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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HALEY VIDEKIS and LAYANA
WHITE, individuals,

Plaintiffs,

vs.

PEPPERDINE UNIVERSITY, a
corporation doing business in California,

Defendant.

Case No. 2:15-CV-00298-DDP (JCx)

**REPLY RE MOTION IN LIMINE NO.
8 TO EXCLUDE TESTIMONY
AND/OR EVIDENCE OF KARISSA
SCHERER TAKING ANNE STONE'S
CELL PHONE AND BLOCKING
PHONE NUMBERS OF PLAINTIFFS;
DECLARATION OF PAULA TRIPP
VICTOR AND EXHIBIT IN SUPPORT
THEREOF**

Date: June 12, 2017
Time: 10:00 a.m.
Ctrm: 9C

Trial Date: July 18, 2017

Once again, Plaintiffs press to put forward evidence at trial of actions that are too remote from the claims in this case to have any tangible relevance. In this case, that evidence is the handling by Ms. Scherer of someone's cell phone *after the Plaintiffs had left the basketball team* and which indisputably resulted in *no adverse consequences to Plaintiffs*. Not only is the evidence inadmissible hearsay because it was told to plaintiffs by Anne Stone, and therefore inadmissible under F.R.E. 602 and 802, it is impossible that Plaintiffs could have known about or witnessed Ms. Scherer's actions while they were still playing basketball for Pepperdine. Therefore, it could not have impacted their purported overarching feelings about the climate at Pepperdine pertaining to LGBT students during their tenure on the team.

The cases Plaintiffs cite in support of their "social context" argument are misplaced. For example, Plaintiffs rely on *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998) for its social context argument, but that argument only potentially applies here if the Plaintiffs were present or aware of the situation that resulted in the perceived hostile environment. In this case, there is no evidence that they were. See, e.g., *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 520 (1998) ("Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others."); see also *Kovach v. California Cas. Management Co.*, 65 Cal. App. 4th 1256, 1268 (1998) (disapproved of on other grounds in *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826 (2001)). *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) likewise adds nothing to Plaintiffs' argument. See *id.* ("If racial animus motivates a harasser to make provocative comments *in the presence of an individual* in order to anger and harass him, such

1 comments are highly relevant in evaluating the creation of a hostile work environment,
2 regardless of the identity of the person to whom the comments were superficially
3 directed.”) (emphasis added).

4 Moreover, Plaintiffs further postulate that Ms. Scherer’s action could potentially
5 have relevance with relation to the Title IX investigation *if* she happened to be
6 monitoring who Plaintiffs communicated with after they left the team *and* while the
7 investigation was ongoing.¹ (Opp. at 3:11-15.) This is simply wild speculation.
8 Plaintiffs offer no evidence of any of this conjecture. If Plaintiffs wanted the answer to
9 the question of whether Ms. Scherer was monitoring the persons with whom Plaintiffs
10 communicated after they left the basketball team, the proper time to uncover it was at
11 Ms. Scherer’s deposition or during the interview their counsel conducted of Ms. Stone –
12 not at a fishing expedition at trial. Plaintiffs cannot fabricate relevance where none
13 exists. The evidence is irrelevant and vastly prejudicial to Pepperdine for exactly the
14 reasons Plaintiffs’ postulations demonstrate. *See* F.R.E. 402, 403.

15 For the reasons discussed above and in Motion in Limine No. 8, Pepperdine
16 respectfully requests that the Court exclude any evidence of Ms. Scherer blocking
17 Plaintiffs’ phone numbers on Anne Stone’s phone as irrelevant, highly prejudicial and
18 one more example of a waste of time.

19 DATED: June 5, 2017 ANDERSON, McPHARLIN & CONNERS LLP
20

21
22 By: /s/ Paula Tripp Victor
23 Paula Tripp Victor
24 David R. Hunt
Peter B. Rustin
25 Attorneys for Defendant PEPPERDINE
UNIVERSITY

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27 ¹ It is unclear how Ms. Scherer’s actions could have affected the Title IX investigation
as Anne Stone was interviewed by the Title IX investigator (Victor decl. ¶3.)
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DECLARATION OF PAULA TRIPP VICTOR

I, Paula Tripp Victor, declare as follows:

1. I am an attorney-at-law duly licensed to practice before all courts in the State of California and am a partner with the law firm of Anderson, McPharlin & Conners LLP, attorneys of record for defendant PEPPERDINE UNIVERSITY (“Pepperdine”) in the above-entitled action.

2. I have personal knowledge of the matters set forth herein, and if called upon as a witness to testify thereto, I could and would competently do so.

3. Anne Stone was one of the persons interviewed by Tabatha Jones Jolivet during the Title IX investigation. A true and correct copy of her interview notes are attached as **Ex. 1**.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on June 5, 2017.

/s/ Paula Tripp Victor
Paula Tripp Victor

EXHIBIT 1

Anne Stone

10/9/2014 3:58:00 PM

Thursday, October 9, 2014, at about 4 p.m.

Human Resources

Interviewers: Sean Mike Phillips and Tabatha Jones Jolivet

Introduction

See general interview protocol questions to correspond with Anne Stone's responses:

AS: Things just get said aloud. You become a fixture.

