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**IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE DISTRICT OF UTAH, CENTRAL DIVISION**

JENNY M. LEWIS, an individual,

Plaintiff,

vs.

SALT LAKE COUNTY, a political
subdivision of the State of Utah,

Defendant.

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SANCTIONS**

Case No.: 2:11-cv-01088

Judge David O. Nuffer

Plaintiff Jenny M. Lewis, by and through her counsel of record, hereby submits this Memorandum in Opposition to Defendant's Motion for Sanctions. As shown below, Defendant's motion is baseless, and lacks even a modicum of good faith. Accordingly, Plaintiff should be awarded her costs and fees incurred in defending the instant motion.

INTRODUCTION

Defendant's memorandum unequivocally establishes two points: 1) Defendant has little, if any, grasp on the actual testimony provided by Lewis in her depositions and declaration, and cannot point to any actual contradictions in her testimony; and 2) Defendant has little, if any, understanding of the material issues of fact related to Lewis's Title VII retaliation claim. Simply, nothing within Lewis's declaration filed in support of her opposition to SLCO's motion for summary judgment in any way conflicts with her prior deposition testimony, including her first deposition. Instead, Lewis's testimony is not even impeachable, let alone submitted in bad faith. If Defendant had competent counsel who could actually ask cogent, clear questions and follow-up on those questions, perhaps they could have anticipated Plaintiff's testimony. But they did not. Indeed, it is telling that Defendant's own counsel failed to even cite to the relevant testimony in Lewis's first deposition in his motion for summary judgment, failed to even attempt to impeach Lewis during the second deposition concerning the purported changes in her testimony between her first and second deposition, and even in this motion cannot point to specific testimony by which Lewis contradicts her prior testimony, or show that any aspect of her declaration was submitted in bad faith.

Additionally, Defendant's suggestion that Lewis has changed her testimony in order to avoid summary judgment reveals nothing more than the Defendant's own lack of knowledge concerning the material elements of Lewis's claim. Simply, whether or not Larsen contacted McDonald and told her about Lewis's formal complaint of sexual harassment is immaterial to whether or not summary judgment is proper on Lewis's retaliation claim. McDonald, not Larsen, terminated Lewis. McDonald, not Larsen, was repeatedly confronted by Lewis about inappropriate behavior and was repeatedly asked by Lewis to provide her with a copy of SLCO's

sexual harassment policy. Each of these instances involves a separate act of protective activity that can form the basis of Lewis's retaliation claim. Lewis, contrary to Defendant's allegations, need not show that Larsen actually telephoned McDonald prior to Lewis's termination.¹

PLAINTIFF'S RESPONSES TO DEFENDANT'S STATEMENT OF FACTS

1. Undisputed that Lewis testified in her first deposition that Larsen finally returned her telephone calls and Sandy Mitchell's telephone call on the morning of October 6, 2008.

2. Undisputed.

3. Disputed. Lewis's deposition testimony and declaration both make clear that Larsen never returned Lewis's phone calls, which Lewis made over a two week period, (including Sandy Mitchell's telephone message made on behalf of Ms. Lewis, prior to September 2008). On October 6, Lewis was able to finally make phone contact with Larsen for the first time. Because she finally contacted Larsen, she made her first and only formal complaint. However, Lewis had left messages earlier providing information about her complaints. In addition, Defendant's motion completely ignores Lewis's deposition testimony at 110-112. Lewis stated in her second deposition and declaration that she complained to McDonald about the salute incident, the pageant dress incident and Pena's inappropriate comments. Lewis Depo. 110:5-8; 111-112; Lewis Decl. at ¶¶26-31. Lewis similarly testified in her second deposition that, prior to being notified of her termination, Lewis called Larsen repeatedly to file a complaint, and left two messages detailing her sexual harassment complaints. Lewis Depo. at 113-115. Larsen also informed Lewis on October 6, 2008, prior to Lewis' termination, that she had communicated

¹ Of course, this showing would have been easy had the County properly issued a litigation hold and retained Larsen's telephone records during this period.

with McDonald about Lewis's sexual harassment claim and would start an investigation. Lewis Depo. at 125-126:6; Lewis Decl. at ¶¶26-31. Specifically, Lewis testified in her second deposition and in her declaration that she was told by Larsen -after Larsen acknowledged receiving Lewis's prior telephone messages about her sexual harassment complaint - that she was "doing the investigation" and "following up with Claudia [McDonald]." Lewis Depo. at 125-16. Neither Lewis's deposition nor her declaration state that she knew Larsen contacted McDonald. Rather, as noted in the very deposition testimony cited by Defendant, Lewis states that Larsen told her that she had started an investigation and contacted McDonald, although Lewis did not know when Larsen had made the prior contact. However, it is clear from this testimony and Lewis's declaration that the contact had to have occurred prior to Lewis's termination, as Lewis had not yet been terminated when the discussion took place.

4. Disputed. Defendant cites to no testimony in Lewis's first deposition that contradicts her testimony in her second deposition, let alone her declaration. The cited deposition testimony at p. 15 of Lewis's first deposition testimony neither asks nor makes references to any of the prior telephone messages left by Lewis with Larsen. However, Lewis indicates in the very testimony cited by Defendant that she was finally able "to get through" and make a complaint directly to Larsen on October 6, 2008. Similarly, at p. 49 of her first deposition, Lewis is never once asked about the details of her prior telephone messages with Larsen concerning her complaint of sexual harassment. In fact, nowhere in her first deposition is she even asked about the contents of her prior telephone messages.

