

*Not To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

DANIEL MINTEN,  
Plaintiff,

vs.

DOUGLAS L. WEBER, individually and  
in his official capacity as Sheriff of  
Osceola County, Iowa,  
Defendant.

No. C11-4004-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING THE  
PARTIES' MOTIONS IN LIMINE**

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Now pending before me are the parties' motions in limine filed in anticipation of a February 6, 2012, jury trial on damages on a former deputy sheriff's First Amendment retaliation claim against the county sheriff. The former deputy alleged, and I held on cross-motions for summary judgment,<sup>1</sup> that he had been fired for offering to testify in support of a citizen's claim, in a pending lawsuit before this court, that the county sheriff had retaliated against the citizen and his son for their public criticism of the county sheriff, in violation of their First Amendment rights, by denying their applications for concealed weapons permits.<sup>2</sup> The county sheriff now seeks to exclude evidence of the outcome of the administrative hearing on the former deputy's unemployment compensation claim, including references to administrative findings and conclusions, and evidence of the outcome of the citizens' litigation against the county sheriff. The former deputy seeks to exclude evidence of other disciplinary action against him by the county sheriff and evidence of any complaints by citizens against him during the course of his employment as a deputy sheriff. Each party has resisted the other's motion to exclude the evidence in question.

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<sup>1</sup>See *Minten v. Weber*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 6754066 (N.D. Iowa Dec. 22, 2011).

<sup>2</sup>See *Dorr v. Weber*, 741 F. Supp. 2d 1010 (N.D. Iowa 2010) (memorandum opinion and order regarding bench trial on the merits, finding for one of the citizens).

## ***I. INTRODUCTION***

### ***A. Factual Background***

The factual background to the present lawsuit is set out in some detail in my ruling on the parties' cross-motions for summary judgment. *See Minten v. Weber*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2011 WL 6754066, at \*2-\*4 (N.D. Iowa Dec. 22, 2011).<sup>3</sup> A less detailed summary of the facts is sufficient for present purposes.

On August 31, 2009, plaintiff Daniel Minten, a deputy sheriff with the Osceola County Sheriff's Department, stopped a vehicle being driven by Emily Dorr for speeding. Ms. Dorr is the daughter of Paul Dorr and the sister of Alexander Dorr, the plaintiffs in a then-pending federal lawsuit in this court, the Dorr Lawsuit, concerning whether the defendant here, County Sheriff Douglas Weber, had violated the Dorrs' First Amendment rights by denying their applications for nonprofessional permits to carry weapons, even though they met all of the statutory criteria necessary for issuance of such permits, in retaliation for public comments, including criticisms that they had made of Sheriff Weber. After Minten gave Ms. Dorr a verbal warning for speeding, he talked to her about the Dorr Lawsuit and offered to testify on Paul's behalf, but noted that he would have to be subpoenaed. Minten and Ms. Dorr's entire conversation about the Dorr Lawsuit lasted approximately two minutes. Minten's offer to testify was unrelated to the traffic stop and was not part of his official duties.

At some point, Weber viewed a video recording of Ms. Dorr's traffic stop when searching for a video recording of a later traffic stop by Minten that had resulted in a

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<sup>3</sup>Similarly, my findings of fact after a bench trial in the related suit, by Paul Dorr and his son Alexander Dorr, are set forth in *Dorr*, 741 F. Supp. 2d at 1012-16.

citizen complaint.<sup>4</sup> Weber then showed the recording to the county attorney, several deputy sheriffs, and at least one county supervisor. In a meeting on February 1, 2010, after Weber had notified Minten by letter that he wished to speak with him about various matters, including Ms. Dorr's traffic stop, Weber fired Minten for his actions during Ms. Dorr's traffic stop, labeling Minten's actions "insubordination." Also on February 1, 2010, Weber memorialized Minten's firing in a file memorandum, which stated, "Effective February 1, 2010 Deputy Dan Minten is terminated for insubordination. Deputy Minten is not eligible for re-hire." Weber told deputy sheriffs that it was inappropriate for Minten to offer to testify while on duty.

After his firing, Minten made a claim for unemployment compensation, which Weber resisted on the ground that Minten had been fired for misconduct. Weber also made various statements about his reasons for firing Minten in the administrative proceedings on Minten's claim for unemployment compensation. After an administrative appeal before the Iowa Workforce Development Department, in which Weber was not required to and did not participate, Minten was awarded unemployment compensation.

