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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Aimee Lespron; Stacey Smith, )

No. CV 10-01760-PHX-NVW

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Plaintiffs, )

**ORDER**

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vs. )

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Tutor Time Learning Center, LLC;) Learning Care Group, LLC; Michelle Casillas and John Doe Casillas, )

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Defendants. )

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Before the Court is Defendants’ Motion for Summary Judgment (Doc. 39) and Plaintiffs’ Motion for Partial Summary Judgment Re: Punitive Damages (Doc. 41). Oral argument was heard on January 17, 2011. Plaintiffs’ evidentiary objections to exhibits in Defendants’ Separate Statement of Facts (Doc. 40-2) are overruled.

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**I. Background<sup>1</sup>**

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Both Plaintiffs worked at Tutor Time Center No. 6090 in Queen Creek, Arizona. Smith began in June 2008, and Aimee Lespron began in December 2008. Smith worked as a lead teacher and Lespron as an after-school teacher. Defendant Michelle Colbert was Plaintiffs’ supervisor and the Center Director. Neither Smith nor Lespron ever heard

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<sup>1</sup>The facts presented here reflect the evidence viewed in the light most favorable to Plaintiffs, and all justifiable inferences from the evidence are drawn in favor of Plaintiffs. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

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1 Colbert make any negative or discriminatory comments about pregnancy or pregnant  
2 women. Approximately 32 people work at Center No. 6090.

3 Both Plaintiffs received notice regarding performance problems. In February  
4 2009, Smith was in a classroom where another teacher pinched a child. The teacher self-  
5 reported the incident, and Colbert interviewed Smith regarding the incident shortly  
6 thereafter, but Smith did not independently report the incident. On March 16, 2009,  
7 Smith received a Note to File regarding attendance problems and was placed on a  
8 Performance Improvement Plan. At that time, both Smith and Colbert assigned Smith's  
9 performance an overall rating between consistently meets and fails to consistently meet  
10 job requirements. On March 27, 2009, she was placed on a second Performance  
11 Improvement Plan for allegedly placing her feet on a napping child. In March 2009,  
12 Smith told Colbert about her pregnancy a few days after she found out about it. In May  
13 2009, Smith was placed on a third Performance Improvement Plan for attendance. At that  
14 time, she also met with Colbert and Assistant Director Annette Hitchcock and received  
15 and signed a Final Warning/Commitment Letter, acknowledging that she would be  
16 terminated if she missed another day of work.

17 On March 13, 2009, Lespron received a Note to File regarding attendance  
18 problems. On March 16, 2009, Colbert completed Lespron's performance review, which  
19 Lespron signed in June 2009. Colbert gave Lespron an overall rating between  
20 consistently meets and fails to consistently meet job requirements. On March 24, 2009,  
21 Lespron met with Colbert regarding her attendance problems and was placed on a  
22 Performance Improvement Plan because of her attendance problems. In May 2009,  
23 Lespron received another Performance Improvement Plan, met with Colbert about her  
24 attendance, and was placed on a Final Written Warning for her attendance problems.  
25 Tutor Time gave these warnings to Lespron before she told anyone about her pregnancy.  
26 In late May or early June 2009, Lespron told Hitchcock she was pregnant.

1 Center No. 6090's enrollment dropped significantly in the summer of 2009, and it  
2 had reduced revenues. Colbert held an employee meeting to discuss the reduced  
3 enrollment and need to reduce employees' scheduled hours. She asked for volunteers for  
4 reduced hours, and a few employees did volunteer to have their hours reduced. Sherri  
5 Rust (formerly Sherri Tinson) was pregnant at the time and asked to have her hours  
6 reduced in August 2009.