General Observations

AS: Never had any issues with either student. Both polite, respectful. Haley had an injury. I was monitoring weight. Medication was making her feel nauseous. Weight...to make sure she not losing too much. Saw Haley more than Layana. Layana wasn't playing. I know Haley better because of her injury.

A: I usually do body compositions for all athletes, pre-season and post-season body compositions. All confidential. I don't share with coaches or anything. Information I chart that is nutritionally related. When I see athletes, forms have demographic information (e.g., on scholarship, can you afford meals? Anemia?) Intake includes a stress meter. How stressed they are. I always encourage counseling. At least 40 percent counseling. Anything medical, for ex. Layana (very sweet), I love all of them. I'm not threatening to them in anyway. Welcoming. She came in to do a body comp and nutrition eval. She was talking that not feeling well, been seeig someone at Kaiser. Ongoing hypertension issues. She had not been feeling well. Her trainer was busy. Let's just check. It was elevated. She had training in ten minutes. It's a little high. Still elevated. Got her trainer. I'm concerened. Trainer, let me take you into other room. Had her lay down. Best friend haley came down. Karissa was trainer. 9/11/14 going to flags. As walking out, haley came to see me. She shared with me -needed a reassurance, brief situation. Gave her my phone number. Shared a medical concern. Wanted to reassure you're not alone. Went to flags.

Her trainer asked me to come in. asked why I had seen them. One came in for body comp. I have never been questioned before. Odd in itself. Coaches come in. she told me about blood pressure. So I got you. I didn't feel anything unusual. She wanted to share a medical concern. I didn't chart anyting. Only chart on nutrition, not hearsay.

Seemed unusual. What the heck? I ws trying to be sensitive. There were other trainers in the room. No ann. Everybody knows about the codnition. No students. Just trainers. L followed up with green.

In my own office.

Next day, (Friday) only person in officein early am. Haley came in with medical information requested for clearance. Asked to leave for karissa. Is everything OK? Yes. Fine. Then I put on Karissa's desk. Karissa wasn't there.

I have not overheard naything from trainers. Haley shard some things with me. She felt that Karissa modified a document, a workout. I had no knowledge of this. She said one of advisors said that she helped with layana with a paper. I told them to both seek counseling. Layana had said academic counseling. Referred to counseling. I made an apt. I might have sen her try. To facilitate. Layananidn't share anyting.

I told haley to talk to steve potts. Told just nutritionist. Sorry to hear that. I'm not involved. I had no knowledge.

I'm very sensitive. You hear lots of chatter. More stuff from college students. Nothing concerning. I had no clue that there was even an issue.

H approached you to disucss medical. Gave phone. She called. Asked me if her information was shared with anyone else. I said only within the athletic room and yes they were there. That bothered her. She felt there was a hippa violation. I was concerned about tht, we had a meeting. I ws informed in the meeting when I brought it up, no hippa violation had occurred. They sign a waiver that we can speak to each other on a need to know basis. Need copy of

Kevin printed a copy

I purposefully myself –I reassured her that a violation , I do have a copy of waiver. Told her ok to get a copy, but she didn't come down to get it.

Did karissa say how everyone knows. Not sure how they knew. I'm assuming they're all in one office. You can possibly overhear conversations. I was more concerned that I may have done something. I'll own that if I did.

I wanted to reassure haley. I could tell. We don't' wan tot be violated in anyway. Sensitive medical issue. I undderstod her concern. I want to reassure her. Medical condition is beter than saying the cosnidtiion itself. Just the trainers. Brandy and shane. I looked around. This was a circumstance that been more delicate.

I could understandnd.

I can't lie. Couln't pull it off. She asked me: there were other trainers in this room.

Never heard anyting about medical inappropriate. For the most part, we try to do a good job to be sensitive. Kevin's really good about that. Especially body comps. Coaches will come to pry. Weights being shared with coaches. I stopped that. Nipped in the bud. That was handled. We took care of that. As aw hole, we try to do a good job. This was a little more spring to me. Haley expressed that someone accused her of something on a test. I did not sleep to HPPA. With that, I was told we were good.

Sometimes they share more than I want to hear.

Noticed anyone? Treat Haley or Layana differently? I cannot say in all honesty. I haven't noticed. I think I would if really blatant. The only thing: she feel that, but I had not. I'm never at practice. felt differently because academic, documentation –she provided adequate and that they were still not allowing he to play. Felt they were harassing doctors office. She shared that she had to go to get cleared –told me let me know. Cleared by green but later told ot cleared about back or spine injury. Kinda listening.w hy are you telling me this? Trying to convey that I'm sorry but nothing ic an do. I'm ephatethc listener. They are sweet girls.

Always respectful and kind.

Karissa has shared that they've had problems. Didn't say what. Maybe not coming into treatment. But all trainers complain about that. I hear that across the board.if they'd only come in. its very common for the trainer to complain.

SM: coach ryan –harrassing or disapproving

Only form haley: she felt adee was prbing –asking about you and layana together. Do you live together. I would ask: just from haley
Never heard ryan, karissa, have not spoken to adi. I told her to go to steve potts. After labor day. No idea.

Has anyone come to you inquiring bout relatiosnhp –no

I have not heard speculation. Karissa said once: be careful with haley and document everything she says. I didn't feel the need to do that. Be careful. I thought it was personality. Shenever gave specific. Nothing about layana.

I feel caught in middle. Uncomfortable.