se*, but rather an expert on how defendant
23 handles HIPAA issues. ECF No. 129 at 4-5. Defendant argues that the information is relevant
24 to its affirmative defenses of “after-acquired” evidence and the right to make business decisions.

25 The court does not address defendant’s argument about its affirmative defenses
26 here. Whether defendant may assert this defense is discussed below in connection with

1 plaintiff's motion in limine eight. *See* pages 8-9 below. If there was a violation of patient
2 privacy, it would be relevant as a defense to plaintiff's claim that defendant interfered with
3 plaintiff's prospective economic relations.

4 HIPAA includes privacy provisions that govern the use and disclosure of
5 protected health information. *See Webb v. Smart Document Solutions, LLC.*, 499 F.3d 1078,
6 1084 (9th Cir. 2007) (HIPAA emphasizes privacy, efficiency and modernization); 45 C.F.R.
7 §§160.103 (definitions), 164.502(a) (privacy provision); *see generally* 42 U.S.C. § 1320d-9(b)(3)
8 (defining HIPAA privacy regulation). "As a general rule, HIPAA prohibits disclosure of private
9 medical data. HIPAA reads, 'Except as otherwise permitted or required by this subchapter, a
10 covered entity may not use or disclose protected health information without an authorization.
11 . . .'" *Prescott v. County of Stanislaus*, 2011 WL 2119036, at *3 (E.D. Cal. May 23, 2011)
12 (quoting 45 C.F.R. 164.508(a)). Protected information "includes all individually identifiable
13 health information maintained or transmitted in any form." *McEvoy v. Hillsborough County*,
14 2011 WL 1813014, at *6 (D. N.H. May 5, 2011). "Disclosure means the release, transfer,
15 provision of, access to or divulging in any other manner of information outside the entity holding
16 the information," while "use means, with respect to individually identifiable health information,
17 the sharing, employment, application, utilization, examination, or analysis of such information
18 within an entity that maintains such information." 45 CFR § 160.103. Under HIPAA's privacy
19 provisions, a covered entity may use or disclose protected information to the individual and in a
20 few other defined situations. 45 CFR § 164.502(a)(1).

21 The regulations include a whistleblower provision: "a covered entity is not
22 considered to have violated the requirements of this subpart if a member of its workforce
23 disclosed protected health information" in the belief that the entity's conduct "violates
24 professional or clinical standards" or that the care provided by the covered entity "potentially
25 endangers one or more patients" and the disclosure is made to a health oversight agency or "to

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1 an attorney retained by . . .the workforce member . . .for purposes of determining the legal
2 options with regard to the conduct described” in that subdivision. 45 CFR § 164.502(j).

3 Given the dearth of authority presented by either party, the court declines on the
4 current record to determine whether plaintiff’s transfer of patient information into her journal
5 and reports constitutes use or disclosure of protected information. *But see Vaughn v. Epworth*
6 *Villa*, 537 F.3d 1147, 1153 n.4 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1528 (2009). It
7 similarly declines to decide whether plaintiff is entitled to claim the protection of the
8 whistleblower provisions on these facts. The court will allow defendant to present evidence that
9 plaintiff incorporated patient information into her journal and reports and then removed those
10 documents from Mercy General, and that these actions violated defendant’s policies regarding
11 patient confidentiality and information. This evidence does not create a risk of unfair prejudice
12 nor will it confuse the jury by forays into HIPAA regulations. *See United States v. Hankey*, 203
13 F.3d 1160, 1172 (9th Cir. 2000) (“[r]elevant evidence is inherently prejudicial; but it is only
14 unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant
15 matter under Rule 403. . . . [T]he use of Rule 403 must be cautious and sparing.”).

16 B. Plaintiff’s Motion In Limine Two (ECF No. 109)

17 Plaintiff seeks to exclude any evidence regarding a meal break waiver that she
18 purportedly signed. Defendant argues it could not locate the signed waiver, but offers a blank
19 form and deposition testimony suggesting that plaintiff must have signed such a waiver.
20 Defendant has not established a sufficient foundation for the admission of any blank waiver form
21 or for any testimony that plaintiff signed such a waiver. *See Burrows v. Orchid Island Trs., LLC*.
22 2010 WL 2179108, at *2 (S.D. Cal. May 28, 2010).

23 C. Plaintiff’s Motion In Limine Three (ECF No. 103)

24 Plaintiff seeks to bar admission of any evidence that she made claims of sexual
25 harassment against Kaiser, a former employer; filed a lawsuit against Kaiser alleging wrongful
26 termination; or that she lied about why she left Kaiser. Defendant argues that if plaintiff was

1 disciplined at and terminated from Kaiser, as she claimed in an unidentified lawsuit, she should
2 have included this information on her application to Mercy.

3 Under Rule 404(a) of the Federal Rules of Evidence, character evidence is not
4 admissible to prove action in conformity with the character trait unless it is relevant to show
5 something other than propensity. Generally, evidence of prior lawsuits is excluded under Rule
6 404(a) because it shows a propensity to sue. *Rodriguez v. Chertoff*, 2008 WL 4693395, at *3 (D.
7 Ariz. Oct. 22, 2008) (evidence of prior complaint not admissible to show that plaintiff was
8 hyper-sensitive individual; defendant did not bear burden of showing sufficient similarity to
9 instant suit to support permissible purpose).

