

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS**

**U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,**

Plaintiff,

v.

RENT-A-CENTER EAST, INC.,

Defendant.

No. 16-CV-2222

Magistrate Judge Eric I. Long

**DEFENDANT RENT-A-CENTER EAST, INC.’S RESPONSES TO PLAINTIFF’S
MOTIONS IN LIMINE NOS. 1-10**

Defendant Rent-A-Center East, Inc. (“RAC”) files its responses to Plaintiff U.S. Equal Employment Opportunity Commission’s (“EEOC”) Motions in Limine Nos. 1-10 as follows:

1. MOTION TO EXCLUDE PHRASE “STOLEN VALOR.”

RAC does not oppose Plaintiff’s Motion in Limine No.1.

Granted:_____

Denied:_____

Modified:_____

2. MOTION TO EXCLUDE EVIDENCE OF KERR’S UNRELATED CHARGE ALLEGATIONS, AND CERTAIN OTHER LEGAL PROCEEDINGS.

RAC moves the Court to deny the EEOC’s Motion in Limine No. 2.

In its Motion in Limine No. 2, the EEOC seeks to exclude evidence of Megan Kerr’s allegations in her charge of discrimination that she was harassed and demoted on account of her transgender status; her prior employment and educational history; her divorce and child support proceedings; and her unemployment application and benefits. This motion should be denied in full.

The Seventh Circuit has stressed that “*credibility determinations are crucial in discrimination cases and are the particular province of the jury.*” *Smith v. Great Am. Rests.*, 969 F.2d 430, 435 (7th Cir. 1992) (emphasis added) (citing *Mathewson v. National Automatic Tool Co.*, 807 F.2d 87, 90-91 (7th Cir. 1986)). Each of the above matters relates to the credibility of the charging party in this case, Megan Kerr. With regard to her charge allegations that she was harassed and demoted on account of her transgender status, it is fair to let jury consider why these issues have been left out of the lawsuit. *See Gastineau v. Fleet Mortgage Corp.*, 137 F.3d 490 (7th Cir. 1998) (evidence of prior lawsuits against plaintiff’s former employers admitted because the evidence was not offered to prove the fact that plaintiff was litigation-prone but to prove issues affecting his credibility). Indeed, the fact that some of Kerr’s allegations have been omitted raises the question as to whether all of Kerr’s allegations have been made up out of whole cloth, an issue relating directly to her credibility. *See Moore v. Metro. Water Recl. Dist. of Greater Chi.*, 2004 U.S. Dist. LEXIS 23662, at *36-37 (N.D. Ill. Nov. 22, 2004) (admitting evidence to support the defendant’s claims that the plaintiff had a scheme to fabricate false claims of sexual harassment and retaliation for her own gain).

Contrary to the EEOC’s argument, examination of Kerr’s allegations of discriminatory harassment and demotion would not confuse the issues for the jury. Instead, they go to the heart of Kerr’s claim because they bear on whether she can demonstrate discriminatory animus on the part of RAC. *See Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996) (stating that a plaintiff may prevail on a sex discrimination claim if she “demonstrate[s] discriminatory animus through direct evidence . . . [or] by relying on circumstantial evidence.”); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (stating that plaintiffs may present evidence of “prior [allegedly discriminatory] acts as background evidence in support of a . . . claim.”) Therefore,

Kerr can be asked what acts she believes demonstrate discrimination on behalf of RAC. If she testifies about the alleged harassment and demotion, then RAC should be granted the opportunity to explore the issue with Kerr and other witnesses. If Kerr does not testify about the alleged harassment and demotion, then RAC has the right to impeach her regarding her prior inconsistent statements within the Charge. *See* Fed. R. Evid. 613 & 801(d)(1)(A).

The EEOC's citation to *Churney v. Village of Downers Grove*, 122 F. Supp. 2d 921, 922 (N.D. Ill. 2000) is inapposite. As the EEOC notes in its motion in limine, *Churney* involved a plaintiff asserting a claim of retaliation based on a prior Charge of Discrimination. *Id.* at 921. As such, the facts surrounding the Charge were not relevant to demonstrate that the defendant held retaliatory animus. *Id.* (“[T]he only relevant aspect of the 1994 charge of discrimination is the fact that it was filed.”) Here, on the other hand, the EEOC is trying to eliminate inquiry into other alleged acts of discrimination by the same defendant against the same plaintiff. Even if these acts are not pursued in the present litigation, they serve as potential circumstantial evidence of discrimination. *See Nat'l R.R. Passenger Corp.*, 536 U.S. at 113. Because RAC is entitled to question witnesses regarding circumstantial evidence of discrimination (or lack thereof), the EEOC's request to exclude Kerr's allegations of discrimination and testimony surrounding these allegations is frivolous.

