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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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| JENNY M. LEWIS, an individual<br><br>Plaintiff,<br><br>*v.*<br><br>SALT LAKE COUNTY, a political subdivision of the State of Utah,<br><br>Defendant. | DEFENDANT'S MOTION, and SUPPORTING MEMORANDUM, FOR SANCTIONS FOR DECLARATION SUBMITTED IN BAD FAITH<br><br>Case No.: 2:11-CV-01088<br><br>Judge DAVID NUFFER |

Comes now the Defendant, Salt Lake County (hereinafter referred to as the "County") and for its Motion for Sanctions filed pursuant to FED R. CIV. P. 56(h) and DUCivR 7-1 *et seq.* for Plaintiff's Declaration Submitted in Bad Faith, hereby states as follows:

INTRODUCTION:

The Plaintiff, Jenny Lewis, brought this action in relation to her former employment with the County which lasted approximately four months in 2008. Plaintiff alleges five causes of action, the primary thrust of which concern allegations of sexual harassment in the form of an adverse tangible employment action (termination), hostile work environment, and retaliation after Plaintiff allegedly complained about the sexually harassing conduct of a female co-worker. The County moved for

summary judgment pursuant to FED. R. CIV. P 56 *et seq.* and DUCivR 56-1 as there is no evidence of record to support her claims but for self-serving allegations made after she was terminated.

Factually important to Plaintiff' retaliation claim is that she establish both that the decision-makers who made the termination decision knew about her protected activity and fired her on that basis. Plaintiff lacks all evidence to make this required point, and admitted as much in two depositions concerning her allegations as to her retaliation claim. So to make her required showings, Plaintiff decided to attempt to change the evidence by submitting a declaration in opposition to the County's dispositive motion that directly contradicts her prior, sworn testimony. The actions of Plaintiff and her counsel in this regard not only fail to achieve their collective goal of the complete revision of the evidence of record so as to support their shared desire to escape summary judgment, they violate Rule 56(h) given that Plaintiff's declaration is the definition of one filed in bad faith.

RELIEF SOUGHT and GROUNDS THEREFORE:

The current motion is prompted by the Plaintiff's attempt to avoid and revise her prior sworn testimony via her declaration filed in opposition to the County's motion for summary judgment. FED R. CIV. P. 56(h)-Affidavit or Declaration Submitted in Bad Faith states as follows: "[i]f satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court-after notice and a reasonable time to respond-may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions." *Id.*

Comparison of the Plaintiff's prior sworn testimony related to her allegation that Gaylyn Larsen (formerly with the County's Human Resources Department) spoke with any of the decision-makers involved in the decision to terminate Plaintiff before her termination, in contrast to the

statements made in both Plaintiff's declaration and opposition to the County's summary judgment motion, reveals a glaring and substantive difference in her testimony. Specifically, Plaintiff was asked to detail the relevant evidence in her possession that would support her allegation that Larsen advised the decision-makers who terminated her employment about Plaintiff's complaints prior to their termination decision. In her deposition, Plaintiff revealed that she had no evidence, other than circumstantial, to support that important inference (not fact) crucial to her retaliation claim.

Realizing the detrimental impact of her own testimony in that regard to her retaliation claim in the face of the County's summary judgment motion, Plaintiff (with the assistance of her counsel) reversed her testimony in her declaration by stating affirmatively that Larsen told Plaintiff specifically that Larsen had discussed Plaintiff's complaints with the decision-makers before they terminated Plaintiff's employment. Thus, Plaintiff's declaration directly contradicts her prior testimony, constituting a sham declaration designed to create a sham issue of fact, making it a declaration filed in bad faith as defined by the aforementioned rule.

For these reasons, the County specifically requests the Court will assess against both Plaintiff and her counsel the reasonable expenses, including attorney's fees, it incurred as a result of having to address her sham declaration filed in bad faith.

STATEMENT OF RELEVANT FACTS:

1. Plaintiff raised a sexual harassment complaint to Gaylyn Larsen with the County's HR department on October 6, 2008. *Lewis 3-19-13 Depo,* p. 92.