10 Citing to *Gastineau v. Fleet Mortgage*, 137 F.3d 490 (7th Cir. 1998), defendant
11 argues that the evidence of a prior lawsuit demonstrates a modus operandi, specifically, that
12 plaintiff claims she is subject to discriminatory conduct “when things don’t go her way.” ECF
13 No. 128 at 5. In *Gastineau*, however, the defendant presented very specific information that the
14 plaintiff, who claimed sexual harassment, had presented a forged document in a prior suit, also
15 claiming sexual harassment, similar to the forged document presented in the current suit. In this
16 case, defendant has presented absolutely no information about the prior lawsuit and so has not
17 shown that it fits within one of the permissible purposes under Rule 404(b).

18 Defendant also claims that the suit alleging termination is also part of its
19 affirmative defense of after-acquired evidence. As noted above, the court will address the
20 defense of after acquired evidence below.

21 **D. Plaintiff’s Motion In Limine Four (ECF No. 120)**

22 Plaintiff seeks to exclude evidence of her “private life,” claiming there is little
23 evidence that she shared details of her sex life at work and that, even if she did, such evidence is
24 presumptively inadmissible. *See* Fed. R. Evid. 412. Defendant argues that the evidence is
25 admissible to rebut plaintiff’s hostile work environment showing, but concedes that such
26 evidence is subject to Rule 412, which restricts the admission of evidence of an alleged victim’s

1 sexual behavior or predisposition in civil and criminal cases. *See B.K.B. v. Maui Police*
2 *Department*, 276 F.3d 1091, 1104 (9th Cir. 2002). Defendant said it will file a Rule 412 motion
3 within two weeks of trial.

4 E. Plaintiff's Motion In Limine Five (ECF No. 108)

5 Plaintiff seeks to exclude the testimony of David Moore, a forensic document
6 examiner, who reviewed plaintiff's journals and drew several conclusions about the entries.
7 Because the court does not have sufficient information to determine whether Moore's testimony
8 addresses those portions of the journals the court finds relevant, *see* pages 12-13 below, the court
9 grants the motion without prejudice to defendant's right to offer Moore as a witness, after
10 alerting court and counsel in sufficient time to allow for voir dire outside the jury's presence.

11 F. Plaintiff's Motion In Limine Six (ECF No. 110)

12 Plaintiff seeks to exclude evidence she claims was not timely disclosed, including
13 materials from her personnel files from earlier employment, slides from a HIPAA training
14 session, and the files created when she sought privileges at two Mercy facilities after her
15 termination. She argues that had she been given all the privileging files before her deposition of
16 the person most knowledgeable about the privileging, she would have conducted the deposition
17 differently and that she would have deposed additional people who provided information to the
18 committee. She also argues she would have conducted additional depositions about the HIPAA
19 training.

20 The motion is denied as to the personnel materials defendant obtained by
21 subpoena. *SEC v. Strauss*, 2009 WL 3459204, at *11 (S.D.N.Y. Oct. 28, 2009) (party has an
22 obligation to obtain materials from third parties on his own, even if it requires a subpoena). It is
23 also denied as to the HIPAA training slides, to the extent they may remain relevant after the
24 court's ultimate ruling on the entirety of plaintiff's motion in limine one.

25 As to the privileging files, the record shows that in plaintiff's March 2011
26 requests for documents, she asked for "any and all documents created after Plaintiff's

1 termination regarding plaintiff” and “any and all documents regarding Plaintiff’s attempt to be
2 recertified after her termination.” It appears that in June 2011, shortly before the discovery
3 cutoff, she requested “the contents of any file maintained in conjunction with the clinical
4 privileges of Plaintiff including but not limited to applications for privileges, notification of
5 denial of privileges, and MEC’s decision regarding privileging.” ECF No. 110 at 2-3; ECF No.
6 146 at 10-15; *compare* ECF No. 122 at 2. In response to some of these requests, defendant
7 asserted that the documents had been provided. ECF No. 146 at 11. On July 29, defendant
8 wrote to plaintiff, noting it had believed that all of plaintiff’s privileging files had been
9 consolidated, but that it had learned the day before that there were four separate files, which it
10 hoped to provide shortly. *Id.* at 17. It offered to postpone the scheduled deposition of Donna
11 Sakach, the person most knowledgeable about the privileging process. *Id.* at 18. It ultimately
12 provided the files to plaintiff on August 26, 2011, after discovery in this case had closed. *Id.* at
13 20; *see* ECF No. 58 (ordering all depositions to be completed by August 5, 2011).

14 Under Rule 26(e)(1)(A) of the Federal Rules of Civil Procedure, a party must
15 supplement or correct a discovery response if it learns that the disclosure or response was
16 incorrect or incomplete. If a party fails to provide information under Rule 26(e), the court may
17 prevent the party from using that information or impose other sanctions “unless the failure was
18 substantially justified or is harmless.”

19 Although plaintiff’s more specific request for the privileging files may have come
20 close to the end of discovery, plaintiff earlier asked for “any and all documents created after
21 Plaintiff’s termination regarding Plaintiff.” Defendant objected that the request was overbroad,
22 but also responded that the material had previously been produced. ECF No. 146 at 11.
23 Defendant does not now identify the documents it earlier produced or suggest that the request
24 was too obscure for it to determine that the privileging files were covered. Defendant has not
25 shown that its failure to timely supplement the discovery was “substantially justified.”