With regard to Kerr's employment history, courts have held that information from prior employers may be relevant both to claims of emotional distress damages, and could further “contain information that bears upon (the plaintiff's) credibility.” *Jackson v. Parker*, 2008 WL 4844747, at *2 (N.D. Ill. 2008). The same is true of Kerr's divorce and child-custody proceedings, particularly where, as here, Kerr has made material misrepresentations to the courts

presiding over those proceedings regarding issues relating to her mitigation of damages in this case.

Finally, the EEOC argues that evidence of Kerr's application for, or receipt of, unemployment compensation violates the collateral source rule. As a threshold matter, courts in the Seventh Circuit have found just the opposite, using evidence of unemployment benefits to reduce awards of back pay. *See Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 162 (7th Cir. 1981) (finding the deduction of unemployment compensation was an appropriate exercise of the district court's discretion, noting that failure to offset unemployment benefits provides a windfall for the employee); *Adams v. Catrambone*, No. 02 C 8700, 2010 U.S. Dist. LEXIS 104528, at *13 (N.D. Ill. Sep. 30, 2010) (setting off recovery by the amounts of wages and unemployment compensation).

Further, the cases cited by the EEOC only partially support its position. In each of these cases, the courts only approved excluding evidence of unemployment compensation as it related to offsetting damages. *See Tzoumis v. Tempel Steel Co.*, 168 F. Supp. 2d 871, 874 (N.D. Ill. 2001) (excluding evidence because "windfall of unemployment benefits is best conferred on the employee/claimant rather than the employer (as a damages offset)."); *Perry v. Larson*, 794 F.2d 279, 286 (7th Cir. 1986) (refusing to reduce plaintiff's award to offset unemployment compensation); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1113 (8th Cir. 1994) (holding that "unemployment benefits should not be deducted from awards of backpay under the ADEA."). None of these cases stand for the proposition that a court should exclude all evidence of a plaintiff's application for unemployment compensation. To the contrary, a plaintiff's representations to an unemployment compensation office about why his or her employment ceased is directly relevant to a claim of discrimination. *See Evans v. Cernics, Inc.*, No. 3:14-cv-

125, 2017 WL 4863207, at *3 (W.D. Pa. Oct. 26, 2017) (“Plaintiff’s statements to the Unemployment Compensation Office about why he ceased his employment are relevant because they make it more or less probable that Defendants discriminated . . . against him, which is the ultimate issue at question in this case.”); *see also Whitaker v. Saint Gobain Containers, Inc.*, No. 04-2208, 2006 WL 3095652, at *2 (W.D. La. Oct. 30, 2006) (finding that inconsistent statements to unemployment commission may be relevant and admissible); *Russell v. Daiichi-Sankyo, Inc.*, No. 11-34, 2012 WL 1805038, at *10 (D. Mont. May 17, 2012) (denying motion to exclude unemployment application documents because they “may contain information relevant to [plaintiff’s] credibility and to the reason for her discharge.”). Moreover, to the extent Kerr’s unemployment filings reveal misrepresentations that bear on her credibility, such evidence is likewise admissible. *Beem v. Providence Health & Servs.*, No. 10-cv-00037, 2012 WL 13018727, at *5 (E.D. Wash. Mar. 27, 2012) (withholding ruling on motion to exclude unemployment application testimony from plaintiff because it “may be admissible for impeachment purposes.”)

For the foregoing reasons, RAC requests that the court deny the EEOC’s Motion in Limine No. 2 in its entirety.

Granted:_____

Denied:_____

Modified:_____

3. MOTION TO EXCLUDE TESTIMONY FROM RICHARD THOMPSON AND ALBERT BENNETT.

RAC moves the Court to deny the EEOC’s Motion in Limine No. 3 with regard to the testimony of Richard Thompson.

The EEOC claims that Megan Kerr was “set up” – that her supervisor, Jason Morris, gave her permission to use a RAC cube truck to assist with “a project for a local civic organization,”

then fired her when she used the truck. Problematically, however, Kerr cannot seem to identify the “local civic organization” she was assisting, despite this fact being central to her case. Kerr first claimed the organization was Goodwill; then she said it was an unspecified church; and finally she settled on the Masons.

These internally conflicting accounts relate directly to Kerr’s credibility, and so too do the facts surrounding these accounts. Thompson is the Master of the Masonic Lodge that Kerr was purportedly assisting (at least in one of her many versions of events). He will testify that he has no knowledge of Kerr assisting with any “project” for the Masons during the relevant time period, according to his personal knowledge. This testimony bears directly on the credibility of the charging party’s story concerning the central incident in this case and should be allowed into evidence. *See* FED. R. EVID. 401.

Accordingly, the EEOC’s Motion in Limine No. 3 should be denied with regard to the testimony of Richard Thompson.