### ***B. Procedural Background***

On January 10, 2011, Minten filed a Complaint pursuant to 42 U.S.C. §§ 1983 and 1988 (civil rights statutes) and 28 U.S.C. § 2201 (declaratory judgment) asserting a First Amendment retaliation claim by a public employee against Weber, individually and in his capacity as Sheriff of Osceola County. Somewhat more specifically, in his Complaint, Minten alleged that his employment as an Osceola County Deputy Sheriff was terminated by Weber, in violation of his First Amendment right to free speech, because he offered

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<sup>4</sup>The record does not indicate precisely when Weber viewed the video.

to testify in the Dorr Lawsuit. He sought declaratory judgment that Minten violated his free speech rights; compensatory damages, including lost wages and benefits; punitive damages; attorney fees and costs; and such other relief as the court might deem just and equitable.

On September 30, 2011, Minten and Weber each filed a Motion for Summary Judgment (docket nos. 18 and 19). Weber argued that Minten was not protected from discipline by the First Amendment because he was acting in his official capacity as a deputy sheriff when he made the statement at issue and that, if Minten was speaking as a citizen at the time that he made the statements to Ms. Dorr, he had no constitutionally protected right to engage in purely private conduct while working as a deputy sheriff for Osceola County. Minten sought summary judgment in his favor on the ground that his statements related to a matter of public concern and Weber fired him in retaliation for making the statements, in violation of the First Amendment.

In my ruling on the parties' cross-motions for summary judgment, I found the following, as a matter of law: (1) that Minten made his offer to Ms. Dorr to testify in the Dorr Lawsuit in his capacity as a private citizen rather than as a deputy sheriff; (2) that Minten's speech concerned his willingness to testify about what he viewed as Weber's misconduct in the issuance of concealed weapons permits, which was a matter of public concern; (3) that the balance of interests favored constitutional protection of Minten's speech; (4) that Minten suffered adverse employment action; (5) that no reasonable juror could find that Minten's offer to testify in the Dorr Lawsuit was not a motivating factor in Weber's decision to fire him; and (6) that Weber had failed to raise a genuine issue of material fact that he would have fired Minten regardless of whether he offered to testify, so that a reasonable jury would have no choice but to find that Minten was fired because he engaged in protected speech and that, absent his offer to testify in the Dorr Lawsuit, he

would not have been fired. Therefore, I granted Minten's Motion for Summary Judgment on his claim that he was fired in retaliation for exercising his First Amendment rights and denied Weber's cross-motion. This disposition of the parties' cross-motions for summary judgment left Minten's damages as the only issue remaining for trial. *See Minten*, \_\_\_ F. Supp. 2d at \_\_\_, 2011 WL 6754066 at \*15.

A jury trial on Minten's damages is now set to begin on February 6, 2012.

In anticipation of that trial, the parties filed Motions In Limine (docket nos. 26 and 27) on December 28, 2011. Minten filed his Resistance (docket no. 28) to Weber's Motion In Limine on January 11, 2012, and Weber filed his Resistance (docket no. 29) to Minten's Motion In Limine on January 20, 2012. I find that these Motions can be resolved without oral arguments.

## ***II. LEGAL ANALYSIS***

### ***A. Rule 104 And Preliminary Question Of Admissibility***

As a preliminary matter, I note that Rule 104 of the Federal Rules of Evidence provides, generally, that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . ." FED. R. EVID. 104. Such preliminary questions may depend upon such things as whether the factual conditions or legal standards for the admission of certain evidence have been met. *See id.*, Advisory Committee Notes, 1972 Proposed Rule. This rule, like the other rules of evidence, must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. I conclude that preliminary determination of the admissibility of the evidence put at issue in the parties' Motions In Limine will likely serve the ends of a fair and expeditious presentation of issues

to the jury. Therefore, I turn to consideration of the standards applicable to the admissibility of the evidence challenged here.

### ***B. Applicable Rules Of Evidence***

Both parties base their Motions In Limine on the irrelevance of the evidence identified or its potential for prejudice or confusion outweighing any probative value that it may have. Therefore, before turning to consideration of the challenged evidence, I will survey the Federal Rules of Evidence concerning relevance and prejudice.

Rule 401 of the Federal Rules of Evidence defines relevant evidence as “evidence having 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.” Rule 402 provides that relevant evidence is generally admissible, but irrelevant evidence is not.

Rule 403 provides for exclusion of even relevant evidence on various grounds, as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403. As the Eighth Circuit Court of Appeals recently explained,

[U]nder Rule 403, the [challenged evidence’s] probative value must be *substantially* outweighed by *unfair* prejudice. “Evidence is not unfairly prejudicial because it tends to prove guilt, but because it tends to encourage the jury to find guilt from improper reasoning. Whether there was unfair prejudice depends on whether there was an undue tendency to suggest

decision on an improper basis.” *United States v. Farrington*, 499 F.3d 854, 859 (8th Cir. 2007) (quotations omitted).

*United States v. Muhlenbruch*, 634 F.3d 987, 1001 (8th Cir. 2011) (emphasis in the original); *United States v. Myers*, 503 F.3d at 676, 681 (9th Cir. 2007) (“Rule 403 ‘does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party’s case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis.’” (quoting *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981), *aff’d sub nom. Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983))).