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1 The court does not enter a preclusion order lightly, but on the current record
2 defendant has not made an adequate showing of harmlessness. *See United States v. Sumitomo*
3 *Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1369 (9th Cir. 1980); *Churchill v. U.S.*, 2011 WL
4 444849, at *5 (E.D. Cal. Feb. 8, 2011) (a party may avoid exclusion if it shows that the untimely
5 disclosure was harmless; several factors should be considered: (1) prejudice or surprise to the
6 party against whom the evidence is offered; (2) ability of the party to cure the prejudice; (3)
7 likelihood of disruption of the trial; (4) bad faith or willfulness in failing to disclose). The court
8 grants the motion to exclude the privileging files.

9 G. Plaintiff's Motion In Limine Seven (ECF No. 105)

10 Plaintiff seeks to preclude defendant from offering “cumulative witnesses,”
11 particularly others who worked in the cardiac unit where plaintiff was employed. Defendant
12 counters that it should be able to present witnesses who can describe the work atmosphere as part
13 of its showing that a reasonable person would not have been offended. *See, e.g., Brooks v. City*
14 *of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000) (abusiveness and pervasiveness must be
15 objectively and subjectively apparent). This motion will be denied, subject to focused objections
16 at trial.

17 H. Plaintiff's Motion In Limine Eight (ECF No. 106)

18 Plaintiff argues that defendant should not be able to amend its answer to include
19 the defense of after-acquired evidence. Defendant says its answer includes this defense, even
20 though it did not use the term “after-acquired evidence,” because it alleges “the termination of
21 plaintiff was justifiable, and within the terms and conditions of the contract of employment
22 between the parties” and “plaintiff was guilty of willful misconduct about matters referred to in
23 the Second Amended Complaint, and that such willful misconduct on the part of plaintiff
24 proximately or concurrently contributed to the happening of the loss or damage complained of
25 by plaintiff. . . .” ECF No. 23 at 16 ¶¶ 23, 24.

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1 In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), a
2 wrongful discharge case, the employer learned during discovery that plaintiff had violated
3 company policy and so argued that plaintiff could not prevail on her discrimination claim
4 because she would have been discharged had the company been aware of her misconduct. The
5 Supreme Court said that “the employer could not have been motivated by knowledge it did not
6 have and it cannot now claim that the employee was fired for the non-discriminatory reason.”
7 *Id.* at 359. It recognized, however, that evidence of the employee’s wrong-doing was
8 nevertheless relevant and “bears on the specific remedy to be ordered.” *Id.* at 361. “Where an
9 employer seeks to rely on after-acquired evidence of wrongdoing, it must first establish that the
10 wrongdoing was of such severity that the employee would have been terminated on those
11 grounds alone if the employer had known of it at the time of the discharge.” *Id.* at 362-63.

12 Cases discussing the defense suggest it should be specially pleaded. *See, e.g.*,
13 *Red Deer v. Cherokee County, Iowa*, 183 F.R.D. 642, 653 (N.D. Iowa 1999) (after-acquired
14 evidence is affirmative defense which must be pleaded); *Doyle v. Gonzales*, 2011 WL 2607167,
15 at *1 (E.D. Wash. July 1, 2011) (defendant sought permission to amend answer to include
16 affirmative defense of after acquired evidence); *Stubbs v. Regents of University of California*,
17 2007 WL 1532148, at *8 (E.D. Cal. May 25, 2007) (defense must be pleaded).

18 The court’s pretrial scheduling order set a deadline of June 2010 for amendments
19 to pleadings, noting that any attempt to amend after that date must rest on a showing of good
20 cause. ECF No. 20 at 1.

21 Under Rule 16(b) of the Federal Rules of Civil Procedure, a pretrial scheduling
22 order shall not be modified except upon a showing of good cause. *Johnson v. Mammoth*
23 *Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Only if the court determines that the
24 party seeking amendment has shown good cause will it consider whether amendment is
25 appropriate under Rule 15. *Id.* at 608; *Hood v. Hartford Life and Accident Ins. Co.*, 567
26 F.Supp.2d 1221, 1224 (E.D. Cal. 2008). In *Johnson*, the Ninth Circuit described Rule 16(b)’s

1 good cause standard as focusing on “the diligence of the party seeking the amendment.” It
2 recognized that while “the existence or degree of prejudice to the party opposing the
3 modification might supply additional reasons to deny a motion, the focus is upon the moving
4 party’s reasons If that party was not diligent, the inquiry should end.” *Id.* at 609 (citation
5 omitted); *see also Ultimax Cement Manufacturing Corp. v. CTS Cement Manufacturing*, 587
6 F.3d 1339, 1354 (9th Cir. 2010) (“‘good cause’ has been defeated by undue delay in moving to
7 amend . . .”). In this case, it appears defendant learned that plaintiff had used patient information
8 in her journals during her deposition in March 2010. It has not demonstrated that it acted with
9 diligence in seeking to amend.

10 I. Plaintiff’s Motion In Limine Nine (ECF No. 107)

11 Plaintiff seeks a more complete description of defendant’s trial exhibits. This
12 should be resolved by the parties’ exchange of exhibits twenty eight days before trial.