2. Lt. Kris Ownby testified that the decision to terminate Plaintiff had been made on Friday October 3, 2008 as evidenced by the fact that they instructed Plaintiff to appear for a meeting the

following Monday, October 6, 2008 in order to provide Plaintiff notice of her termination. *Ownby Depo,* p. 54.

3. Plaintiff testified in her deposition taken on March 19, 2013 that she possesses nothing but her own opinion to support an assertion that Larsen communicated anything to the County decision-makers about Plaintiff's sexual harassment complaints until after her termination. Plaintiff was specifically asked to detail the relevant evidence in her possession that would support her allegation that Larsen spoke to any of the decision-makers involved in the decision to terminate Plaintiff before her termination. This line of questioning is listed verbatim as follows:

Q. I want to talk about paragraph 40 of your complaint. It says, "Larsen further stated that she would immediately speak with McDonald regarding the matter, which she did." How did you know that Larsen spoke with McDonald?

A. Because she said that she would.

Q. Said that she would, but do you know, in fact, whether she did?

A. Because of the circumstances and the events that occurred, I fully believe she did.

Q. You believe that she did. What facts do you have to support your belief?

A. Basically when the message was left, Gaylynn was aware that I was trying to file a sexual harassment complaint. When she spoke with me and I gave her all the details of all the incidents that had been going on, including the pickle incident, she said that as soon as she hung up the phone, she was calling Claudia.

Q. So this is October 6th? This is a conversation that you had with Gaylynn Larsen on October 6th?

A. Yes. So she said that she would talk with Claudia, and I fully believe that she did because there was no cause or reason for me to be terminated that afternoon.

Q. So you believe that she did. My question is what evidence do you have to show that she did, in fact, talk with McDonald after you spoke with her on the telephone on October 6th?

A. I would say because of the circumstantial evidence.

Q. Do you have anything other than circumstantial evidence?

A. Gaylyn, she had indicated that she had, if I remember right, when I met with her on Friday, she made indication that there had been some communication.

Q. Is that October 10th?

A. Yes.

Q. So is it your testimony here today that Gaylynn told you that she spoke with McDonald on October 6th before you were terminated?

A. I don't know if she worded it exactly like that, but there was reason for me to believe that she had spoken with her.

Q. What did she say?

A. Basically that she -- when we met, something along the lines of doing the investigation and following up with Claudia.

Q. She told you it was October 6th that she spoke with Claudia?

A. She didn't give me an exact date. *Lewis 3-19-13 Depo,* pp. 124-126.

4. Plaintiff's self-serving claims describing that Plaintiff left detailed phone messages complaining about the alleged sexually harassing conduct at her workplace with Larsen **prior to the date of her termination** were made for the first time only during Plaintiff' **second deposition** taken on March 19, 2013. But before then, and much closer in time to the actual events, Plaintiff testified during her **first deposition** that the first complaint of sexual harassment to Larsen was made on October 6, 2008: "[a]nd the main thing was the day that I was finally able to get through to Gaylyn Larsen and make the complaint was the same day I was fired." *Lewis 9-24-10 Depo,* pp. 15, 49

5. Larsen denied learning about any sexual harassment claim lodged by Plaintiff until at least October 6, 2008. *See Larsen Depo*, p. 17.

6. For the first time ever, when faced with defending against the County's dispositive motion, Plaintiff stated in her declaration definitively that "Larsen informed Lewis on October 6, 2008, prior to her termination, that she had communicated with McDonald about Plaintiff's sexual harassment claim ..." Moreover, Plaintiff makes this false assertion repeatedly in her opposition. *Pltf. Memo in Opp.,* pp. 14, 15, 17, 24, 26, 34, 36.