The Advisory Committee Notes to Rule 403 explain that a decision on an “improper basis” is “commonly, though not necessarily, an emotional one.” FED. R. EVID. 403, Advisory Committee Notes; *see also United States v. Jiminez*, 487 F.3d 1140, 1145 (8th Cir. 2007) (quoting this note); *United States v. Dierling*, 131 F.3d 722, 730-31 (8th Cir. 1997) (considering whether evidence was unfairly prejudicial, because it might lead to a decision on an improper basis, where it purportedly had no connection to the charged offense and revealed grisly or violent behavior that made the defendant appear “dangerous”). Unfairly prejudicial evidence has also been described as evidence that is “so inflammatory on [its] face as to divert the jury’s attention from the material issues in the trial.” *United States v. Adams*, 401 F.3d 886, 900 (8th Cir. 2005) (quoting *United States v. Shoffner*, 71 F.3d 1429, 1433 (8th Cir. 1995)). “Under Rule 403, district courts have broad discretion to assess unfair prejudice, and are reversed only for an abuse of discretion.” *Myers*, 503 F.3d at 681 (citing *United States v. Henderson*, 416 F.3d 686, 693 (8th Cir. 2005), *cert. denied*, 546 U.S. 1175, 126 S. Ct. 1343, 164 L. Ed. 2d 57 (2006)); *accord Muhlenbruch*, 634 F.3d at 1001 (“We review the district court’s decision not to exclude evidence under Rule 403 for an abuse of discretion.”).

Minten argues that some of the evidence that Weber seeks to exclude is admissible pursuant to Rule 404(b) of the Federal Rules of Evidence. As the Eighth Circuit Court of Appeals has recently explained,

Federal Rule of Evidence 404(b) prohibits the admission of “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” Fed. R. Evid. 404(b). It does not, however, prohibit the admission of such evidence if it is “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* Whether Rule 404(b) prohibits the admission of a particular piece of evidence depends, therefore, on the purpose for which it is offered. *See Huddleston v. United States*, 485 U.S. 681, 687, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988) (“Generally, [Rule 404] do[es] not flatly prohibit the introduction of such evidence, but instead limit[s] the purpose for which it may be introduced.”).

*United States v. Maxwell*, 643 F.3d 1096, 1101 (8th Cir. 2011). As the Eighth Circuit Court of Appeals has also explained, “Admissibility of 404(b) evidence is governed by four factors: the evidence must be 1) relevant to a material issue; 2) proven by a preponderance of the evidence; 3) of greater probative value than prejudicial effect; and 4) similar in kind and close in time to a charged offense.’” *United States v. McGilberry*, 620 F.3d 880, 887 (8th Cir. 2010) (quoting *United States v. Walker*, 428 F.3d 1165, 1169 (8th Cir. 2005)); *Williams v. City of Kansas City, Mo.*, 223 F.3d 749, 755 (8th Cir. 2000) (applying the same factors to determine the admissibility of prior acts of the harasser in a discrimination suit, but excluding evidence of the harasser’s prior affairs with customers as only minimally relevant to whether he had a motive to accost a co-worker, owing to lack of similarity, substantial temporal separation, and inflammatory nature). “There is no absolute rule for the number of years that can separate evidence of offenses admitted

under Rule 404(b). Instead we examine the facts and circumstances of each case and apply a reasonableness standard.’” *Id.* (quoting *United States v. Thomas*, 398 F.3d 1058, 1063 (8th Cir. 2005)). In the Rule 404(b) context, “[a]lthough an issue for which an item of evidence is offered as proof need not be in dispute for the item to be admissible, the probative value of an item of evidence is calculated with respect to the other evidence available to prove the same point.” *Clark v. Martinez*, 295 F.3d 809, 813 (8th Cir. 2002) (citations omitted).

Even where evidence might otherwise be admissible pursuant to Rule 404(b), however, it may still be subject to exclusion, if its probative value is substantially outweighed by its potential for prejudice or confusion. *See Maxwell*, 643 F.3d at 1102 (explaining that such a balancing analysis may be “folded into” or separate from determination of whether evidence is admissible pursuant to Rule 404(b)); *see also Clark*, 295 F.3d at 814 (holding that Rule 403 applies to evidence otherwise admissible pursuant to Rule 404(b)); *United States v. Mound*, 149 F.3d 799, 801-02 (8th Cir. 1998) (same), *cert. denied*, 525 U.S. 1089 (1999).