13 J. Plaintiff’s Motion In Limine Ten (ECF No. 111)

14 Plaintiff seeks to use portions of videotaped depositions during opening statement
15 and to use still pictures from the videos for illustrative purposes, as well as pictures from the
16 cardiac unit at Mercy General and timelines and other demonstrative evidence.

17 The parties are directed to select still pictures of witnesses to be used at trial,
18 which will be added to the binders the court provides to jurors. Plaintiff will not be allowed to
19 use deposition testimony in any form during opening statement, *Carpenter v. Forest Meadows*
20 *Owners Ass’n.*, 2011 WL 3207778, at *7 (E.D. Cal. July 27, 2011), but may use pictures from
21 the cardiac unit and a timeline so long as she has provided copies of what she intends to use
22 during the exchange of exhibits, and subject to any objections by defendant made prior to
23 opening.

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1 II. Defendant's Motions In Limine

2 A. Defendant's Motion In Limine One (ECF No. 75)

3 Defendant seeks to exclude a number of "event reports" prepared by plaintiff,
4 arguing that they are hearsay. It argues that only two such reports were included in its
5 computerized event reporting system (IVOS) and so, absent evidence that the additional reports
6 were submitted to supervisors, the additional reports cannot constitute verbal acts. Defendant
7 concedes that it provided these reports to plaintiff in discovery, but contends that this was
8 inadvertent, as it had originally received the forms from plaintiff's former counsel, as shown by
9 the Bates stamps. It also argues that plaintiff acknowledges she did not submit all the reports to
10 her supervisors.

11 Plaintiff counters that defendant has not shown that the reports were not entered
12 into the computerized system or that they originally came from plaintiff's counsel.

13 Defendant has not established a sufficient foundation for the court to conclude
14 that plaintiff's handwritten reports would not necessarily have been transferred to defendant's
15 computerized system: it has offered only the declaration of its counsel, who does not
16 demonstrate first hand familiarity with the system. In light of plaintiff's reliance on portions of
17 Doris Frazier's deposition showing the inadequacies of the system's search function and the
18 limitations of the actual searches run, it is possible that these reports were made a part of the
19 reporting system. *Compare United States v. Diaz-Lopez*, 625 F.3d 1198, 1200 (9th Cir. 2010),
20 *cert. denied*, 131 U.S. 2918 (2011) (foundation for evidence of database search sufficient when
21 agent testified he was familiar with the process of searching the records and the government's
22 record keeping practices). Any complaints entered into the system are verbal acts and as such
23 are not hearsay. *United States v. Faulkner*, 439 F.3d 1221, 1226 (10th Cir. 2006) (verbal acts,
24 which are statements themselves affecting the rights of the parties or are circumstances affecting
25 their rights).

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1 Similarly, defendant has not shown that it received the documents exclusively
2 from plaintiff's counsel. That plaintiff's counsel provided the documents as part of its initial
3 disclosures does not preclude the fact that plaintiff may have submitted them to defendant's
4 personnel office as well and kept copies.

5 To the extent plaintiff agrees she did not provide the reports to a supervisor or to
6 Human Resources, defendant's objection is well-taken. However, defendant relies on portions of
7 plaintiff's deposition that do not definitively show plaintiff's failure to give certain reports to her
8 supervisors. *See, e.g.*, ECF No. 75-1 at 44 (plaintiff assumes she did not give particular report to
9 medical staffing, but doesn't address whether she sent it to Human Resources). At the same
10 time, plaintiff does clearly admit she did not submit the following reports to Human Resources
11 or to a supervisor: a report dated April 8, 2007, Bates-stamped P000183; a report dated May
12 2007, Bates-stamped P000184; a report dated July 11, 2007, Bates-stamped P000185-187; a
13 report dated August 10, 2007, Bates-stamped P000188; and an undated report, Bates-stamped
14 P000222-P000223. Defendant's motion with respect to these five reports is well taken. This
15 ruling does not preclude plaintiff from offering evidence of verbal complaints and from using
16 these reports to refresh her recollection, if the proper foundation is laid. *See* ECF No. 75-1 at 43
17 (whenever plaintiff documented an incident in writing, she told Jean about it).

18 **B. Defendant's Motion In Limine Two (ECF No. 86)**

19 Defendant asks the court to exclude plaintiff's journals and case logs that she
20 began to keep approximately a month before her termination. At the hearing on these motions,
21 defendant withdrew its objection to those portions of the journals referring to patient safety, but
22 argued that the sections dealing with affairs between employees and incidents of female
23 employees fondling male employees and physicians at the hospital are not relevant. Defendant
24 also seeks to exclude plaintiff's written comments about her supervisor's alcoholism and
25 drinking on the job. It argues that the documents are hearsay, not relevant, and prejudicial.
26 Plaintiff contends they are admissible as verbal acts, because they prompted defendant to

1 retaliate by denying her privileges when the documents were produced. Plaintiff also argues the
2 documents may be used for a variety of non-hearsay uses.