STATEMENT of LAW and ARGUMENT:

As to Plaintiff's retaliation claim, it is incumbent upon Plaintiff to demonstrate not only that the decision-makers (in this case Claudia McDonald and Lt. Kris Ownby) knew that Plaintiff had engaged in protected activity, but that also that they based their termination of her for the reason that she engaged in that protected activity. However, Ownby and McDonald each testified that Plaintiff never complained of sexual harassment to them personally, and that each respectively learned about Plaintiff's harassment complaints only after Plaintiff had been terminated. *See McDonald Depo,* pp. 22, 105, 107; *Ownby Depo,* pp. 25, 66.

Because Plaintiff cannot and does not point to any documentary evidence or corroborating witness testimony, not even an email she authored to show (or that would tend to show) that she felt she was being subjected to an unlawful hostile work environment or that she desired to make a sexual harassment complaint, Plaintiff decided to attempt to manufacture evidence on her own behalf and in doing so, revise and reverse her prior sworn testimony to create a "genuine" issue of material fact. Plaintiff and her counsel seemingly share the opinion that they can convert Plaintiff's beliefs regarding a crucial element of their retaliation claim and which was previously described in her sworn deposition testimony as being based solely on circumstantial evidence into a conclusion founded on direct evidence simply by refuting her own deposition testimony with a contrary declaration statement. The actions of Plaintiff and her counsel in this regard not only fail to achieve the goal of the complete revision of the evidence of record so as to support their shared desire to escape summary judgment, they violate Rule 56(h) given that Plaintiff's declaration is the definition of one filed in bad faith.

Specifically, Plaintiff's declaration attempts to substantively alter her prior sworn testimony as to specific questions about what evidence, if any, that Plaintiff possessed to support the allegation in her complaint that Larsen communicated to either McDonald or Ownby the information she gleaned from Plaintiff about her sexual harassment complaints **before** Plaintiff was terminated on October 6, 2008. As previously referenced, Larsen denies learning about Plaintiff's sexual harassment complaints until at least October 6, 2008 (Plaintiff' date of termination) and denies that she ever communicated such information to Ownby or McDonald until after Plaintiff was terminated.

At the time of Plaintiff's second deposition on March 19, 2013, Plaintiff testified under oath that she only **believed** Larsen spoke to the decision-makers about Plaintiff's complaints based upon the circumstantial evidence. Now in her declaration filed in support of her opposition to the County's summary judgment motion, and for the first time ever, Plaintiff affirmatively claims she **knows** Larsen communicated information about her sexual harassment claims to the decision-makers **before** she was terminated as Larsen specifically told her so. Undaunted by this blatant contradiction, Plaintiff finds herself in the unenviable position of having to rely on her newly authored fiction even in light of her contrary testimony given in both of her deposition(s). The contradictions are numerous and mounting, as again, Plaintiff definitively claimed in her second deposition that she was not provided a date or other information related to specific timing as to when Larsen allegedly spoke with the decision-makers about Plaintiff's complaints, nor was provided the information until October 10th of the existence of any communication between Larsen and McDonald in the first instance. Plaintiff also definitively testified in her first deposition that she made no complaint to Larsen until October 6th. But according to her declaration, Plaintiff knows for certain

that she left detailed complaints with Larsen which she also knows now were communicated to McDonald before she was terminated.

But when Plaintiff was asked in her deposition specifically as to whether Larsen told Plaintiff definitively that Larsen had spoken to the decision-makers on or before October 6, 2008, Plaintiff responded "I don't know if she worded it exactly like that...and later confirmed that Larsen "didn't give me an exact date (when Larsen spoke to McDonald)" at the time Larsen and Plaintiff met on October 10th to discuss her complaints for the first time in detail. Yet Plaintiff's declaration claims that "Larsen also informed Lewis on October 6, 2008, prior to her termination, that she had communicated with McDonald about Lewis' sexual harassment claims and would start an investigation. Lewis Depo at 125-126-:6; Lewis Decl. at ¶¶ 26-31." *Pltf Memo in Opp.,* pp. 14, 15, 17, 18, 24, 26. Plaintiff's changed testimony is analogous to a witness testifying first at her deposition that **she believes** the traffic light was red based on circumstantial evidence only to later claim in her declaration that **she knows** for a fact that the light was red based on direct evidence. Furthermore, during Plaintiff's first deposition in this case, Plaintiff testified that she only was able to make specific complaints to Larsen **for the first time on October 6, 2008**. *See Lewis 9-24-10 Depo,* pp. 15, 49.