Where evidence may otherwise be inadmissible pursuant to Rule 403 or 404(b), the Eighth Circuit Court of Appeals and the Federal Rules of Evidence recognize that a limiting instruction on the proper uses of certain evidence may mitigate potential prejudice of such evidence. *See, e.g., United States v. Cowling*, 648 F.3d 690, 699 (8th Cir. 2011) (“Moreover, the risk of unfair prejudice was reduced by a cautionary instruction to the jury, given when the evidence was first admitted.”); *United States v. Young*, 644 F.3d at 757, 761 (8th Cir. 2011) (concluding that the district court did not abuse its discretion in admitting evidence for the limited purpose set forth in its instruction); *United States v. Walker*, 470 F.3d 1271, 1275 (8th Cir. 2006) (“[A] limiting instruction [concerning proper use of evidence of a prior conviction] diminishes the danger of unfair prejudice arising

from the admission of the evidence.”); *see also* FED. R. EVID. 105 (requiring a limiting instruction when the court admits evidence for a limited purpose).

With these rules in mind, I turn to consideration of the admissibility of the challenged evidence.

### ***C. Weber’s Motion In Limine***

As noted above, in his Motion In Limine (docket no. 26), Weber seeks to exclude two categories of evidence: (1) evidence of the outcome of the Workforce Development hearing, on Minten’s application for unemployment compensation, including references to administrative findings and conclusions; and (2) evidence of the outcome of the Dorr Lawsuit. I will consider the admissibility of these two categories of evidence in turn.

#### ***1. Evidence of the outcome of administrative proceedings***

##### ***a. The challenged evidence***

Weber explains that, when Minten was discharged, he sought unemployment compensation. Although Minten’s application was denied at the interview level, benefits were ultimately awarded at the first level on appeal. Minten asserts that the hearing officer concluded that Weber’s accusation of insubordination by Minten was unfounded and that Minten did not engage in any misconduct by offering to testify in the Dorr Lawsuit. Weber points out that he was not required to and did not participate in the administrative appeal proceedings. Weber seeks to exclude any reference to how the unemployment compensation proceedings were ultimately concluded and any findings and conclusions that were reached by the administrative law judge.

*b. Arguments of the parties*

Weber asserts that the standard for an award of unemployment compensation is different from the standard for liability on a public employee's First Amendment retaliation claim. Furthermore, he argues that the procedures employed by the Workforce Development Department do not follow the Federal Rules of Evidence or the Federal Rules of Civil Procedure. Thus, he argues that any reference to how the unemployment compensation proceedings were ultimately concluded or any findings and conclusions reached by the administrative law judge would be irrelevant, unfairly prejudicial to him, and confusing to the jury.

Minten counters that the administrative record and decision regarding his unemployment compensation proceedings is relevant to the recovery of punitive damages. Somewhat more specifically, Minten argues that the unemployment compensation proceedings reflect Weber's reckless and callous indifference to his federally protected rights, because they show Weber's motive for firing him and the need to deter Weber and others from similar conduct in the future. Minten also argues that the administrative record will not cause any confusion or prejudice, so that its probative value outweighs any of these dangers.

*c. Analysis*

In a recent antitrust case, I recognized that, in the context of employment discrimination cases, the question of whether to admit or exclude evidence of administrative findings, investigations, action, or inaction, is within the sound discretion of the court. *See BoDeans Cone Co., L.L.C. v. Norse Dairy Sys., L.L.C.*, 678 F. Supp. 2d 883, 897 (N.D. Iowa 2009) (citing *Phan v. Trinity Regional Hosp.*, 3 F. Supp. 2d 1014, 1017 (N.D. Iowa 1987)). "More specifically, the court must ensure that unfair prejudice does not result from a conclusion based on a cursory [administrative] review of

the very facts examined in depth at trial.” *Id.* (internal quotation marks and citations omitted). I observed that “the same concern with unfair prejudice from admitting evidence about action or inaction of a state or federal enforcement agency, based on the agency's cursory investigation or review of facts examined in depth at a civil trial, is likely to arise in a case involving alleged antitrust violations.” *Id.* I added that, “[b]efore undertaking such a ‘prejudice’ analysis, pursuant to Rule 403, however, the court . . . should also consider the probative value of the evidence in question.” *Id.* (citing FED. R. EVID. 401 & 402). I find that the same concerns are presented here, even though the administrative proceedings at issue here involved neither employment discrimination nor violation of antitrust regulations, but unemployment compensation.