3 Hearsay is an out of court statement offered to prove the truth of that statement.
4 FED. R. EVID. 801(c). However, if the significance of the statement is the fact that it was made,
5 rather than its truth, the statement is not hearsay. *Stuart v. UNUM Life Ins. Co. of America*, 217
6 F.3d 1145, 1154 (9th Cir. 2000) (admission of group insurance policy); *United States v.*
7 *Henderson*, 626 F.3d 326, 333-34 (6th Cir. 2010) (victim’s offer to help FBI not admissible to
8 show his information was truthful, but rather to show why defendant retaliated against him).
9 Defendant concedes that plaintiff told her supervisors and HR representatives that she was
10 recounting incidents of harassment in her journal, but notes she refused to produce the journal
11 until her deposition. ECF No. 86 at 2. Plaintiff theorizes that defendant denied her privileges
12 based on the production of the journal and thus argues its existence and production shows the
13 denial of privileges was part of the Title VII retaliation.

14 Under Title VII, an employer may not take an adverse employment action against
15 an employee for participating in any investigation of or opposing any practice made illegal by
16 Title VII. *Surrell v. California Water Service Co.*, 518 F.3d 1097, 1107 (9th Cir. 2008); *O’Day*
17 *v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996). Action taken after the
18 end of the employment relationship may still constitute retaliation if it “‘is related to or arises out
19 of the employment relationship.’” *Hashimoto v. Dalton*, 118 F.3d 671, 675 (9th Cir. 1997)
20 (quoting *Passer v. American Chemical Soc.*, 935 F.2d 322, 330 (D.C. Cir. 1991)) (dissemination
21 of negative employment reference); *Pieszak v. Glendale Adventist Medical Center*, 112
22 F.Supp.2d 970, 994 (C.D. Cal. 2000) (failure to forward documents to Medical Board). To the
23 extent that the journal records instances of sex-based talk or employee sexual relationships, it
24 may be deemed relevant to plaintiff’s claim of a hostile work environment. *See Ocheltree v.*
25 *Scollon Productions, Inc.*, 335 F.3d 325, 332 (4th Cir. 2003) (discussion of sexual exploits);
26 *Barclay v. Mercy Health Services-Iowa*, 2009 WL 2462296, at *12 (N.D. Iowa Aug. 12, 2009)

1 (sexual discussion condoned by management). Its production during discovery may be deemed
2 protected activity, which renders the keeping of the journal a verbal act. *Compare Glover v.*
3 *South Carolina Law Enforcement Div.*, 170 F.3d 411, 413 (4th Cir. 1999). Plaintiff's
4 description of her supervisor's drinking, however, has no relationship to any Title VII claim and
5 therefore would not be admissible.

6 C. Defendant's Motion In Limine Three (ECF No. 79)

7 Defendant seeks to exclude any findings issued by the Administrative Law Judge
8 (ALJ) who presided over a hearing related to plaintiff's claim for unemployment benefits.
9 Plaintiff says she does not intend to offer the findings, but rather may seek to use some of the
10 documents or testimony from the hearing to impeach defendant's witnesses. Defendant counters
11 that the impeachment would be improper because there is no transcript of the proceedings.
12 Defendant also says the nature of the hearing should not be disclosed, but has not clearly
13 explained how it would be prejudiced by the jury's learning of this. *See Hankey*, 203 F.3d at
14 1172.

15 To the extent this motion is based on the ALJ's findings, it is granted; to the
16 extent it is based on potential impeachment, the court cannot resolve it in a vacuum and will rely
17 on the parties to make appropriate objections at trial.

18 D. Defendant's Motion In Limine Four (ECF No. 80).

19 This unopposed motion to redact patient information from trial exhibits is
20 granted.

21 E. Defendant's Motion In Limine Five (ECF No. 81)

22 This motion to bifurcate the trial on punitive damages is denied.

23 F. Defendant's Motion In Limine Six (ECF No. 82)

24 Defendant seeks an order "precluding plaintiff from presenting any evidence on
25 claims that were not included in her administrative complaint to the EEOC. This includes claims
26 of retaliation, claims related to patient care, and specific evidence irrelevant to the vague factual

1 allegations in her administrative EEOC complaint.” ECF No. 82 at 1. The exhaustion
2 requirement applies to plaintiff’s Title VII claims only; whether or not her complaints about
3 meal and rest breaks or patient care were included is not relevant as her state causes of action are
4 not subject to the EEOC’s jurisdiction.

5 As more fully discussed below, this motion is not properly brought in limine.
6 Nevertheless, because of its jurisdictional implications, the court requested further briefing.

7 The Supreme Court has held “that filing a timely charge of discrimination with
8 the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a
9 statute of limitations, is subject to waiver, estoppel, and equitable tolling.” *Zipes v. TransWorld*
10 *Airlines, Inc.*, 455 U.S. 385, 393 (1982). Despite this language, the Ninth Circuit maintains that
11 “[t]o establish federal subject matter jurisdiction, [plaintiff] was required to exhaust her EEOC
12 administrative remedies before seeking federal adjudication of her claims.” *EEOC v. Farmer*
13 *Bros. Inc.*, 31 F.3d 891, 899 (9th Cir. 1994). The Ninth Circuit acknowledges *Zipes*, recognizes
14 that some of its own cases have found the exhaustion requirement to be a condition precedent
15 rather than jurisdictional, but says “our case law also holds that substantial compliance with the
16 presentment of discrimination complaints to an appropriate administrative agency is a
17 jurisdictional requisite.” *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001)
18 (emphasis in original). Other authority differentiates between the timeliness, which is subject to
19 waiver, estoppel and equitable tolling, and the ultimate filing. *Surrell v. California Water*
20 *Service Co.*, 518 F.3d at 1104 (“Title VII’s timeliness provision is entirely separate from Title
21 VII’s jurisdictional provisions and ‘does not speak in jurisdictional terms or refer in any way to
22 the jurisdiction of the district courts.’”); *EEOC v. Hotspur Resorts Nevada, Ltd.*, 2011 WL
23 4737409, at *2 (D. Nev. Oct. 5, 2011) (filing an EEOC complaint is jurisdictional, but the timely
24 filing is not).

