IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANEESHA BRYANT,	:	
	:	
Plaintiff	:	
	:	**Docket No. 3:14-CV-01062-MEM**
v.	:	
	:	
WILKES-BARRE HOSPITAL COMPANY, LLC	:	
	:	
Defendant	:	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE

Plaintiff Aneesha Bryant, by and through her undersigned counsel, hereby submits this brief in support of her Motion In Limine To Preclude Defendant From Arguing, Referencing And/Or Testifying Regarding the Facebook group entitled "You Know Ya Ass is from da Hood When".

The case at hand is one concerning racial discrimination in the form of a hostile work environment. Based upon the discovery conducted, the Plaintiff expects the Defendant to attempt to admit evidence concerning the Plaintiff's participation in a Facebook group entitled "You Know ya Ass is from da Hood When". The Facebook group contains a parody of Jeff Foxworthy's comedy routine "You Might Be a Redneck If..." and other such jokes concerning life in the neighborhood in which the Plaintiff grew up. Bryant Dep. Pages 237-

99 in Docket no. 33-2. Evidence of The Facebook group is irrelevant. Any attempt to admit this evidence would unfairly prejudice and confuse the jury.

Under Federal Rule 402 only relevant evidence is admissible. Irrelevant evidence is not admissible. See Fed. R.E 402. The participation of the Plaintiff through her personal Facebook page in the abovementioned Facebook group has no relevance to her claims of racial harassment, constructive discharge, and retaliation.

In order to establish racial harassment, the Plaintiff must show that conduct toward her was "unwelcome". Through the discovery process it was indicated that Defendant will attempt to use the Facebook evidence in order to show that the speech and conduct to which Plaintiff was subjected in the workplace was welcomed by her.

The first flaw in that argument is that unwelcome conduct has a very particular analysis in the jurisprudence. In *Meritor Sav. Bank, FSB v. Vinson*, the Supreme Court stated that, "The correct inquiry is whether respondent by her conduct **indicated** that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." (emphasis added) 477 U.S. 57, 68, 106 S. Ct. 2399, 2406, 91 L. Ed. 2d 49 (1986).

Additionally, "In order to constitute harassment, the conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." *Clegg v. Falcon Plastics, Inc.*, 174

Fed.Appx. 18, 25 (3d Cir. 2006) citing *Bales v. Wal–Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir.1998).

Hostile work environment claims that are based on racial discrimination are evaluated under the same standard as those based on sexual harassment. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S.Ct. 2061, 2074, 153 L.Ed.2d 106 (2002)

There has been no evidence presented that the Plaintiff's co-employees had any knowledge of the Facebook group in question. Therefore, this information could not have indicated any desire by the Plaintiff to be spoken to in the manner in which they did. The current area of inquiry in this matter is confined to the speech and actions in the workplace observed by the co-employees. It does not include the actions of the Plaintiff in other spheres of her life of which the perpetrators in this matter have no contact or knowledge. It has been determined in the Fourth Circuit that private activities of a Plaintiff are not invitations to harassment. As stated in *Katz v. Dole*, "A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment." 709 F.2d 251, 254 n. 3 (4th Cir.1983). This has been applied even if activity was posing for a lewd magazine as in *Burns v. McGregor Elec.* Indus., Inc. The court in *Burns* provides a powerful and persuasive statement against the rationale that permission to some people implies permission to all.

> **This rationale would allow a complete stranger to pursue sexual behavior at work that a female worker would accept from her husband or boyfriend.** This standard would allow a male employee to kiss or fondle a female worker at the workplace. None of the plaintiff's conduct, which the court found relevant to bar her action, was work related. Burns did not tell sexual stories or engage in sexual gestures at work. She did not initiate sexual talk or solicit sexual encounters with co-employees. Under the trial court's rationale, if a woman taught part-time sexual education at a high school or college, a court would be compelled to find that sexual language, even though uninvited when directed at her in the work place, would not offend her as it might someone else who was not as accustomed to public usage of the terms. 989 F.2d 959, 963 (8th Cir. 1993) (emphasis added)

To determine that evidence of activities outside the sphere of the workplace is relevant throws open the door to an intensive and intrusive examination of all aspects of a plaintiff's life and allows the dangerous argument that being permissive of behavior in one area of one's life leads to a blanket permission for that behavior in all aspects of life, including in the workplace.