7 On July 13, 2009, Plaintiffs' supervisor, Michelle Colbert, distributed a  
8 memorandum to all staff, informing them they must plan on working every day they were  
9 scheduled to work. The letter said that no more than one person per classroom would be  
10 approved to be off on their scheduled day. The letter also states:

11 I will be interviewing starting tomorrow for teachers that actually want to  
12 work everyday and not complain. I am looking for team players! For those  
13 of you that have fallen into the "I do not care category" (which are quite a  
14 few of you) I will be redoing the schedule and your schedule will reflect  
15 your attitude, your attendance and what I think is best for the center and  
16 children in your care. And, just a reminder that there is NO TIME OFF IS  
17 ALLOWED IN AUGUST PERIOD per the employee handbook. Also, I  
18 will be going over the occurrences [*i.e.*, absences] over the next few days  
19 and some of you probably will not have to worry about this because you are  
20 not going to have a job much longer.

21 For each two-week pay period from July 2008 through mid-March 2009, when  
22 Smith told Tutor Time about her pregnancy, Smith worked the following hours: 72.68,  
23 56.08, 77.93, 72.23, 61.38, 64.17, 75.85, 73.80, 54.12, 71.37, 61.77, 67.0, 26.93, 60.17,  
24 69.05, 54.35, 40.0, and 68.35. For each two-week pay period from mid-March 2009  
25 through early June 2009, after she told Tutor Time about her pregnancy, Smith worked  
26 the following hours: 73.57, 66.93, 72.67, 60.62, 68.07, and 61.28. From mid-June  
27 through August 2009, she worked the following hours: 43.67, 32.77, 53.43, 58.82, 40.45,  
28 and 17.18 hours.

For each two-week pay period from December 2008 through May 2009, when  
Lespron told Tutor Time about her pregnancy, Lespron worked the following hours:  
62.83, 22.92, 68.70, 43.67, 48.93, 65.18, 54.69, 30.05, 42.77, 52.27, 53.12, and 44.53.

1 For each two-week pay period ending in June 2009, Lespron worked the following hours:  
2 48.95 and 52.23. For each two-week pay period ending in July 2009 through the end of  
3 her employment in August 2009, Lespron worked the following hours: 25.65,<sup>2</sup> 35.42,  
4 38.73, 38.33, and 9.57.

5 In July 2009, Smith told Colbert that it was difficult for her to lift and change  
6 diapers of the children in the classes for one- and two-year-olds, so Colbert no longer  
7 assigned Smith to work alone in those classes. In August 2009, Smith was placed on “on  
8 call” status. She was supposed to be called by 11:00 a.m. each day to be told whether she  
9 was needed to work that day. For two weeks after being placed on “on call” status, she  
10 did not get any work. On August 28, 2009, Smith was called to work 3:00 p.m. to 6:00  
11 p.m., but she said that she could not work past 5:30 p.m. The same thing happened the  
12 following week. Smith was told that if she did not work the hours she was offered, it  
13 would be considered job abandonment. Smith’s last day of employment was September  
14 16, 2009.

15 Lespron’s last day working at Tutor Time was August 19, 2009. That day, she  
16 worked about an hour and a half to two hours when she was sent home because she was  
17 not needed. She was scheduled to work 3:00 p.m. to 6:00 p.m. on subsequent days, but  
18 she stopped coming in to work because she was “fed up” with her hours. She never  
19 talked to Colbert or anyone else in management about why her hours were reduced. She  
20 did not tell anyone at Tutor Time that she was not going to show up for work any longer,  
21 and no one from Tutor Time called to ask her why she had not come to work.

22 Between July 23, 2009, and August 4, 2009, Center No. 6090 hired six new  
23 employees.

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26 <sup>2</sup>Lespron took several days off in July 2009 because her daughter had surgery and was  
27 in the hospital.

1 On August 18, 2010, Plaintiffs initiated this lawsuit. Plaintiffs claim they were  
2 injured by Defendants reducing their scheduled work hours. Their complaint alleged four  
3 counts: (1) violation of Title VII of the Civil Rights Acts of 1964, as amended (“Title  
4 VII”) and the Arizona Civil Rights Act (“ACRA”) by disparate treatment; (2) violation of  
5 Title VII and ACRA by a hostile work environment; (3) intentional infliction of  
6 emotional distress; and (4) negligent supervision. On September 15, 2011, the second  
7 and third counts were dismissed upon stipulation of the parties.