25 “Subject matter jurisdiction extends to all claims of discrimination that fall within
26 the scope of the EEOC’s actual investigation or an EEOC investigation that could reasonably be

1 expected to grow out of the charge.” *Vasquez v. County of Los Angeles*, 349 F.3d 634, 644 (9th
2 Cir. 2003). To determine what is related, a court must consider ““the alleged basis of the
3 discrimination, dates of discriminatory acts specified with the charge, perpetrators of the
4 discrimination named in the charge, and any locations at which the discrimination is alleged to
5 have occurred.”” *Id.* at 644. A court may also consider the EEOC intake questionnaire in
6 determining what was exhausted. *B.K.B. v. Maui Police Dept.*, 276 F.3d at 1101. This court
7 must construe the language of the EEOC charges liberally in determining their scope. *Sosa v.*
8 *Hiraoka*, 920 F.2d 1451, 1458 (9th Cir. 2002).

9 The exhaustion requirement is not rigid, however, for “[e]ven when an employee
10 seeks judicial relief for claims not listed in the original EEOC charge, the complaint
11 ‘nevertheless may encompass any discrimination like or reasonably related to the allegations of
12 the EEOC charge.’” *Freeman v. Oakland Unified School District*, 291 F.3d 632, 636 (9th Cir.
13 2002) (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973)). The
14 Ninth Circuit has also said that “subject matter jurisdiction extends over allegations of
15 discrimination that either ‘fell within the scope of the EEOC’s *actual* investigation or an EEOC
16 investigation which *can reasonably be expected* to grow out of the charge of discrimination.””
17 *Id.* (quoting *B.K.B. v. Maui Police Dept.*, 276 F.3d at 1100 (emphasis in original)).

18 In her EEOC complaint filed in February 2009, plaintiff said “throughout my
19 employment I was subjected to derogatory remarks concerning my . . . sex. Additionally, I was
20 continuously sexually harassed. The offending persons were various doctors & employees.”
21 ECF No. 82-1 at 4. She also said she was falsely accused of several things and terminated for
22 not reporting for work on a Sunday when she had not been scheduled. Finally, she said “I
23 believe I have been discriminated against because of my . . . sex (female), . . . and in retaliation
24 for engaging in protected activity . . .” *Id.* On the questionnaire, she answered the question “I
25 believe that I was discriminated against by the following organization(s),” by checking the box

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1 “employer” and then by listing a number of individuals, but not Dr. Kaplon, who is mentioned in
2 the Second Amended Complaint.

3 On this record, the court cannot say plaintiff failed to exhaust her hostile work
4 environment claim. The Second Amended Complaint alleges that plaintiff was “subjected to a
5 hostile work environment in which sexual comments and jokes were made, gender-based
6 comments permeated the workplace . . . often at the expense of Plaintiff who found the
7 atmosphere to be both offensive and demeaning.” ECF No. 19 ¶ 41. It also alleges that
8 “Plaintiff repeatedly complained about the comments of the surgeons and coworkers as well as
9 their behavior” and “about Defendants’ failure and refusal to take action and address and remedy
10 hostile work environment,” but that defendant responded by retaliating against her in many
11 ways. *Id.* ¶¶ 54-57. These claims are encompassed within her EEOC complaint and intake
12 questionnaire: plaintiff alleges she was sexually harassed and subjected by derogatory comments
13 by “various doctors and employees,” facts which are related to the claims in the SAC and which
14 would have been uncovered by a reasonable investigation. *See Vasquez v. County of Los*
15 *Angeles*, 349 F.3d at 645. Similarly, in her intake questionnaire, plaintiff says she believes she
16 was retaliated against for complaining about the work environment. ECF No. 139 at 5. The
17 retaliation claims in the SAC are consonant with this allegation.

18 The court declines to decide at this time whether the 2010 denial of privileges as
19 retaliation for plaintiff’s production of her journal is reasonably related to the 2009 EEOC
20 complaint.¹ The evidence concerning the denial of privileges is admissible in connection with
21 plaintiff’s claim of interference with prospective economic relations; the court will reevaluate the
22 connection if necessary during trial. *See Chung v. Pomona Valley Community Hospital*, 667
23 F.2d 788, 792 (9th Cir. 1982).

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26 ¹ A right to sue letter was issued on March 27, 2009. ECF No. 82-1 at 6.

1 G. Defendant's Motion In Limine Seven (ECF No. 83)

2 Defendant asks the court to dismiss plaintiff's eighth cause of action, interference
3 with economic relations stemming from defendant's denial of plaintiff's application for hospital
4 privileges, because plaintiff failed to exhaust internal remedies. Plaintiff complains that this also
5 is a substantive motion, not properly raised as a motion in limine and argues that the denial of
6 privileges is relevant not only to her eighth cause of action, but also to her claim of retaliation.

