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

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **RENT-A-CENTER EAST, INC.,** **Defendant.**	**Case No. 16-cv-2222** **Magistrate Judge Long**

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTIONS IN LIMINE

The EEOC replies to Defendant's responses to the EEOC's ten motions in limine as set forth below.

MOTION NO. 1: To Exclude Phrase "Stolen Valor"

RAC does not oppose EEOC's first motion in limine and, therefore, the Court should exclude the phrase "stolen valor."

MOTION NO. 2: To Exclude Evidence of Kerr's Unrelated Charge Allegations, and Certain Other Legal Proceedings

RAC responds to the EEOC's second motion in limine by arguing that all of these matters go to Kerr's credibility and thus are admissible. However, this argument misses the mark. Just stating that an issue goes to "credibility" does not render it either relevant or admissible pursuant to Rules 401 and 402—and it certainly does not address any of the requirements regarding character evidence as required by Rules 608 and 609. Indeed, while Rule 608 allows for testimony about a witness's "reputation for having a character for truthfulness or untruthfulness," it specifically precludes extrinsic evidence (except of a criminal conviction) to

attack a "witness's character for truthfulness." FRE 608. Therefore, merely stating something goes to credibility does not render it relevant or admissible.

RAC cites to *Gestineau v. Fleet Mortgage Corp.*, 137 F.3d 490 (7th Cir. 1998), and *Moore v. Metro. Water Recl. Dist. Of Greater Chi.*, 2004 U.S. Dist. LEXIS 23662 (N.D. Ill. Nov. 22, 2004), for the proposition that the jury should hear about "why [the other charge allegations] were left out of the lawsuit." With this, RAC wants to insinuate that Kerr filed her charge in bad faith or that she is litigious. "The charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent." *Batiste-Davis v. Lincare, Inc.*, 526 F.3d 377, 380-81 (8th Cir. 2008) (quoting *Outley v. City of New York*, 837 F.2d 587, 592 (2d Cir. 1988)). Courts generally disallow evidence of prior lawsuits or complaints when, as is the case here, there is no evidence that the party asserted the prior claims on a fraudulent basis. *See Gestineau*, 137 F.3d at 496. In this case, there is simply no evidence of litigious character. Therefore, the Court should not allow RAC to portray the current lawsuit as an act in conformity with a litigious character. *See* FRE 404(a). Further "the final results of the EEOC investigation are precluded as prejudicial and with a high potential to mislead the jury, Fed. R. Evid. 403." *Thomas v. Big Lots Stores, Inc.*, No. 2:10-CV-342-JEM, 2016 WL 1746366, at *2 (N.D. Ind. May 3, 2016).

RAC also argues that it should be able to "impeach" Kerr based on the other allegations in her charge not at issue in this lawsuit. This severely confuses the issue. The fact that Kerr alleged in her charge that she *believes* she was also demoted and harassed are not inconsistent statements with the fact that she *believes* RAC terminated her on the basis of sex.

RAC argues these allegations go to whether Kerr can demonstrate discriminatory animus. As the court already held: "The issue is why she was terminated by Defendant." Order [ECF No.

47], at 7. The Commission must establish discriminatory animus regarding Kerr's termination, and it is irrelevant whether or not Kerr was actually harassed or demoted—and even less relevant if she believed she was harassed or demoted. Allowing RAC to examine Kerr regarding alleged adverse actions she believes were discriminatory would confuse the issues and mislead the jury from the one issue before it: whether RAC discriminatory terminated Kerr in violation of Title VII.

Regarding Kerr's employment history, RAC argues the similar "credibility catch all" as before. As discussed above, it is not enough to simply wave the credibility-flag without discussing whether or not this is relevant character evidence pursuant to Rule 608. RAC relies on *Jackson v. Parker*, 2008 WL 4844747 (N.D. Ill. 2008), to argue that someone's employment history could be relevant. This proposition is not particularly controversial in certain situations; however, *Jackson* regards a discovery dispute about employer subpoenas. *Jackson* provides no support that in this case—under these circumstances—that Kerr's employment history is admissible for any permissible purpose at trial.[1]

MOTION NO. 3: To Exclude Testimony from Richard Thompson and Albert Bennett

RAC does not oppose the portion of this motion seeking to exclude Albert Bennet as a witness, and so the Court should exclude him from trial.

Regarding Richard Thompson, RAC responds by arguing that Thompson is relevant to Kerr's credibility—similar to its credibility argument in response to the EEOC's second motion above. RAC argues that whether or not Shumate's move was a sanctioned Mason event or not is

[1] This point is discussed further in the EEOC's reply to motion no. 9 below regarding extrinsic evidence.

central to the EEOC's case. However, it is not. As the court previously held: "Further, what she was using the vehicle for is not the issue in this case. The issue is why she was terminated by Defendant." Order [ECF No 47], at 7. The issue of pretext in this case is whether Morris gave Kerr permission to use the RAC vehicle, to set up a reason to fire her because she is transgender. Whether any Mason other than Wiedemann participated in the move is simply not relevant to the determination of that issue. Further, while Thompson could testify as to his personal knowledge regarding whether he helped Shumate move, it would be hearsay for him to testify regarding what other Masons told him about whether they participated in the Shumate move or not.