## 8 **II. Legal Standard**

9 Summary judgment shall be granted if the evidence shows there is no genuine  
10 dispute as to any material fact and the moving party is entitled to judgment as a matter of  
11 law. Fed. R. Civ. P. 56(a). The moving party must produce evidence and show there is  
12 no genuine issue of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*,  
13 210 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000). To defeat a motion for summary judgment, the  
14 nonmoving party must show that there are genuine issues of material fact. *Anderson v.*  
15 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact is one that might affect the  
16 outcome of the suit under the governing law. *Id.* at 248. A factual issue is genuine “if the  
17 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
18 *Id.*

19 The nonmoving party must produce evidence to support its claim or defense by  
20 more than simply showing “there is some metaphysical doubt as to the material facts.”  
21 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court  
22 must view this evidence in the light most favorable to the nonmoving party, must not  
23 assess its credibility, and must draw all justifiable inferences from it in favor of the  
24 nonmoving party. *Anderson*, 477 U.S. at 255. Where the record, taken as a whole, could  
25 not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue  
26 of material fact for trial. *Matsushita*, 475 U.S. at 586.

1 **III. Analysis**

2 **A. Disparate Treatment**

3 Plaintiffs concede they cannot assert a pregnancy discrimination claim against  
4 Michelle and Gregory Colbert because there is no individual liability under Title VII.  
5 Although not plainly identified in the Complaint, Plaintiffs' Title VII claim for pregnancy  
6 discrimination is directed only against Tutor Time Learning Center, L.L.C.

7 **1. Burden of Proof**

8 The United States Supreme Court has set forth the basic allocation of burdens and  
9 order of presentation of proof in a Title VII case alleging discriminatory treatment:

10 First, the plaintiff has the burden of proving by the preponderance of the  
11 evidence a prima facie case of discrimination. Second, if the plaintiff  
12 succeeds in proving the prima facie case, the burden shifts to the defendant  
13 to articulate some legitimate, nondiscriminatory reason for the employee's  
14 rejection. Third, should the defendant carry this burden, the plaintiff must  
15 then have an opportunity to prove by a preponderance of the evidence that  
16 the legitimate reasons offered by the defendant were not its true reasons, but  
17 were a pretext for discrimination.

18 The nature of the burden that shifts to the defendant should be understood  
19 in light of the plaintiff's ultimate and intermediate burdens. The ultimate  
20 burden of persuading the trier of fact that the defendant intentionally  
21 discriminated against the plaintiff remains at all times with the plaintiff. . . .

22 The burden of establishing a prima facie case of disparate treatment is not  
23 onerous. The plaintiff must prove by a preponderance of the evidence that  
24 she applied for an available position for which she was qualified, but was  
25 rejected under circumstances which give rise to an inference of unlawful  
26 discrimination. . . . Establishment of the prima facie case in effect creates a  
27 presumption that the employer unlawfully discriminated against the  
28 employee. . . .

29 The burden that shifts to the defendant, therefore, is to rebut the  
30 presumption of discrimination by producing evidence that the plaintiff was  
31 rejected, or someone else was preferred, for a legitimate, nondiscriminatory  
32 reason. The defendant need not persuade the court that it was actually  
33 motivated by the proffered reasons. It is sufficient if the defendant's  
34 evidence raises a genuine issue of fact as to whether it discriminated against  
35 plaintiff. To accomplish this, the defendant must clearly set forth, through  
36 the introduction of admissible evidence, the reasons for the plaintiff's  
37 rejection. The explanation provided must be legally sufficient to justify a  
38 judgment for the defendant. If the defendant carries this burden of  
39 production, the presumption raised by the prima facie case is rebutted, and  
40 the factual inquiry proceeds to a new level of specificity.