Here, I agree with Weber that the probative value, if any, of evidence of the *outcome, findings, or conclusions* of the administrative proceedings on Minten’s claim for unemployment compensation is substantially outweighed by its potential for prejudice and confusion and the possibility (or probability) that introduction of that evidence will allow trial of the relatively straightforward issue of damages for Weber’s violation of Minten’s First Amendment rights to devolve into a “mini-trial” on the issues in and the reliability of the findings and conclusions in the administrative proceedings. *See id.*; *see also* FED. R. EVID. 403. First, the administrative determination that Minten was not properly fired for “insubordination” or “misconduct” has little relevance here, because the standard for denial of unemployment compensation on the basis of such misconduct, *see Kleidosty v. Employment Appeal Bd.*, 482 N.W.2d 416, 417-18 (Iowa 1992), differs considerably from the standard for liability for retaliatory discharge of a public employee in violation of the First Amendment, as set forth in my ruling on the cross-motions for summary judgment in this case. *See Minten*, \_\_\_ F. Supp. 2d at \_\_\_, 2011 WL 6754066 at \*6-\*7. Thus, the determination by the agency of whether or not Minten was discharged for “misconduct”

or “insubordination” is even further removed from the question remaining for trial here, which is not the issue of whether Minten was fired for misconduct, but whether Minten is entitled to punitive damages for his retaliatory discharge in violation of the First Amendment. *See Dossett v. First State Bank*, 399 F.3d 940, 954 (8th Cir. 2005) (observing, in a First Amendment retaliation case pursuant to § 1983, that “a jury may assess punitive damages ‘when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others’” (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983))). Moreover, admission of the administrative conclusions may improperly lead the jurors to believe that determinations besides the ones I made in the ruling on the cross-motions for summary judgment have already been made, and that they need not make an independent determination based on the evidence relating to damages presented to them. *See* FED. R. EVID. 403 (permitting exclusion of relevant evidence, *inter alia*, because it may confuse or mislead the jury). If admitted, evidence of the outcome, conclusions, or findings in the administrative proceedings would certainly invite a distracting and time-wasting “mini-trial” on just what, if anything, pertinent to these proceedings was determined by the agency. *Id.* (also permitting exclusion of relevant evidence based on undue delay and waste of time).

What *is* probative—and not within the scope of Weber’s motion to exclude evidence of the outcome, findings, or conclusions of the administrative proceedings—is Weber’s admissions in those proceedings about the reasons that he fired Minten. To that extent, portions of the administrative record may be admissible, subject to other objections at trial. Such evidence should be identified only as Weber’s statements in “other proceedings.”

That part of Weber's Motion In Limine seeking to exclude evidence of the outcome of the Workforce Development hearing, including references to administrative findings and conclusions, is granted.

**2. *Evidence of the outcome of the Dorr Lawsuit***

**a. *The challenged evidence***

Weber acknowledges that, in the lawsuit filed by Paul Dorr and Alexander Dorr, Paul Dorr alleged that Weber's decision to deny him a permit to carry a concealed weapon constituted retaliation in violation of the First Amendment. He acknowledges, further, that Paul Dorr prevailed at a bench trial; that I entered a declaratory ruling that the denial of Paul Dorr's application for a concealed carry permit was unconstitutional; that I enjoined him from continuing to deny Paul Dorr's application for such a permit; and that I ordered him to enroll in and successfully complete an approved course on constitutional law. Weber seeks to exclude evidence of the *outcome* of the Dorr Lawsuit.

**b. *Arguments of the parties***

Weber argues that, while the fact of the Dorr Lawsuit is central to this lawsuit by Minten, the events that gave rise to Minten's lawsuit happened long before the Dorr Lawsuit ultimately came to trial. He also points out that the Dorr Lawsuit was only resolved after the conduct at issue in Minten's lawsuit. Thus, he argues that the *outcome* of the Dorr Lawsuit is irrelevant to the issues that remain for trial in this case and that evidence of the outcome of that trial would be unfairly prejudicial to him.

Minten argues that evidence *relating to* the Dorr Lawsuit should be admitted as relevant to his punitive damages claim. He contends that evidence relating to the Dorr Lawsuit is admissible pursuant to Rule 404(b). Specifically, he argues that such evidence is material to the issue of punitive damages, because of the similarity and intertwining of events, including the similarity of Weber's conduct, in the two instances. He contends that

the Dorr Lawsuit reveals that Weber took retaliatory actions for the exercise of First Amendment rights against a citizen, then, in his case, against a public employee. He argues that the evidence relating to the Dorr Lawsuit can be proved by a preponderance of the evidence and that, indeed, I am familiar with the evidence in that case, because I also presided over it. Next, he argues that the prior litigation is similar in kind and close in time to the events at issue here. Finally, he argues that the evidence relating to the Dorr Lawsuit has more probative value than potential for prejudice. Indeed, he contends that Weber's recidivist conduct, as demonstrated by the Dorr Litigation, is particularly relevant for the determination of the appropriate amount of punitive damages in this case.