7 Plaintiff is correct that this is a substantive motion, not properly raised at this
8 stage. Defendant's reliance on the pretrial scheduling order is unavailing: in that order, the court
9 said that "non-trial worthy issues could be eliminated *sua sponte* '[i]f the pretrial conference
10 discloses that no material facts are in dispute and that the undisputed facts entitle one of the
11 parties to judgment as a matter of law.'" ECF No. 20 at 2. This motion presents no clear set of
12 undisputed facts. Indeed, the motion is, as plaintiff argues, a substantive motion disguised as a
13 motion in limine, which the court "may . . . summarily deny." *Id.*

14 The motion also fails on its merits. In California, a medical professional may
15 seek damages for the withdrawal or denial of privileges only after she has exhausted the
16 hospital's internal review procedure and has been successful in a mandamus action in setting
17 aside the denial. *Westlake v. Community Hospital v. Superior Court*, 17 Cal.3d 465, 468 (1976).
18 It is defendant's burden to show an adequate remedy was available to plaintiff. *Id.* at 477. An
19 adequate procedure must provide a right to be heard and a decision rendered through a fair
20 and sufficient process. *Payne v. Anaheim Memorial Hospital*, 130 Cal.App.4th 729, 739-40
21 (2005).

22 Defendant has provided a copy of a letter from a Dr. Wood, denying plaintiff's
23 application for privileges, advising plaintiff she had a right "under the Medical Staff Rules and
24 Regulations to challenge the MEC's recommendation by requesting a review." ECF No. 83-1 at
25 22. It continued, "to exercise this right, you must file a written grievance (i.e., a letter objecting
26 to the recommended action and requesting an interview) with the MEC" *Id.*

1 If you do submit a grievance, the MEC . . . shall conduct an
2 interview. The purpose of the interview is to allow both you and
3 the MEC the opportunity to discuss the situation and to produce
4 evidence in support of their respective positions. At the direction
5 of the MEC, you will be given an opportunity to submit
6 information to the MEC. . . prior to or at the time of the interview.

7 Please note that any meeting requested by you does not constitute
8 a hearing under Article VII of the Medical Staff Bylaws and the
9 procedural rules therein do not apply.

10 ECF No. 83-1 at 22-23. The letter said it enclosed a different provision of the bylaws, which
11 defendant has not provided here. This letter is insufficient to show that an adequate remedy was
12 available for plaintiff to appeal the denial of privileges. Defendant has not borne its burden.

13 H. Defendant's Motion In Limine Eight (ECF No. 84)

14 Defendant claims that plaintiff is estopped from pursuing her causes of action for
15 interference with economic advantage and defamation because, during settlement and again
16 during the preparation of the pretrial statement, she said she might drop these claims. As
17 defendant has made no showing of prejudice, this motion is denied.

18 I. Defendant's Motion In Limine Nine (ECF No. 85)

19 Defendant seeks to preclude plaintiff from presenting evidence that she was not
20 provided adequate meal and rest breaks, arguing that plaintiff is exempt from this requirement
21 under California Labor Code §512(b) and 5 California Code of Regulations § 11040. Plaintiff
22 counters that this, too, is a substantive motion and offers a copy of a letter to plaintiff classifying
23 her as non-exempt. ECF No. 131 at 9, 14.

24 Defendant has not shown that the facts on this issue are undisputed: plaintiff's
25 submission raises a triable issue about plaintiff's status. The court declines to resolve this
26 substantive dispute disguised as an evidentiary motion prior to trial.

J. Defendant's Motion In Limine 10 (ECF No. 100)

Defendant objects to plaintiff's numerous designations of portions of videotaped
depositions she seeks to present at trial. In response, plaintiff agrees she will not present

1 testimony from several of the witnesses and argues that the portions she still seeks to present are
2 statements of a party opponent under Rule 801(d)(2) of the Federal Rules of Evidence. Without
3 seeing the portions she seeks to offer, however, the court cannot determine whether the witness
4 was in fact acting in a representative capacity.

5 The parties are directed to provide the portions of the depositions they seek to
6 offer, with the requested portions highlighted and the counter designations highlighted in a
7 different color, accompanied by objections, by **January 9, 2012**.

8 K. Defendant's Motion In Limine 11 (ECF No. 101)

9 Defendant seeks to exclude testimony from other employees who believe
10 plaintiff's termination was wrong. This is denied without prejudice to renewal by specific
11 objection at trial.

12 L. Defendant's Motion In Limine 12 (ECF No. 102)

13 Defendant seeks to preclude plaintiff from presenting evidence of wage loss after
14 August 31, 2009, when she was hired by RAS. It continues that even though plaintiff lost that
15 job in June 2010, almost certainly as the result of the denial of privileges at Mercy General and
16 Mercy San Juan, she failed to pursue internal remedies. As noted above, in connection with
17 defendant's motion in limine seven, defendant has not borne its burden of showing that any
18 adequate remedies were available, so to the extent this motion is based on a failure to exhaust, it
19 is denied.

