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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Aimee Lespron and Stacey Smith,)	
)	
Plaintiffs,)	2:10-cv-1760 JWS
)	
vs.)	ORDER AND OPINION
)	
Tutor Time Learning Center, LLC, et al.,)	[Re: Motion at docket 76]
)	
Defendants.)	
)	

I. MOTION PRESENTED

At docket 76, Aimee Lespron (“Lespron”) and Stacey Smith (“Smith”) (collectively “Plaintiffs”) move for an order *in limine* precluding defendants Tutor Time Learning Centers, LLC (“TTL”); Learning Care Group, LLC (“LCG”); Michelle Casillas and John Doe Casillas (collectively “Defendants”) from introducing evidence at trial concerning an incident in March of 2009 in which Stacey Smith was disciplined for restraining a child by placing her legs on the child. Defendants’ response is at docket 77. No reply was filed. Oral argument was not requested and would not assist the court.

II. BACKGROUND

TTL and LCG owned a child care facility in Queen Creek, Arizona, where Plaintiffs were employed as teachers. Plaintiffs each became pregnant in the Spring of

1 2009. Lespron was separated from her employment in August of 2009, and Smith was
2 separated from her employment in September of 2009. Plaintiffs contend that the
3 separations were a constructive discharge resulting from a substantial reduction in work
4 hours and further allege that the constructive discharge occurred because each was
5 pregnant. Defendants deny that Plaintiffs' treatment was the result of discrimination
6 based on Plaintiffs' pregnancies.
7

8 Readers unfamiliar with the details of this litigation may wish to read the
9 summary judgment order issued by Judge Wake, which is at docket 51 and the Ninth
10 Circuit's memorandum decision which is at docket 65-1. Judge Wake recently recused,
11 and the case was re-assigned by random draw to the undersigned judge.¹
12

13 **III. DISCUSSION**

14 Evidence which is not relevant to an issue in a lawsuit may not be admitted into
15 evidence.² Relevant evidence may be excluded if its probative value is substantially
16 outweighed by the danger of unfair prejudice or misleading the jury.³ The evidence
17 which is the subject of the motion at hand is evidence of Smith's disciplinary history
18 which would show that Smith was disciplined because she used her legs to restrain a
19 child under her supervision.
20

21 Plaintiffs argue that the evidence is not relevant, because it played no role in
22 either the reduction of Smith's work hours or her separation from employment.
23

24
25 ¹Doc. 78.

26 ²"Irrelevant evidence is not admissible." Fed. R. Evid. 402.

27 ³Fed. R. Evid. 403.

1 Plaintiffs rely on deposition testimony by defendant Michelle Colbert (previously known
2 as Michelle Casillas) who determined how to implement the reduction in staff hours
3 associated with the decreasing number of children at the facility. In the passage relied
4 upon by Plaintiffs, Colbert is asked, “So I think you told me that [Smith’s] separation
5 from the company didn’t have anything to do with the incidents we just discussed [viz.]
6 not reporting Dawn pinching [a child] and putting her legs over a child. Is that right?”
7 To which Colbert responded, “That is correct.”⁴

9 The court has trouble treating the response as determinative of the relevance of
10 Smith’s disciplinary history in Colbert’s decision to reduce Smith’s hours. Given the
11 precise question asked, it would have been reasonable for Colbert to answer the
12 question in the way she did because it asked about the separation from employment
13 and that was the direct result of Smith’s failure to come to work. The reduction in hours
14 was a step removed from the separation itself and its connection to the separation was
15 determined by Smith, not by Colbert. Plaintiffs do not point to any deposition question
16 in which Colbert was asked if the “legs” incident or any other aspect of Smith’s
17 disciplinary history played a role in Colbert’s decision to reduce Smith’s hours.⁵

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20 In contrast to the deposition testimony in which Colbert was not asked what role,
21 if any, Smith’s disciplinary history had on Colbert’s decision to reduce her hours, her
22 Declaration points to numerous factors she considered, including Smith’s disciplinary
23

24
25 _____
26 ⁴Deposition of Michelle Colbert at p. 26 of the deposition, doc. 76-2 at p. 3.

27 ⁵The court does not have access to a complete deposition transcript, but relies on the
28 proposition that if such testimony existed, Plaintiffs would call it to the court’s attention.

1 history which entered into her decision about whose hours to reduce.⁶ In sum,
2 Plaintiffs' argument that Smith's disciplinary history is irrelevant based on the single
3 question and answer in Colbert's deposition is not persuasive.