Granted: _____

Denied: _____

Modified: _____

4. MOTION TO EXCLUDE STATING THAT “FALSUS IN UNO, FALSUS IN OMNIBUS” IS THE LAW.

RAC moves the Court to deny the EEOC’s Motion in Limine No. 4 and reserves its argument for the final pretrial conference.

Granted: _____

Denied: _____

Modified: _____

5. MOTION TO EXCLUDE ARGUMENTATIVE QUESTIONS AND REMARKS CHALLENGING A WITNESS'S CONCLUSIONS.

RAC moves the Court to deny the EEOC's Motion in Limine No. 5 and reserves its argument for the final pretrial conference.

Granted: _____

Denied: _____

Modified: _____

6. MOTION TO PROHIBIT ATTORNEY VOUCHING AND PERSONAL EXPERIENCES.

RAC moves the Court to deny the EEOC's Motion in Limine No. 6 and reserves its argument for the final pretrial conference.

Granted: _____

Denied: _____

Modified: _____

7. MOTION TO EXCLUDE TESTIMONY ABOUT VERACITY OF OTHER WITNESSES' TESTIMONY.

RAC does not oppose Plaintiff's Motion in Limine No. 7.

Granted: _____

Denied: _____

Modified: _____

8. MOTION TO EXCLUDE CALL CENTER RECORDS.

RAC moves the Court to deny the EEOC's Motion in Limine No. 8.

Motion in Limine No. 8 concerns records of calls made by Megan Kerr to RAC's call center following her termination. These documents were produced to the EEOC more than five months ago; accordingly, the EEOC can show no prejudice owing to their purported "late

disclosure.” Moreover, as recognized by the EEOC, discovery has continued by agreement long after the May 8, 2017 discovery deadline.

The EEOC further argues that the records bear “no apparent relevance” to the action. This assertion is plainly wrong. Indeed, the call center notes reveal that Megan Kerr called the RAC call center twice following her termination – yet RAC’s witnesses are prepared to testify that at no time during these phone conversations did Kerr make any allegation or report of discrimination. The records are accordingly relevant to Kerr’s credibility, as they weigh in favor of the conclusion that Kerr concocted her allegations of discrimination well after her discharge.

Finally, the EEOC contends that these documents are not admissible as business records, as RAC “has failed to produce records that would enable the EEOC to evaluate whether the records are sufficiently reliable to fall within that exception to the hearsay rule.” While noting that such a determination is not the EEOC’s to make, RAC will confer with the EEOC to determine what, if any, records would satisfy their curiosity in that regard, and promptly supplement to provide those records.

Granted: _____

Denied: _____

Modified: _____

9. MOTION TO EXCLUDE IMPEACHMENT BY EXTRINSIC EVIDENCE OF COLLATERAL MATTERS.

RAC moves the Court to deny the EEOC’s Motion in Limine No. 9.

In its Motion in Limine No. 9, the EEOC attempts to exclude evidence of “a host of matters from the last 25 years of [Megan Kerr’s] life” – without, apparently, naming them all. Rather, it’s presumably left to RAC to determine in the course of trial which pieces of evidence might qualify as “extrinsic evidence of collateral matters” as defined by the EEOC. Given the

breadth and ambiguity of this request, Motion in Limine No. 9 should be denied on these grounds alone.

Moreover, the EEOC is misguided with regard to the specifics of this motion. As explained in RAC's response to Motion in Limine No. 2, with regard to Kerr's employment history, courts have held that information from prior employers may be relevant both to claims of emotional distress damages, and could further "contain information that bears upon (the plaintiff's) credibility." *Jackson v. Parker*, 2008 WL 4844747, at *2 (N.D. Ill. 2008). Likewise, information concerning Kerr's military service and divorce/child custody proceedings can be used to impeach witness credibility, which is never a collateral issue. *See* FED. R. EVID. 607.

Finally, with regard to information concerning mitigation of damages, as explained fully in RAC's response to Motion in Limine No. 10, mitigation is an issue for the jury, warranting denial of any motion in limine seeking to exclude mitigation evidence. *See Tomao v. Abbott Labs., Inc.*, No. 04 C 3470, 2007 U.S. Dist. LEXIS 3274, at *7 (N.D. Ill. Jan. 16, 2007) ("Failure to mitigate is an affirmative defense that must be proven by the defendant and decided by a jury.") (citing *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048-49 (7th Cir. 1999)). Because the documents are relevant to mitigation, which is properly before the jury, the EEOC's arguments fail.

For the foregoing reasons, the EEOC's Motion in Limine No. 9 should be denied.