5. Disputed. In her deposition testimony, Larsen acknowledged that Lewis left a voicemail on her phone inquiring about the sexual harassment policy, but could not remember if

Lewis in fact had made a sexual harassment complaint on her voicemail. Larsen Depo. at 33-34. Larsen also admitted that she received a second call from Lewis on October 3, 2008, but did not remember the content of that call. Larsen Depo. at 35. Larsen also acknowledged that Lewis had called her to set up an appointment to discuss her sexual harassment complaint, but could not recall if that was October 3rd or 6th. Larsen Depo. at 36.

Lewis complained about this incident twice in September, 2008 by telephone and then again to Gaylyn Larsen about the incident personally on the morning of October 6, 2008 prior to her termination. Lewis Depo. at 92:5-23; 98-99. In addition, Lewis was present when Sandy Mitchell left messages for Larsen on Lewis' behalf twice in August, 2008 notifying Larsen about Lewis's concerns. Lewis Depo. at 99-100.

6. Disputed. See Response to SOF Nos. 1-5 above.

ARGUMENT

Defendant's motion and its argument in support of the motion is unworthy of anything more than a brief response. First, Defendant's claim that Lewis's testimony was changed in her declaration is without merit. The very deposition testimony cited by Defendant in its motion shows that Lewis was told 1) that Larsen was investigating her claim (prior to Lewis's October 6, 2013 meeting with McDonald) and 2) that Larsen informed Lewis that she had contacted McDonald. Lewis's declaration contains the exact same testimony that is in her second deposition. Second, Defendant's claim that Lewis's motivation for changing her testimony is so that her retaliation claim can survive summary judgment is equally without merit. Simply, whether or not Larsen contacted McDonald prior to Lewis's termination is immaterial to her

retaliation claim, as Lewis engaged in consistent and repeated protected activity which McDonald was aware for over three months leading up to Lewis's termination. The protected activity included direct complaints to McDonald about inappropriate behavior and direct requests to McDonald for a copy of SLCO's sexual harassment policy. As pointed out in Lewis's opposition memorandum, this conduct consists of protected activity under Title VII. SLCO's entire argument in its motion for summary judgment completely ignores the fact that Lewis testified that she complained directly to McDonald on numerous occasions and left two prior telephone messages with Larsen providing details about her complaints of harassment.

Simply, Plaintiff was never asked in her first deposition about the details of her telephone messages she left for Larsen (or even specific details about what Mitchell told Larsen).

However, when asked these questions in her second deposition, she clearly testified that she had left details about her complaint on the messages. Moreover, in her deposition testimony Larsen acknowledged that Lewis left a voicemail on her phone inquiring about the sexual harassment policy, but could not remember if Lewis, in fact, had made a sexual harassment complaint on her voicemail. Larsen Depo. at 33-34. Larsen also admitted that she received a second call from Lewis on October 3, 2008, but did not remember the content of that call. Larsen Depo. at 35. Larsen also acknowledged Lewis had called her to set up an appointment to discuss her sexual harassment complaint, but could not recall if that was October 3rd or 6th. Larsen Depo. at 36.

Lewis's deposition testimony and declaration both make clear that Larsen never returned Lewis's phone calls for more than two weeks (including Sandy Mitchell's telephone message for Ms. Lewis) until October 6 and that the first time she actually spoke in person to Larsen was on the morning of October 6. Lewis testified in her second deposition that, prior to being notified of

her termination, Lewis called Larsen repeatedly to file a complaint, and left two messages detailing her sexual harassment complaints. Lewis Depo. at 113-115. Larsen also informed Lewis on October 6, 2008, prior to Lewis' termination, that she had communicated with McDonald about Lewis's sexual harassment claim and would start an investigation. Lewis Depo. at 125-126:6; Lewis Decl. at ¶¶26-31. Specifically, Lewis testified in her second deposition and in her declaration that she was told by Larsen -after Larsen acknowledged receiving Lewis's prior telephone messages about her sexual harassment complaint - that she was "doing the investigation" and "following up with Claudia [McDonald]." Lewis Depo. at 125-16.

Neither Lewis's deposition nor her declaration state that she knew Larsen contacted McDonald. Rather, as noted in the very deposition testimony cited by Defendant, Lewis states that Larsen told her that she had started an investigation and contacted McDonald, although Lewis did not know when Larsen had made the prior contact. This is the exact "circumstantial evidence" that Lewis referenced in her second deposition.

Contrary to Defendant's allegations, nowhere in Lewis's declaration does she state that she knows Larsen called McDonald. Instead, it states the same thing that her deposition stated: Larsen told her she had started an investigation and that she had spoke with McDonald about her allegations. Lewis Decl. at ¶¶26-31. Finally, Defendant's implication that somehow Plaintiff's counsel submitted Lewis's declaration in bad faith is, like the rest of the motion, supported by no evidence. **Rather, it is nothing more than yellow-belly lawyering unworthy of our profession.**

CONCLUSION

For the reasons set forth more fully above, Defendants' Motion should be denied and Plaintiff should be awarded costs and attorneys' fees incurred in defending the motion.

RESPECTFULLY SUBMITTED this 25th day of July, 2013

/s/ Andrew W. Stavros
Andrew W. Stavros
STAVROS LAW P.C.
Attorney for Plaintiff Jenny Lewis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2013 I caused a true and correct copy of the foregoing OPPOSITION MEMORANDUM to be filed using the Court's CM/ECF system, which sent notice to the following individuals:

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