4
5 Plaintiffs also contend that Smith's disciplinary problems were not referenced in
6 TTL's response or supplemental response to the EEOC. The original response advised
7 that Smith was separated because she failed to show up for work for two consecutive
8 days and further asserted that actions taken by the employer were not related to
9 Smith's pregnancy. Some other details were included, such as the assertion that Smith
10 refused an opportunity to work additional hours, but there is no mention made of
11 disciplinary problems. There are several reasons why the original response is
12 insufficient to support the conclusion Plaintiffs would have the court draw. First, the
13 court has not been provided with a copy of the underlying EEOC complaint rendering it
14 impossible to confidently assess the significance of the original response. Second, the
15 response reserved the right to add additional information as it was discovered. Third,
16 and related to the second point, there is no indication that Michelle Colbert had any
17 input into the original response.
18
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20 Michelle Colbert was one of the people who provided information for the
21 supplemental response, but it was by its nature primarily limited to answering specific
22 inquiries from the EEOC, which are identified in the supplement. There is no inquiry
23 about disciplinary issues, although there was a request for Smith's personnel file. The
24 file was provided and presumably did contain her disciplinary history.
25

26 ⁶Declaration of Michelle Colbert at doc. 76-5, originally filed as part of doc. 40-2 in
27 support of Defendants' motion for summary judgment.

1 Standing alone, and even in combination with Colbert's deposition testimony, the
2 original and supplemental response do not establish that Smith's disciplinary history
3 was irrelevant to Colbert's decision as to which employees' hours would be reduced.
4 The court concludes that Smith's disciplinary history is relevant to the issues to be
5 litigated.
6

7 Plaintiffs also argue that even if relevant, Smith's disciplinary history should be
8 excluded for other reasons. First, they assert that admitting evidence of that history
9 would violate Ariz. R. Ev. 404(b). Of course, the rules of evidence which will apply at
10 trial in this case are the Federal Rules of Evidence. The court assumes Plaintiffs meant
11 to refer to Fed. R. Evid. 404(b). In any event for present purposes, Fed. R. Evid. 404(b)
12 and Ariz. R. Evid. 404(b) are substantively equivalent.
13

14 Rule 404(b) precludes use of crimes, wrongs or other prior bad acts to show that
15 a person's more recent action conformed to the earlier action (with certain exceptions
16 relating to motive, opportunity, intent, and the like). However, Rule 404(b) is not
17 relevant to the issue raised by Plaintiffs' motion. Defendants would not be using
18 evidence of Smith's disciplinary history to show that Smith acted in conformity with the
19 behavior which resulted in disciplinary action. Rather, Defendants would use the
20 evidence to show that Colbert's action was informed by her knowledge of Smith's
21 disciplinary history.
22

23 Plaintiffs also argue that evidence of Smith's disciplinary history should be
24 excluded pursuant to Ariz. R. Ev. 403. Again, the relevant rule is the corresponding
25 federal rule, Fed. R. Evid. 403. In this instance the two rules are identical. Rule 403
26 provides that a court may exclude relevant evidence whose "probative value is
27

1 substantially outweighed” by the danger that it would result in “unfair prejudice,
2 confusing the issues, misleading the jury, undue delay, wasting time, or needlessly
3 presenting cumulative evidence.” Plaintiffs urge that evidence of Smith’s disciplinary
4 history would result in undue prejudice, confuse the issues, and mislead the jury.
5 Plaintiffs do not elaborate beyond the bare assertion that these consequences would
6 flow from allowing the jury to hear the evidence.
7

8 Smith’s disciplinary history has probative value because Colbert will testify that it
9 played a role in her selection of Smith as one of the employees whose hours would be
10 reduced. The incidents in the disciplinary record do not reflect well on Smith’s behavior
11 around children, but they are unlikely to result in serious prejudice. What parent has
12 not had an urge to restrain a recalcitrant child? Indeed, most parents probably have
13 done so in one way or another. Smith’s actions won’t raise her esteem in the eyes of
14 the jury, but they do not represent conduct that would generate serious prejudice.
15

16 The court does not see how testimony from Colbert, which identifies the
17 disciplinary history as one factor among many considered in making her decision, would
18 confuse the issues or mislead the jury. The jury will understand that it has to evaluate
19 all of the evidence in deciding whether what really motivated Colbert was Smith’s state
20 of pregnancy. Furthermore, cross-examination can be relied upon to keep all of the
21 evidence in perspective. In that regard, it should be added that although the court is
22 not persuaded that Colbert’s deposition testimony rendered the disciplinary history
23 irrelevant, it provides material for cross-examination aimed at showing Colbert did not
24 actually rely on that disciplinary history.
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