Granted: _____

Denied: _____

Modified: _____

10. MOTION TO EXCLUDE REFERENCES TO BACKPAY AND MITIGATION.

RAC moves the Court to deny the EEOC's Motion in Limine No. 10 with regard to the issues of mitigation and unemployment compensation.

As reflected in its proposed jury instructions, RAC agrees that back pay is an issue for the Court to decide. However, it does not follow, as the EEOC suggests, that mitigation of damages is consequently an issue that should not be presented to the jury. The Seventh Circuit has stressed on numerous occasions that the issue of mitigation is a question of fact for the jury. *Smith v. Rowe*, 761 F.2d 360, 366-67 (7th Cir. 1985); see *Smith v. Great Am. Rests.*, 969 F.2d 430, 439 (7th Cir. 1992) (“First, we emphasize that the issue of reasonable mitigation is ultimately a question of fact for the jury.”); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1049 (7th Cir. 1999) (“A rational jury had a legally sufficient basis to conclude [plaintiff] failed to mitigate her damages.”). Likewise, district courts within the Seventh Circuit have held that mitigation of damages is an issue for the jury. See *Fowler v. Colfax Envelope Corp.*, No. 00 C 7862, 2002 U.S. Dist. LEXIS 13759, at *18 (N.D. Ill. July 23, 2002) (“It is for the jury to decide whether [plaintiff’s] job search . . . was reasonable.”)

This precept holds true even where back pay determinations rest with the Court. In *Tomao v. Abbott Labs., Inc.*, an employment discrimination case, the Northern District of Illinois granted plaintiff’s motion in limine regarding back pay, agreeing that the issue of back pay was an equitable remedy to be decided by the judge. See No. 04 C 3470, 2007 U.S. Dist. LEXIS 3274, at *6 (N.D. Ill. Jan. 16, 2007). The court, however, denied plaintiff’s motion in limine with regard to mitigation of damages: “Plaintiff’s objection to evidence regarding mitigation of damages, however, is overruled. ***Failure to mitigate is an affirmative defense that must be proven by the defendant and decided by a jury.***” *Id.* at *7 (emphasis added) (citing *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048-49 (7th Cir. 1999)).

The same result is warranted here. Mitigation is the province of the jury, even where the judge determines the equitable remedy of back pay, and accordingly the EEOC’s motion in

limine regarding mitigation evidence should be denied. *Compare* Seventh Circuit Model Jury Instruction 3.11 (“Back Pay”) Comment (a) (stating “back pay is an equitable remedy to be decided by the court”), *with* Seventh Circuit Model Jury Instruction 3.12 (“Mitigation”) (providing no such limitation).

The EEOC’s citation to *Ortega v. Chicago Bd of Educ.*, No. 11-C-8477, 2017 WL 5593350 (N.D. Ill. Nov. 21, 2017) is misleading. The EEOC cites *Ortega* (and only *Ortega*) for the proposition that “mitigation is . . . an issue to be determined by the Court rather than the jury.” What the EEOC neglects to mention, however, is that the defendant in *Ortega* stipulated to the amount of back pay damages, which obviated its need to present mitigation to the jury. *Id.* at *10. In fact, the court in *Ortega* specifically noted that, after stipulating to back pay, the defendant did not seek a jury instruction on mitigation “notwithstanding that, prior to entering into the stipulation, the [defendant] anticipated presenting [mitigation] to the jury as indicated by its pre-trial proposed jury instructions.” *Id.* at *10. Only after finding the parties’ stipulation was nonbinding (and after the defendant no longer had the opportunity to argue mitigation to a jury) did the court analyze back pay and mitigation. *Id.* at *12.

In addition, with regard to the EEOC’s motion in limine concerning unemployment compensation, RAC objects to the EEOC’s contention that such compensation is a collateral source as a matter of law. The determination as to whether unemployment compensation should be set-off against back pay is committed to the discretion of the trial judge. *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1428 (7th Cir. 1986); *see Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 162 (7th Cir. 1981) (finding the deduction of unemployment compensation was an appropriate exercise of the district court’s discretion, noting that failure to offset unemployment benefits provides a windfall for the employee); *Adams v. Catrambone*, No.

02 C 8700, 2010 U.S. Dist. LEXIS 104528, at *13 (N.D. Ill. Sep. 30, 2010) (setting off recovery by the amounts of wages and unemployment compensation). Accordingly, unemployment evidence should not be barred on the grounds that such evidence is a collateral source.

Granted: _____

Denied: _____

Modified: _____

Respectfully submitted,

/s/ J. Bradley Spalding

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Dated: December 29, 2017

CERTIFICATE OF SERVICE

I, **J. Bradley Spalding**, an attorney, certify that I served the attorney of record named below with a copy of **Defendant's Responses to Plaintiff's Motions in Limine Nos. 1-10** via ECF (*Electronic Case Filing*) on December 29, 2017:

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