1 *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-55 (1981) (citing  
2 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and other cases; internal  
3 quotation marks, citations, and footnotes omitted). This burden-shifting framework  
4 applies to federal and state employment discrimination claims both at trial and on  
5 summary judgment. *See Dawson v. Entek Int'l*, 630 F.3d 928, 935 (9th Cir. 2011); *Hawn*  
6 *v. Exec. Jet Mgmt.*, 615 F.3d 1151, 1155 (9th Cir. 2010).

7 **2. Plaintiffs Have Not Established a Prima Facie Case of**  
8 **Discrimination Based on Pregnancy.**

9 Title VII prohibits employers from discriminating because of an individual's race,  
10 color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Title VII's definition of  
11 discrimination based on sex includes pregnancy. 42 U.S.C. § 2000e(k). The ACRA  
12 includes similar prohibitions. *See A.R.S. § 41-1463(B)*.

13 To establish a prima facie case of intentional discrimination, Plaintiffs must show:  
14 (1) they were members of a protected class; (2) they were performing their jobs  
15 satisfactorily; (3) they experienced adverse employment actions; and (4) similarly situated  
16 individuals outside their protected class were treated more favorably. *Hawn*, 615 F.3d at  
17 1156. Because the ACRA is modeled after Title VII, federal case law is persuasive in  
18 applying the ACRA. *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 582, 937 P.2d  
19 1382, 1388 (Ct. App. 1996).

20 Plaintiffs have shown that they were members of a protected class, *i.e.*, pregnant,  
21 and they experienced adverse employment actions, *i.e.*, reduction in scheduled work  
22 hours. On this record, whether either Plaintiff was performing her job satisfactorily is  
23 questionable. It is undisputed each received multiple notices regarding attendance  
24 problems, yet neither was terminated for cause.

25 But Plaintiffs have not produced any evidence that similarly situated individuals  
26 outside their protected class were treated more favorably. They contend they are required  
27 to show only that pregnant employees' scheduled hours were reduced and non-pregnant  
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1 employees' scheduled hours were not. Generally, however, "individuals are similarly  
2 situated when they have similar jobs and display similar conduct." *Hawn v. Executive Jet*  
3 *Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010) (quoting *Vasquez v. Cnty. of Los*  
4 *Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees who did not engage in  
5 problematic conduct of comparable seriousness were not similarly situated)). To be  
6 similarly situated, employees must be similar in all material respects, a determination that  
7 requires fact-intensive inquiry. *Id.* "[W]hat facts are material will vary depending on the  
8 case." *Id.* Here, whether employees consistently show up for work when scheduled is  
9 material. Thus, to establish a prima facie case of intentional discrimination, Plaintiffs  
10 must show that non-pregnant employees with attendance problems were treated more  
11 favorably, and they have not. Although Plaintiffs contend that Defendants have produced  
12 no records of any other employees' attendance, Plaintiffs have not alleged that they  
13 unsuccessfully sought discovery of attendance records, and they bear the burden of  
14 production on this point.

15       Even if Plaintiffs were only required to show disparate treatment between pregnant  
16 and non-pregnant employees, their evidence does not support their conclusions. They  
17 correctly state that for the pay period ending August 28, 2009, the only employees who  
18 worked less than 20 hours were Plaintiffs, but that is the only pay period in which they  
19 worked less than 20 hours, and it is the period during which they were unable or  
20 unwilling to work the hours offered to them. Moreover, the trend of hours each Plaintiff  
21 worked did not abruptly drop after she told Tutor Time about her pregnancy. The record  
22 does not show a noticeable reduction in hours worked until June 2009 for Smith and July  
23 2009 for Lespron.

