

CC TO JUDGE KN

HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

EQUAL EMPLOYMENT OPPORTUNITY)

Case No.: C00-1596C

COMMISSION,)

Plaintiff,)

vs.)

**PLAINTIFF'S SUR REPLY IN
OPPOSITION TO DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

AMERICAN SEAFOODS CO,)

NOTED FOR: August 31, 2001

Defendant)

CONNIE L. MARTIN)

Plaintiff in Intervention)

Plaintiff In Intervention Connie Martin offers this Sur Reply to Defendant's Reply

Memorandum in Support of its Motion for Partial Summary Judgment. This

memorandum is compelled by additional submissions of the record in defendant's Reply

as well as false representations and factual inaccuracies contained therein. Contrary to

defendant's assertions, plaintiff has not "changed her story", nor does her declaration

"materially conflict" with her deposition testimony. Plaintiff's declaration and

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PLAINTIFF'S SUR REPLY IN OPPOSITION TO
DEFENDANT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

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1 deposition testimony, as well as the testimony of numerous witnesses, create genuine
2 issues of material fact that preclude summary judgment.

3 Defendant claims that Ms. Martin has "changed her story" and that her
4 declaration, filed in support of her Opposition to Partial Summary Judgment, conflicts
5 with her deposition testimony. This is simply not true Ms. Martin was never questioned
6 at deposition regarding her call to the Blue Mountain Clinic on January 5, 1999, and thus
7 was not given the opportunity to explain the reasons for this call. Defendant admits that
8 at the time of Ms. Martin's deposition, it was unaware of this call. See Supplemental
9 Declaration of John H. Chun Because defendant was unaware of the call, it did not
10 specifically question Ms. Martin about the call. Defendant's argument that Ms. Martin
11 should have supplemented her deposition testimony with this information is specious
12 since, at deposition there were no questions regarding this call to supplement. While
13 blaming Ms. Martin for not "supplementing" her deposition testimony, Defendant does
14 not attempt to explain its own lack of following up on this evidence through discovery
15 requests regarding Ms. Martin's reasons for the call. Defendant, now pretends surprise
16 at Ms. Martin's explanation, and in an attempt to deflect the focus from its own
17 discrimination practices and misconduct, attacks Ms. Martin's credibility.¹
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21 ¹ Defendant also attacks the credibility of counsel for the plaintiffs by asserting plaintiffs' opposition
22 memorandum contains unsupported factual assertions and that "each assertion in plaintiffs' brief must be
checked against the record" (Defendant's reply memorandum, p 2, fn 1) Notwithstanding this elliptic
attack on plaintiffs' counsel, Defendant identifies no such unsupported factual assertions

1 *Defendant ASC attempts to mislead this court by incomplete and inaccurate*
2 *representations of Ms. Martin's deposition testimony*

3 Defendant claims that at deposition Ms. Martin testified that she had no contact
4 with a medical provider prior to being replaced and that her declaration conflicts with this
5 testimony At deposition, Ms. Martin responded "no" to the following question: "Now at
6 this point in time, had you had any contact with a physician or a medical provider?" See
7 Connie Martin deposition p. 48. In her declaration, Ms. Martin states that on January 5,
8 1999, she called a clinic "to inquire about their services". Calling a medical clinic and
9 inquiring of their receptionist as to what services they provide hardly rises to the level of
10 contacting a physician or medical provider. Furthermore, a single question without
11 follow up in a full day deposition, or elaboration as to what is meant by "contact" or
12 "medical provider", hardly amounts to a thorough inquiry on the subject.

13 Defendant again claims that Ms. Martin's testimony conflicts with her declaration
14 because her deposition testimony "omits any mention of a call to Blue Mountain prior to
15 the date of her alleged replacement on or about January 8, 1999." See Reply
16 Memorandum In Support of ASC's Motion for Partial Summary Judgment, p. 3. At
17 deposition, defendant failed to ask Ms. Martin if that was the first time she called the
18 Blue Mountain Clinic. As explained in Plaintiff's Opposition, during this questioning it
19 was obvious that Ms. Martin was referring to the second call made to the Clinic, on
20 January 11, 1999. Defendant misrepresents Ms. Martin's testimony by stopping short of
21 quoting the entire sequence of questions:

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23 PLAINTIFF'S SUR REPLY IN OPPOSITION TO
24 DEFENDANT'S MOTION FOR PARTIAL
25 SUMMARY JUDGMENT

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1 Q How did you know the name Blue Mountain Clinic?

A. I looked it up in the phone book.

2 Q When did you call Blue Mountain?

A. I don't remember the exact date

3 Q Was it within a couple of days after the phone call from Cathy Udoff?

4 A. Yes.

At the time you made the phone call then, had you decided that you would go ahead and terminate the pregnancy?