The Court should disregard Plaintiff' declaration as it is simply an attempt to create a sham issue of fact so as to avoid the dismissal of her claims. "Courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue." *See Franks v. Nimmo,* 796 F.2d 1230, 1237 (10th Cir.1986). To be disregarded as a sham, an affidavit must contradict prior sworn statements. *See Law Co., Inc. v. Mohawk Constr. & Supply Co., Inc.,* 577 F.3d 1164,

1169 (10th Cir.2009). Clearly Plaintiff said one thing in her deposition and another in her opposition as to any alleged communication between Larsen and McDonald and when that communication took place. Moreover, Plaintiff was, as one would expect, clearer in her first deposition in 2010 when she indicated that October 6, 2008 was the first date on which she was finally able to complain to Larsen. Before her declaration, Plaintiff could only show that she engaged in the protected activity of complaining as of October 6, 2008; she could not establish that the decision-makers knew of these complaints prior to terminating her. So, to circumvent that glaring problem, Plaintiff simply changed her testimony via the use of her declaration.

Plaintiff's actions in this regard lack all plausibility and are simply not believable. Plaintiff's declaration does not diminish her credibility but rather destroys it; in doing so, however, the declaration confirms the total lack of evidence in support of Plaintiff's claims. Again, in her first deposition, Plaintiff never claimed to have left detailed, complaints to Larsen prior to October 6, 2008 nor claimed she possessed any evidence that Larsen communicated these complaints to McDonald. In her second deposition, Plaintiff claimed that she left detailed complaints with Larsen's voicemail service but could only infer based on circumstantial evidence that communications between Larsen and McDonald had occurred before she was fired. But now, after all this time and all her deposition testimony to the contrary, Plaintiff claims both that she left detailed messages and also that she **now knows** definitively that which she testified previously she could only infer from the circumstances, namely that her complaints of sexual harassment to Larsen were shared by Larsen in advance of October 6th with McDonald prior to her termination. Certainly, the most critical point pertinent to Plaintiff's retaliation claim, namely when Larsen communicated

the information of Plaintiff's sexual harassment complaints to McDonald that Plaintiff alleges resulted in her termination, seemingly would have been recalled by Plaintiff earlier in these proceedings and far in advance of the summary judgment stage of the case; unless, of course, Plaintiff is writing the script as the case progresses.

Plaintiff (and her counsel's) resort to the manufacture and modification of crucial "facts" is telling and adds import to the County's position that virtually everything Plaintiff alleges in this case is merely a figment of her imagination. But regardless of the obvious inferences as to the veracity of Plaintiff' factual claims, there is no dispute that Plaintiff lacks any and all evidence to corroborate her story. Like the witnesses Plaintiff identified by name in her pleading, her initial disclosures, and her other answers given throughout the discovery process who Plaintiff all claimed would support her allegations but did not, Plaintiff's resort to the desperate act of modifying her testimony reveals the inescapable truth that the only weapons she possesses to defend against the County's summary judgment motion are her unsubstantiated conjecture, self-serving allegations and, now, changed testimony.

In attempting to meet their evidentiary burden, both Plaintiff and her counsel have violated their practical and professional duty of candor to this Court. They have presented a sham declaration in order to manufacture a sham issue of material fact. For these reasons, the County is entitled to an appropriate sanction to both deter them from repeating such action in this matter and reimburse the County for having to respond to issues of fact that clearly do not exist. WHEREFORE, for these reasons, the County respectfully prays the Court will enter an Order:

1. GRANTING Salt Lake County's Motion for Sanctions for Declaration Submitted in Bad Faith;

2. AWARDING the County its costs and fees incurred in the prosecution of this motion and;

3. AWARDING the County any and all other relief to which it may appear entitled.

Respectfully submitted this 12th day of July 2013.

SIM GILL
Salt Lake County District Attorney

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