MOTION NO. 4: To Exclude Stating that "Falsus In Uno, Falsus In Omnibus" Is the Law

RAC did not respond to the EEOC's fourth motion in limine. Having waived its response, the Court should grant the EEOC's fourth motion in limine.

MOTION NO. 5: To Exclude Argumentative Questions and Remarks Challenging a Witness's Conclusions

RAC did not respond to the EEOC's fifth motion in limine. Having waived its response, the Court should grant the EEOC's fifth motion in limine.

MOTION NO. 6: To Prohibit Attorney Vouching and Personal Experiences

RAC did not respond to the EEOC's sixth motion in limine. Having waived its response, the Court should grant the EEOC's sixth motion in limine.

MOTION NO. 7: To Exclude Testimony About Veracity of Other Witnesses' Testimony

RAC does not oppose the EEOC's seventh motion in limine, and the Court should grant

it.

MOTION NO. 8: To Exclude Call Center Records

In its response to the EEOC's eighth motion in limine, RAC failed to respond to several arguments and its other statements are without merit. First, the EEOC's motion explained that RAC did not comply with the stipulation (ECF No. 59) entered into by the parties concerning additional discovery. RAC does not dispute that statement. That stipulation, which called for additional discovery responses to be served no later than November 29, 2017, was intended to alleviate the prejudice of RAC's *previous* round of untimely disclosures. In its MIL response, RAC does not explain how it believes it has complied with the stipulation, but instead has suggested a meet and confer. However, the parties' stipulation, the result of extensive negotiations, was to deal with these matters in November, not January. It should not be the EEOC's burden to set aside trial preparation to engage in discovery work just weeks before trial.[2]

Second, although the EEOC's motion pointed out a basis for concluding that the "method or circumstances of preparation" of the call center tickets "indicate a lack of trustworthiness,"

[2] Illustrating this point further, late today, as these MIL replies were being finalized, the EEOC received *another* round of new documents from RAC. While the EEOC has not had an opportunity to examine these documents closely, nearly all of the 54 pages appear to be previously undisclosed documents, all or most of which appear to be RAC's own company records (rather than documents that might have been received by RAC from a third party recently, for example). It should require no special showing to conclude that disclosing a packet of new evidence this close to trial is inherently unfair and should not be permitted. To the extent RAC intends the documents served today to be a response to EEOC MIL No. 8, they are too late for that as well; the deadline for MIL responses was December 29, 2017, and the EEOC has had no reasonable opportunity to examine the documents before filing this reply.

FRE 803(6)(E), RAC has not attempted to demonstrate otherwise. Thus RAC has not met its burden to demonstrate the admissibility of these records.

For these reasons, and for those set forth in the EEOC's motion, the Solutions Center records should be excluded.

MOTION NO. 9: To Exclude Impeachment by Extrinsic Evidence of Collateral Matters

With respect to its ninth motion in limine, the EEOC notes that: (1) the district court case RAC relies upon addresses discoverability, not admissibility, and that the fact that a matter may be discoverable does not demonstrate that it is admissible at trial; and (2) RAC's response does not distinguish between the relevance of *information* that may be used to impeach and *extrinsic evidence* of the same. But the rules cited by the motion in limine make exactly that distinction. The collateral evidence rule and Fed.R.Evid. 608(b) unambiguously prohibit the use of extrinsic evidence of certain matters *notwithstanding* their relevance to impeachment by contradiction or to character for truthfulness. Indeed, if such evidence were irrelevant, then those rules would serve no purpose, as irrelevant evidence is already inadmissible under Fed.R.Evid. 402 ("Irrelevant evidence is not admissible.").

Otherwise, the EEOC believes its position was set forth adequately in its ninth motion in limine, and that extrinsic evidence should not be permitted to prove matters offered simply to impeach.

MOTION NO. 10: To Exclude References to Backpay and Mitigation

The allocation of decisions about equitable relief to the Court is a basic feature of the statutory language of Title VII, and so RAC's contention that the EEOC has not cited enough caselaw to support the proposition is misplaced. Statutory language does not require caselaw to enable it. The text of Title VII itself makes plain that failure to mitigate is a defense to back pay;

the defense is written into the section of the statute that defines the court's power to grant equitable relief: "[A]mounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the *back pay* otherwise allowable...." 42 U.S.C § 2000e-5(g)(1) (emphasis added). RAC offers no explanation of how that statutory language (or any other statutory language) authorizes RAC's approach of assigning some (but not all) of the issue of mitigation to the jury.