*c. Analysis*

While Minten is correct that the Eighth Circuit Court of Appeals recognized in *Batiste-Davis v. Lincare, Inc.*, 526 F.3d 377 (8th Cir. 2008), that evidence of "prior acts" within the meaning of Rule 404(b) includes "prior lawsuits," *Batiste-Davis*, 526 F.3d at 380, that case, on which Minten relies for the admissibility of evidence relating to the Dorr Lawsuit, is otherwise entirely distinguishable. In *Batiste-Davis*, the court concluded that the district court improperly admitted evidence that the *plaintiff* had filed, then dismissed, a similar lawsuit against a different employer six years earlier to show the plaintiff's motive in filing the case then before the court. *Id.*<sup>5</sup> Here, in contrast, the prior lawsuit

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<sup>5</sup>In *Batiste-Davis*, the appellate court acknowledged that the prior lawsuit had a bearing on the plaintiff's credibility, the plaintiff's state of mind with respect to the case before the court, and the plaintiff's pattern or plan of asserting false claims. *Batiste-Davis*, 526 F.3d at 380. However, the Eighth Circuit Court of Appeals noted that the evidence of a prior lawsuit by the plaintiff ordinarily was not admissible unless the prior suit was fraudulently filed. *Id.* The court also observed that the prior lawsuit was relevant, similar, and probably close enough in time to be admissible under Rule 404(b), but nevertheless concluded that the probative value of the lawsuit was minimal, because there  
(continued...)

was not filed by Weber, but against him. Thus, the *filing* of the prior lawsuit has no probative value as to Weber's motives or to any other issues for which a prior act might be admissible under Rule 404(b).

On the other hand, *the facts* giving rise to the Dorr Lawsuit are relevant to and probative of the question of whether Weber is a recidivist, and that issue is relevant to the determination of punitive damages. As the Eighth Circuit Court of Appeals explained, in a § 1981 race discrimination case,

The dominant consideration for assessing the constitutionality of a punitive damages award is the reprehensibility of the defendant's conduct. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). In assessing reprehensibility, however, it is crucial that a court focus on the conduct related to the plaintiff's claim rather than the conduct of the defendant in general. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), the Supreme Court emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer. Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal

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<sup>5</sup>(...continued)

was only one such suit and it was six years earlier, and that there was potential for prejudice from a charge of litigiousness, unless the prior suit was fraudulent. *Id.* at 380-81. The court ultimately concluded that the improper admission of the evidence of the prior lawsuit was harmless. *Id.* at 381.

conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.

That does not mean that conduct in other cases is always irrelevant when assessing the defendant's reprehensibility. *An incident that is recidivistic can be punished more harshly than an isolated incident.* See *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513. In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. For example, in a slip-and-fall case, a prior instance of negligent misrepresentation could be evidence that the defendant has been repeatedly negligent, or, in a slander case, a prior physical assault by the defendant could become evidence that he or she is a recidivist tortfeasor.

The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality. “[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages,” *id.*, but the conduct must be closely related. In *State Farm*, the plaintiff sued because his insurance company refused to settle a lawsuit filed against him by a third party, which resulted in a hefty and avoidable judgment. According to the plaintiff, the insurance company's conduct was part of a larger scheme to limit artificially the pay-outs of valid claims and involved altering records, attempts to bully policy holders into selling personal assets to pay for claims, and the like. The Court, however, held that conduct unrelated to third-party lawsuits could not be properly considered. *Id.* at 423-24, 123 S. Ct. 1513. *Hence, the recidivist conduct must be factually as well as legally similar to the plaintiff's claim.*

*Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 796-97 (8th Cir. 2004) (emphasis added) (ultimately holding that, in upholding the punitive damages award, the district court had relied on some evidence of “recidivism” that was not sufficiently similar to fit “the *State Farm* recidivism exception,” and some that was).

Here, Weber’s prior retaliation against Paul Dorr for the exercise of Dorr’s First Amendment rights in criticizing Weber is sufficiently similar to fit “the *State Farm* recidivism exception,” *see id.*, and the other requirements for admission of prior acts under Rule 404(b), *see McGilberry*, 620 F.3d at 887; *Williams*, 223 F.3d at 755. There is no doubt that Weber’s retaliation against Dorr can be proved by a preponderance of the evidence, as the evidence in the Dorr Lawsuit ultimately demonstrated; that a prior instance of First Amendment retaliation by the same defendant is relevant to whether or not he is a recidivist and, hence, is relevant to a material issue here relating to punitive damages; that Weber’s conduct toward Dorr is close in time to his conduct toward Minten, where the Dorr Lawsuit was pending at the time of Weber’s conduct toward Minten; and that Weber’s conduct toward Dorr was similar in kind to the conduct at issue here, as it also involved First Amendment retaliation for conduct that Weber believed criticized or undermined him. *Id.*; *Williams*, 223 F.3d at 755. Indeed, in the ruling on the cross-motions for summary judgment, I expressly observed that, because I found that Weber had retaliated against Minten for exercising his First Amendment right to offer to testify for the Dorrs and had previously held that Weber had retaliated against Paul Dorr for exercising his First Amendment right to criticize Weber, “Sheriff Weber [is] a serial, recidivist, First Amendment violator, [who] must now face a jury trial on damages.” *Minten*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 6754066 at \*16. I do not find that Weber’s acts at issue in the Dorr Lawsuit are more prejudicial than probative, simply because they show

that Weber did the same sort of thing more than once and, thus, hurt him on the issue of punitive damages. *See Muhlenbruch*, 634 F.3d at 1001 (stating that evidence is not unfairly prejudicial just because it tends to prove an issue against the objecting party, but only if it encourages the jury to find the issue on an improper basis).