20 Defendant also cites *Stanchfield v. Hamer Toyota, Inc.*, 37 Cal.App.4th 1495,
21 1502 (1995). In that case, the court examined the duty to mitigate damages "in the context of a
22 discharged employee who, after finding and accepting comparable employment, loses the
23 position because of his or her own conduct"; it concluded that a jury considering the discharged
24 employee's duty to mitigate damages "may properly take into account that employee's failure to
25 retain comparable employment once it has been secured." *Id.* Defendant argues that *Stanchfield*
26 supports an order limiting plaintiff's ability to present evidence of wage loss. Plaintiff counters

1 that the denial of privileges, which led to her termination from RAS, was part of defendant's
2 continued retaliation against her. The court declines to resolve the disputed evidence on the
3 question of plaintiff's failure to mitigate on a motion in limine, but will instead leave the
4 resolution of the question to the jury. *Carpenter v. Forest Meadows Owners Ass'n.*, 2011 WL
5 3207778, at *10 (E.D. Cal. July 27, 2011).

6 III. The Order To Show Cause

7 On November 10, 2011, the court issued an order, directing defendant's counsel
8 Judith Martin to show cause why she should not be sanctioned for filing motions in limine 3, 7
9 and portions of 12, which are substantive motions as noted above. ECF No. 145. Ms. Martin
10 has responded that she did not act in bad faith, but rather filed the motions because she believed
11 they raised valid evidentiary issues.

12 A motion in limine should not be used to prevent a party from pursuing the
13 theories supporting its causes of action. *ABC Beverage Corp. & Subsidiaries v. United States*,
14 2008 WL 5424174, at *2 (W.D. Mich. Dec. 4, 2008). Another court has rejected the use of such
15 motions as "preemptive weapons. . . which . . . endeavor to strike in shotgun fashion at whole
16 topics and sources of prospective evidence . . ." and, as such, "would effectively serve as a form
17 of advance trial of substantive portions of the case, or indeed as a substitute for the trial itself."
18 *TVT Records v. Island Def Jam Music Group*, 250 F.Supp.2d 341, 344 (S.D.N.Y. 2003).

19 Although counsel should be aware of this body of law, this court acknowledges that the pretrial
20 scheduling order does not unmistakably preclude the filing of such broad motions; it warns only
21 that substantive motions disguised as motions in limine may be summarily denied. After careful
22 consideration, the court therefore concludes that Ms. Martin did not act in bad faith, vexatiously,
23 wantonly, or for oppressive reasons. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

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1 IT IS THEREFORE ORDERED that:

2 1. Plaintiff's motion in limine one (ECF No. 112) is denied in part and granted in
3 part, with the limitations on permissible evidence identified in the body of this order, with
4 further resolution of this motion deferred until trial;

5 2. Plaintiff's motion in limine two (ECF No. 109) is granted, based on the record
6 before the court;

7 3. Plaintiff's motion in limine three (ECF No. 103) is granted, based on the
8 record before the court;

9 4. Plaintiff's motion in limine four (ECF No. 104) is granted, without prejudice
10 to defendant's filing a motion under Rule 412 of the Federal Rules of Evidence;

11 5. Plaintiff's motion in limine five (ECF No. 108) is granted without prejudice to
12 defendants offering Moore for voir dire prior to his being called to testify at trial;

13 6. Plaintiff's motion in limine six (ECF No. 110) is granted, based on the record
14 before the court;

15 7. Plaintiff's motion in limine seven (ECF No. 105) is denied without prejudice;

16 8. Plaintiff's motion in limine eight (ECF No. 106) is granted;

17 9. Plaintiff's motion in limine nine (ECF No. 107) is denied without prejudice
18 pending the parties' exchange of exhibits;

19 10. Plaintiff's motion in limine ten (ECF No. 111) is denied insofar as plaintiff
20 seeks to use portions of depositions in opening statement but granted in other respects, subject to
21 the parties' agreement, as discussed in the body of this order;

22 11. Defendant's motion in limine one (ECF No. 75) is granted in part and denied
23 in part, as discussed in the body of this order;

24 12. Defendant's motion in limine two (ECF No. 86) is granted as to plaintiff's
25 written comments about her supervisor's alcoholism and drinking on the job, and otherwise
26 denied, based on the record before the court;

1 13. Defendant's motion in limine three (ECF No. 79) is granted in part and
2 denied in part, as discussed in the body of the order;

3 14. Defendant's motion in limine four (ECF No. 80) is granted;

4 15. Defendant's motion in limine five (ECF No. 81) is denied;

5 16. The ruling on defendant's motion in limine six (ECF No. 82) is denied
6 without prejudice;

7 17. Defendant's motion in limine seven (ECF No. 83) is denied;

8 18. Defendant's motion in limine eight (ECF No. 84) is denied;

9 19. Defendant's motion in limine nine (ECF No. 85) is denied;

10 20. Ruling on defendant's motion in limine ten (ECF No. 100) is deferred
11 pending the parties' further submissions as directed in the body of this order;

12 21. Defendant's motion in limine eleven (ECF No. 101) is denied without
13 prejudice;

14 22. Defendant's motion in limine twelve (ECF No. 102) is denied; and

15 23. The order to show cause issued November 2, 2011 is discharged.

16 DATED: December 20, 2011.

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19 UNITED STATES DISTRICT JUDGE
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