Courts have determined the remarks made of a discriminatory or harassing nature that are made outside of the presence and knowledge of a Plaintiff are irrelevant for the purpose of proving harassment. See *Ngeunjuntr v. Metropolitan Life Ins. Co.,* 146 F.3d 464, 467 (7th Cir.1998*), Johnson v. City of Fort Wayne*, 91 F.3d 922, 938 & n. 8 (7th Cir.1996), see also *Burnett v. Tyco Corp.*, 203 F.3d 980, 981 (6th Cir.2000) *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 n. 7 (8th Cir.1999), *Hardin v. S.C. Johnson & Son, Inc.,* 167 F.3d 340, 347 (7th Cir.1999) , *Mason v. S. Illinois Univ. at Carbondale*, 233 F.3d 1036, 1046 (7th Cir. 2000). It would logically follow that the same would be true for Plaintiff's remarks made

outside of the hearing of the alleged harassers in regards to determining whether statements are "unwelcome," of which no one else in the workplace had any knowledge.

Additionally, Federal Rule of Evidence 403 provides that: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403. The trial court has broad discretion to exclude evidence under Rule 403. *Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 806 (3d Cir. 1987). In this case, the admission of the Facebook evidence would be unfairly prejudicial, confuse the issue, and mislead the jury. As stated above, the law is clear that the determination of whether something is unwelcome is limited to the presentation of voluntariness of the Plaintiff towards the person making the statements. To introduce the Facebook evidence would be to muddy the waters for the jury which would be misleading.

It is an established part of society that the appropriateness of language and conversation is determined in part by the audience of that communication. Language has different meaning when used consensually than when used as a slur. This can be particularly seen in the practice of reappropriation of stigmatizing labels. Groups use words and concepts among themselves in a positive and strengthening way that have been used against them by others. That only can occur when everyone in the group has consented to the given meaning of a word. This does not occur when there is a power imbalance

between the participants in the conversation.[1] Communication shared among a community that voluntarily participates in it together is inherently different than a conversation in which there is a power imbalance between the participants. The rules of the conversation in a peer group that in this case was mainly African-American are established to allow for an informality that is not present in the workplace. To allow this type of evidence into the case causes confusion of the issues at hand.

Evidence that on balance is more prejudicial than probative should be excluded. As established above, the probative nature of this evidence is nonexistent but there is a strong likelihood of unfair prejudice with its admission. A review of the Plaintiff's deposition transcript indicates that Defendant intends to use introduce the Facebook evidence for the purpose of mocking the Plaintiff. During questioning, the Defendant's counsel repeatedly requested the Plaintiff to state the name of the Facebook group, asking her numerous times to spell and pronounce words. The admission of the evidence is an attempt to paint the Plaintiff in an unfairly prejudicial light. A review of the video itself establishes the mocking nature of the questioning.

[1] This concept is examined in "the Reappropriation of Stigmatizing Labels: Implications for Social Identity" by Adam G. Galinsy, Kurt Hugenburg, Carla Groom ,and Galen Bodenhausen in Research in Managing Groups and Teams, Volume 5, 221-256, 2003

The Defendant should be precluded from arguing, referencing and/or testifying regarding the Facebook group because it is irrelevant, unfairly prejudicial, and will lead to confusion and the mislead of the jury.

BORLAND & BORLAND, LLP

/s/ Kimberly D. Borland
Kimberly D. Borland, Esquire
11th Floor
69 Public Square
Wilkes-Barre, Pa 18701
Phone: 570-822-3311
Facsimile: 570-822-9894
Attorney for the Plaintiff, Aneesha Bryant

/s/ Sarah L. Borland
Sarah L. Borland, Esquire
11th Floor
69 Public Square
Wilkes-Barre, Pa 18701
Phone: 570-822-3311
Facsimile: 570-822-9894
Attorney for the Plaintiff, Aneesha Bryant

CERTIFICATE OF SERVICE

I, Kimberly D. Borland, Esquire hereby certify that on this 27th day May, 2016 a true and correct copy of the foregoing Brief was filed electronically and is available for viewing and downloading from the Court's ECF system and was served upon the following attorney via the Court's ECF system:

SIDNEY R. STEINBERG
POST & SCHELL
FOUR PENN CENTER
1600 JOHN F. KENNEDY BLVD
PHILADELPHIA PA 19103

/s/ Kimberly D. Borland
Kimberly D. Borland