In contrast, I do not believe that my specific comment in this case that Weber is a serial, recidivist violator of the First Amendment, in light of the violations at issue in the Dorr Lawsuit and this lawsuit, should be admitted. That comment was not an essential part of my conclusion that Weber violated Paul Dorr’s First Amendment rights—indeed, it was not an observation in the Dorr Lawsuit at all—nor is it an essential part of my conclusion that Weber violated Minten’s First Amendment rights, so that it has little or no probative value. Moreover, even if that statement has some probative value, its probative value is substantially outweighed by its potential for prejudice. *See* FED. R. CIV. P. 403 & 404(b); *see also Maxwell*, 643 F.3d at 1102 (explaining that such a balancing analysis may be “folded into” or separate from determination of whether evidence is admissible pursuant to Rule 404(b)); *Clark*, 295 F.3d at 814 (holding that Rule 403 applies to evidence otherwise admissible pursuant to Rule 404(b)). Specifically, it would invite the jurors to award punitive damages on the basis of my observation, not on the basis of their own assessment of the effect of Weber’s recidivism.

Whether or not the *outcome* of the Dorr Lawsuit is admissible is a closer question. Were this a case in which both liability and damages were at issue, I likely would exclude the *outcome* of the Dorr Lawsuit, on the ground that jurors might improperly rely on my conclusion that Weber violated *someone else’s* First Amendment rights to conclude that Weber *also* violated *Minten’s* First Amendment rights, rather than on their own assessment of whether Weber violated Minten’s First Amendment rights. *See Muhlenbruch*, 634 F.3d at 1001 (stating that Rule 403 permits exclusion of evidence that encourages the jury to

resolve an issue on an improper basis); *see also Maxwell*, 643 F.3d at 1102 (explaining that such a Rule 403 balancing analysis may be “folded into” or separate from determination of whether evidence is admissible pursuant to Rule 404(b)); *Clark*, 295 F.3d at 814 (holding that Rule 403 applies to evidence otherwise admissible pursuant to Rule 404(b)). In the case of a trial limited to *damages*, however, where I have already determined that Weber has, as a matter of law, violated Minten’s First Amendment rights, the potential for unfair prejudice is dramatically reduced. In this context, my determination that Weber also violated Dorr’s First Amendment rights is little more than proof by the preponderance of the evidence that Weber engaged in the prior similar act. *See McGilberry*, 620 F.3d at 887 (requiring that prior acts be proved by the preponderance of the evidence to be admissible under Rule 404(b)); *Williams*, 223 F.3d at 755 (same). Therefore, the precise evidence that Weber seeks to exclude is admissible, and the part of Weber’s motion seeking to exclude that evidence is denied.

To the extent that evidence of Weber’s *conduct* at issue in the Dorr Lawsuit and the *outcome* of that lawsuit are admissible for purposes of determining punitive damages in this case, I must and will caution the jurors that they may punish a recidivist more harshly, but that they cannot award punitive damages to Minten for wrongful behavior that Minten did not himself suffer. *See Williams*, 378 F.3d at 797; *see also Cowling*, 648 F.3d at 699 (a limiting instruction may eliminate potential prejudice). Similarly, not everything that I said in the Dorr Lawsuit, or every factual finding or legal conclusion is necessarily admissible here. Evidence of the conduct at issue in and the outcome of the Dorr Lawsuit will be limited to what is necessary to demonstrate the similarity of Weber’s conduct in the two cases, that is, his retaliation for the exercise of Paul Dorr’s or Minten’s First Amendment rights, and my conclusion that Weber’s conduct violated Paul Dorr’s First Amendment rights. To that end, I will give the parties a short period of time to attempt to reach a

stipulation on the circumstances giving rise to the Dorr Lawsuit, the nature of Paul Dorr's First Amendment claim, and my holding in that lawsuit to be presented to the jurors as a background instruction on the Dorr Lawsuit and the appropriate purposes for which that evidence may be considered. Failing agreement of the parties on a stipulation, I will request separate proposed instructions on the Dorr Lawsuit, and I will resolve the differences.

The part of Weber's Motion In Limine seeking to exclude evidence of the outcome of the Dorr Lawsuit is denied.