Instead, RAC cites three Seventh Circuit cases to support its position, but none of them does. One, *Smith v. Rowe*, is a prisoner rights case that does not involve Title VII at all. *See* 761 F.3d 360 (7th Cir. 1985). Apart from the fact that *Rowe* involves an entirely different statutory regime, its conclusion that mitigation is a question for the jury is actually consistent with the EEOC's position here, since mitigation in the Section 1983 context is a defense to a form of relief that is likewise awarded by the jury (compensatory damages). *See id.* at 364, 368. The second case cited by RAC, *Smith v. Great American Restaurants*, is also not a Title VII case, but rather is brought under the Age Discrimination in Employment Act. *See* 969 F.3d 430, 432 (7th Cir. 1992). While the ADEA concerns a type of employment discrimination, it too has a different statutory structure than does Title VII. Unlike Title VII, the ADEA expressly provides for "a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter." 29 U.S.C. s. 626(c)(2).

The third case cited by RAC, *Sheehan v. Donlen Corp.* is indeed a Title VII case, but addresses a question entirely different than the one here. *See* 173 F.3d 1039 (7th Cir. 1999). *Sheehan* was a case in which the jury (not the judge) decided both backpay and mitigation. *Id.* at 1043. However, the issue on appeal was not whether the jury or the judge was the appropriate trier of fact for those issues. Rather, the Seventh Circuit was reviewing a ruling on a Rule 50

motion and addressed whether there was a dispute of fact that required submitting the issue of mitigation to the trier of fact at all. *See id.* at 1048-49. The court concluded that there was a dispute of fact, and it was only in that sense that the court stated that the issue was one "for the jury." *Id.* The jury was the finder of fact for backpay in that case,[3] and so it follows that any dispute of fact involving backpay was "for the jury." Thus *Sheehan* is a Rule 50 decision and does not address whether or when the jury *rather than the judge* is the trier of fact for backpay and mitigation.[4]

While the language of Title VII does not need caselaw support in order to be controlling here, the EEOC notes that any number of other cases from within the Seventh Circuit can be found in which the judge decides mitigation as part of the backpay determination. A recent

[3] As the EEOC's motion noted, there are circumstances, none of which apply here, in which the issue of backpay could be assigned to the jury instead of to the court. *See* EEOC Motion in Limine No. 10 [ECF No. 75], at 1 n.1.

[4] RAC also cites two unpublished decisions from the Northern District of Illinois. The first is also a decision under the ADEA (not Title VII) and addressed the unrelated question of whether to grant summary judgment on the question of mitigation. *See Fowler v. Colfax Envelope Corp.*, 2002 WL 1676568, at *6 (N.D. Ill. July 23, 2002). That decision, like *Sheehan*, concluded that mitigation is an issue "for a jury" in the sense that summary judgment was not appropriate. *Id.* The case does not address when a jury, rather than the judge, is the trier of fact for backpay and mitigation.

The second is *Tomao v. Abbot Laboratories, Inc.*, and is the only case that RAC cites that supports its position. *See* 2007 WL 141909, at *2-*3 (N.D. Ill. Jan. 16, 2007). With due respect to the Northern District of Illinois, the EEOC believes that case was wrongly decided on this point. The decision offers little explanation or analysis beyond a citation to *Sheehan* and other cases that, for the reasons noted above, do not support assigning mitigation to the jury when the court is deciding backpay. The decision is not controlling on this Court, and the EEOC respectfully suggests that the language of Title VII is, and that the other caselaw cited by the EEOC here and in its motion illustrates that mitigation and backpay go hand-in-hand -- to the court.

example from the Court of Appeals is *Stragapede v. City of Evanston*, in which "[a]fter a weeklong trial, the jury found the City liable and awarded $225,000 in damages," and then "*[t]he judge* then held an evidentiary hearing on the issue of equitable remedies and concluded that Stragapede was entitled to backpay plus interest from the date he was fired until the time of judgment." 865 F.3d 861, 864 (7th Cir. Aug. 8, 2017) (emphasis added). In rejecting an appeal of the judge's decision on mitigation, the Seventh Circuit noted that "*[t]he judge* faithfully applied circuit precedent in declining to reduce the backpay award *for failure to mitigate*" and affirmed on that issue. *Id.* at 869 (emphases added).

Mitigation of damages is a defense to backpay, and both are issues for the Court under Title VII. RAC offers no statutory language or Seventh Circuit caselaw to suggest otherwise. Accordingly, the motion in limine should be granted, and backpay and mitigation should not be referenced in the jury's presence.

January 12, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on today's date, I caused the PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTIONS IN LIMINE to be served upon counsel to Defendant via the court's Electronic Case Filing system, pursuant to Local Rule 5.3(A).

January 12, 2018

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