24       Plaintiffs also contend that Colbert's July 13, 2009 letter to staff indicates many  
25 people had attendance problems, but not everyone's hours were reduced. However, the  
26 letter actually says "all" of them were "out of control with wanting to trade shifts, leave  
27 early and wanting the same days off." Regarding attendance, the letter indicates that  
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1 Colbert intended to review attendance records and “some” of them were likely to lose  
2 their jobs as a result.

3 Thus, Plaintiffs have not shown a prima facie case of discrimination because the  
4 evidence does not show that any non-pregnant employees with attendance problems did  
5 not have their scheduled work hours reduced.

6 **3. Even If Plaintiffs Had Shown a Prima Facie Case of**  
7 **Discrimination, They Have Not Created a Genuine Issue of**  
8 **Material Fact Regarding Whether Defendants’ Non-**  
9 **Discriminatory Reasons for Their Actions Are Pretextual.**

9 Defendants contend they reduced Plaintiffs’ scheduled work hours because of  
10 reduced enrollment and Plaintiffs’ attendance problems. In addition, they chose not to  
11 place Smith in certain classrooms because of an incident between another teacher and a  
12 child and because Smith asked not to be scheduled in classes where she would need to  
13 pick up children for diaper changing, which reduced options for scheduling her to work.  
14 They also explained that they hired new employees because they were needed to fill  
15 specific positions inappropriate for Plaintiffs. Plaintiffs concede that there is no evidence  
16 of pregnancy discrimination other than the reduction of scheduled work hours. Thus,  
17 even if Plaintiffs had made a prima facie case of discrimination, Defendants have  
18 presented legitimate nondiscriminatory reasons for reducing Plaintiffs’ hours that would  
19 be sufficient to rebut a presumption of discrimination.

20 Plaintiffs contend that they have shown a genuine issue of material fact regarding  
21 whether Defendants’ justifications for reducing Plaintiffs’ scheduled work hours are mere  
22 pretext by showing that Defendants have stated different reasons for their actions:  
23 decreased enrollment, need to exclude Smith from certain classrooms, and Plaintiffs’ poor  
24 attendance. However, these reasons are not inconsistent with each other. Further,  
25 Plaintiffs’ poor attendance documented well before Plaintiffs claimed pregnancy  
26 discrimination cannot be disregarded as post hoc justification created by lawyers, as  
27 Plaintiffs contend. Moreover, Colbert announced in her July 13, 2009 memorandum to  
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1 staff her intention to hire new employees and that employees would be scheduled hours  
2 based on their attitude and attendance. Thus, Plaintiffs have not created a genuine issue  
3 of material fact regarding whether Defendants' reasons for reducing Plaintiffs' hours are  
4 pretext.

5 **B. Negligent Supervision**

6 In their Complaint, Plaintiffs allege "Defendants owed them a duty to supervise  
7 their employees in a reasonable, non-negligent manner" and "Defendants breached this  
8 duty by . . . allowing its employees to . . . engage in a persistent pattern of conduct in  
9 violation of the law and the public policy of this state." Because summary judgment will  
10 be granted in Defendants' favor on Plaintiffs' discrimination claim, there is no evidence  
11 showing negligent supervision by permitting discrimination.

12 Further, there is no Arizona common law duty for employers to comply with Title  
13 VII and ACRA. Plaintiffs may not create a common law negligence cause of action to  
14 hold individuals liable for statutory violations.

15 **C. Punitive Damages**

16 Based on the foregoing determinations, Plaintiffs' Motion for Partial Summary  
17 Judgment Re: Punitive Damages is moot.

18 IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment  
19 (Doc. 39) is granted and Plaintiffs' Motion for Partial Summary Judgment Re: Punitive  
20 Damages (Doc. 41) is denied as moot.

21 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants  
22 and against Plaintiffs and that Plaintiffs take nothing. The Clerk shall terminate this case.

23 DATED this 18<sup>th</sup> day of January, 2012.

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27 Neil V. Wake  
28 United States District Judge