#### ***D. Minten's Motion In Limine***

##### ***1. The challenged evidence***

In his Motion In Limine, Minten seeks to exclude evidence of other disciplinary action against him by Weber and evidence of any complaints by citizens against him during the course of his employment as a deputy sheriff. He explains that Weber has alleged that there were other disciplinary actions against him at the time that Weber fired him. He seeks to exclude any reference to workforce disciplinary actions, including "five other unresolved matters" identified in my Memorandum Opinion And Order On Cross-Motions For Summary Judgment at 27-29; *Minten*, \_\_\_ F. Supp. 2d at \_\_\_, 2011 WL 6754066 at \*14-\*15.

##### ***2. Arguments of the parties***

Minten argues that, despite this evidence of other disciplinary actions, I held that Weber violated Minten's First Amendment rights and that the only remaining issue is damages. He points out that I have already concluded that Weber had failed to generate a genuine issue of material fact that any of the other disciplinary actions was a reason for firing him and, indeed, I held that no reasonable juror could find that his offer to testify

in the Dorr Lawsuit was not a motivating factor in Weber's decision to fire him. Thus, he argues that any reference to the disciplinary actions or citizen complaints against him that form the basis for the "unresolved matters" would be irrelevant, unfairly prejudicial to him, and confusing to the jury.

Weber argues that punitive damages are the primary remaining issue in this case and that his intent is the focus in determining the propriety of punitive damages. He argues that consideration of intent necessarily should involve consideration of evidence of the factors that he considered in reaching the decision to discharge Minten. Thus, he argues that, to the extent that he considered Minten's work history in making his decision, that evidence is relevant to the jury's remaining decisions.

### **3. *Analysis***

Weber is correct that the defendant's motive or intent is a central issue in the determination of whether or not jurors should assess punitive damages in a First Amendment retaliation case. *See Dossett*, 399 F.3d at 954 (observing, in a First Amendment retaliation case pursuant to § 1983, that "a jury may assess punitive damages 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others'" (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983))). Nevertheless, that does not mean that Weber is now entitled to retry the question of what his intent was at the time that he fired Minten, where I have previously held that he had failed to generate a genuine issue of material fact that Minten's conduct, protected by the First Amendment, was not a motivating factor in his decision to fire Minten and that, as a matter of law, he had violated Minten's First Amendment rights by retaliating against him for offering to testify in the Dorr Lawsuit. Indeed, in the ruling on cross-motions for summary judgment, I went further, concluding that the record showed beyond dispute that, "but for Minten's

protected speech, he would not have been fired.” Memorandum Opinion And Order On Cross-Motions For Summary Judgment at 29; *Minten*, \_\_\_ F. Supp. 2d at \_\_\_, 2011 WL 6754066 at \*15.

Therefore, Minten’s motion to exclude any reference to workforce disciplinary actions, including “five other unresolved matters” identified in my Memorandum Opinion And Order On Cross-Motions For Summary Judgment at 27-29; *Minten*, \_\_\_ F. Supp. 2d at \_\_\_, 2011 WL 6754066 at \*14-\*15, is granted.

### ***III. CONCLUSION***

Upon the foregoing,

1. Defendant Weber’s December 28, 2011, Motion In Limine (docket no. 26) is **granted in part and denied in part**, as follows:

a. That part of the Motion seeking to exclude evidence of the outcome of the Workforce Development hearing on Minten’s claim for unemployment compensation, including references to administrative findings and conclusions, is **granted**; but

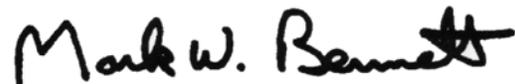
b. That part of the Motion seeking to exclude evidence of the outcome of the Dorr Lawsuit is **denied**. The parties shall have **to and including January 30, , 2012**, to attempt to reach and file a stipulation on the circumstances giving rise to the Dorr Lawsuit, the nature of Paul Dorr’s First Amendment claim, and my holding in that lawsuit to be presented to the jurors as a background instruction on the Dorr Lawsuit and the appropriate purposes for which that evidence may be considered and, failing agreement of the parties on a stipulation, each party shall have **to and including January 30, 2012**, to file separate proposed instructions on these matters.

2. Plaintiff Minten's December 28, 2011, Motion In Limine (docket no. 27), seeking to exclude any reference to workforce disciplinary actions, including "five other unresolved matters" identified in my Memorandum Opinion And Order On Cross-Motions For Summary Judgment at 27-29; *Minten*, \_\_\_ F. Supp. 2d at \_\_\_, 2011 WL 6754066 at \*14-\*15, is **granted**.

3. To avoid exposure of potential jurors to information about challenged evidence, this ruling shall be sealed until ten days after completion of the trial or notice of any settlement, unless a party files a motion within that ten-day period showing good cause why the ruling should remain sealed.

**IT IS SO ORDERED.**

**DATED** this 26th day of January, 2012.



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MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA