

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

PAULA LANE, *et al*,

Plaintiffs,

Case No. 3:12-cv-00138 -ST

v.

ORDER

JOHN KITZHABER, Governor of the State of
Oregon, *et al*,

Defendants.

STEWART, Magistrate Judge:

In connection with the pending Motion to Certify the Class, defendants filed a Motion to Strike New Evidence Submitted With Plaintiffs' Reply in Support of Their Motion for Class Certification (docket # 68). Defendants argue that this new evidence is inappropriately proffered with plaintiffs' reply brief, denying them the opportunity to respond. *See e.g., Provenz v. Miller*, 102 F3d 1478, 1483 (9th Cir 1996), *cert denied*, 522 US 808 (1997). Plaintiffs counter that this evidence is not new, but is properly submitted in order to rebut arguments made in defendants' opposition to the motion to certify. *See e.g., Terrell v. Contra Costa County*, 232 Fed Appx 626, 629 n2 (9th Cir 2007).

After plaintiffs filed their Motion to Certify the Class with supporting exhibits, defendants conducted discovery, taking eight depositions and requesting client records. They

used this discovery to support their opposition to class certification, attaching excerpts from depositions, client records, and a declaration from Joshua Leslie, the personal agent for one of the plaintiffs, Gretchen Cason. They also submitted two declarations attesting to hearsay evidence from Susan Norman at Eastco Diversified Services (“Eastco”) which has been stricken (dockets # 51 & # 73) and superseded by the subsequent deposition testimony of Ms. Norman (dockets # 74 & # 75).

The issue is whether the evidence submitted with plaintiffs’ reply is permissible rebuttal evidence or impermissible new evidence. Defendants’ motion to strike is GRANTED IN PART and DENIED IN PART as follows:

I. Declaration of Paul Kinville

Paul Kinville is the father of one of the plaintiffs, Zavier Kinville. His declaration confirms that Zavier Kinville would like a community job, particularly one that involves working with children, has not received the services he needs to help him obtain a community job, and any contradictory statements in his deposition are due to the stressful, unfamiliar environment of a deposition.

Had defendants submitted excerpts from the deposition of Zavier Kinville, then his father’s declaration would be permissible rebuttal evidence. However, they did not. Instead, they argued only that he received employment services at Eastco which they supported with Ms. Norman’s testimony. Since all parties are relying on Ms. Norman’s deposition testimony which more fully describes the scope of employment services provided to Zavier Kinville by Eastco, Paul Kinville’s declaration is both “new” and unnecessary evidence and, therefore , is stricken.

///

///

II. Declaration of Kathleen Cason

Kathleen Cason is the mother of plaintiff Gretchen Cason. Her declaration contradicts several statements made in the declaration by Joshua Leslie, her daughter's personal agent, which defendants submitted in opposition to class certification. Therefore, it is permissible rebuttal evidence.

If this declaration is not stricken, defendants request the opportunity to take a deposition of Kathleen Cason in order to respond to her declaration. However, Kathleen Cason's declaration simply responds to statements made by Joshua Leslie. No further discovery in this regard is necessary or useful to the court and, thus, will not be permitted.

III. Declaration of Bettina Toner

The Declaration of Bettina Toner attaches 20 exhibits, consisting of excerpts from depositions of the eight plaintiffs, as well as various client records. To the extent that plaintiffs are merely rebutting deposition excerpts and client records submitted by defendants' in opposition to class certification, these exhibits are permissible. However, some of plaintiffs' exhibits exceed the scope of permissible rebuttal evidence.

In their opposition, defendants submitted excerpts of depositions of only four plaintiffs: Angela Kehler, Gretchen Cason, Elizabeth Harrah, and Andres Paniagua. Beatty-Walters Decl., Exs. 1, 5-8. They also submitted client records for plaintiffs Angela Kehler and Lori Robertson. *Id.*, Exs. 2-4. Defendants' opposition memorandum discusses the employment situation of these four plaintiffs and also asserts that three of them (Angela Kehler, Elizabeth Harrah, and Andres Paniagua), plus two others (Zavier Kinville and Lori Robertson), work with a job developer at Eastco. The evidence concerning the five plaintiffs who work at Eastco is further supported by the deposition testimony of Ms. Norman.

Defendants' opposition to class certification does not refer at all to either plaintiff Paula Lane or Sparkle Green. Thus, the evidence submitted by plaintiffs with their reply brief concerning Paula Lane and Sparkle Green (Toner Decl., Exs. 1, 2, 10-13) is outside the scope of permissible rebuttal evidence and stricken.

The remaining deposition excerpts and client records submitted by plaintiffs address the same issues referenced in defendants' opposition through deposition excerpts or Ms. Norman's testimony. Admittedly, defendants' opposition centers primarily on the employment situation of plaintiffs Angela Kehler and Gretchen Cason and only briefly mentions the other four plaintiffs. However, given defendants' assertion that all of these plaintiffs are receiving employment services, plaintiffs are entitled to respond with evidence contesting the accuracy of that assertion. Accordingly, the motion to strike is denied as to those exhibits (*id.*, Exs. 3-9, 14-20).

DATED June 26, 2012.

s/ Janice M. Stewart

Janice M. Stewart
United States Magistrate Judge