5 A Yes

6 Q. And were the reasons the reasons you've already told me about?

A. Yes

7 Q. Any – anything new or different that factored into the equation at the time you made your decision?

8 A. No.

9 Q. When you called Blue Mountain then, did they give you a date to come in?

A. Yes.

10 Q. Do you remember how far off that was?

A. It was just at the end of that week.

11 Q. I'm looking at a calendar for 1999. January 6th was a Wednesday. January 8th was a Friday. Does that help you at all to recall when you got the phone calls from Cathy Udoff?

12 A. No

13 Q. Okay. If you waited a couple of days, do you believe that you called to Missoula maybe early the next week, Monday the 11th, or Tuesday, the 12th, and then had the termination the end of that week?

14 A. I don't recall the dates.

15
16 Deposition of Connie Martin, pp. 72-73 (emphasis supplied)

17 This series of questions clearly shows that Ms. Martin was referring to the second call to
18 the clinic, made on January 11, 1999, when she testified that she had decided to terminate
19 the pregnancy at the time of the call. Furthermore, the telephone records produced by
20 the Blue Mountain Clinic reflect a phone call from Ms. Martin to the clinic on January
21 11, 1999. See Declaration of John Chun, Exhibit J

1 Defendant again misrepresents Ms. Martin's deposition testimony regarding
2 whether she was concerned about being allowed to work while pregnant. The specific
3 questions posed to Ms Martin at deposition were.

4 Q. When you said to Cathy [Udoff] then, "I'm pregnant", what did she say in
5 response?

6 A. She said she would have to talk to Renee Vargas and get back with me.

7 Q. Right after you said, "I'm pregnant", did you say something about the policies or
8 did you ask a question about the policies?

9 A. I asked her if she knew what company policies were regarding pregnancies.

10 Q. So something along the lines of, "Do you know what the company policies are
11 with regard to pregnancies?"

12 A. Something along those lines, yes.

13 Q. Now, when you asked that question, what issues were you concerned about?
14 Were you concerned about whether or not you would be allowed to work?

15 A. I was concerned about whether I would be able to see the doctor in Dutch Harbor.
16 I wasn't so concerned about whether I would be allowed to work.

17 Q Were you hoping to be able to visit the doctor when the boat came in –

18 A. Yes.

19 Deposition of Connie Martin p. 42.

20 This testimony does not conflict with Ms. Martin's declaration. Her deposition testimony
21 reflects the fact that, at the time she spoke to Cathy Udoff, Ms. Martin was concerned
22 about whether she would be able to see a doctor in Dutch Harbor Even though Ms
23 Martin knew that she had never seen a pregnant woman working aboard an ASC vessel,
24 which caused her concern about whether ASC would allow her to work while pregnant,
25 she still hoped that there would be a "pregnancy policy" that would allow her to work
and see a physician in Dutch Harbor during an offload. Moreover, her declaration is

1 entirely consistent with the deposition testimony of Audrey Triantafillidis regarding Ms.
 2 Martin's desire and ability to work while pregnant

3 In a further attempt to deflect the focus from its own discriminatory practices and
 4 misconduct, Defendant makes other specious comments intended to reflect badly on Ms
 5 Martin, such as the speculation by ASC counsel that "it would appear unlikely that a
 6 woman living in Salmon, Idaho, would inquire about prenatal care at a clinic in Missoula,
 7 Montana." See Reply Memorandum, p. 3, n.4. It is not unlikely at all that a woman
 8 living in a small, rural community would want to receive prenatal care in a larger
 9 metropolitan city where the medical care is more advanced. In fact, consistent with her
 10 declaration, Ms Martin testified at deposition that she intended to visit a physician for
 11 prenatal care in either Missoula, Montana or Boise, Idaho See Connie Martin
 12 deposition, p. 48.

14 *Argument*

15 Defendant asks that this Court not consider Ms Martin's declaration. To do so
 16 would fly in the face of rulings by the United States Supreme Court as well as the Ninth
 17 Circuit. The Supreme Court has held that

18 Credibility determinations, the weighing of the evidence, and the drawing of
 19 legitimate inferences from the facts are jury functions, not those of a judge,
 20 whether he is ruling on a motion for summary judgment or for a directed verdict.
 21 **The evidence of the non-movant is to be believed, and all justifiable
 22 inferences are to be drawn in his favor.**

1 *Anderson v Liberty Lobby, Inc* , 477 U S 242, 255, 106 S. Ct. 2505, L.Ed. 2d 202 1986)
 2 (emphasis supplied) Even the case defendant relies upon, *Kennedy v Allied Mutual*
 3 *Insurance Co* , 952 F 2d 262 (9th Cir. 1991), urges extreme caution in this regard and
 4 requires that the Court make a specific factual determination that the contradiction
 5 between the non-movant's testimony and affidavit is actually a sham.

6 The gravamen of the *Perma Research-Radobenko* line of cases is the reviewing
 7 court's determination that the issue raised by the contradictory affidavit
 8 constituted a sham. Certainly, every discrepancy contained in an affidavit does
 9 not justify a district court's refusal to give credence to such evidence. . . In light
 10 of the jury's role in resolving questions of credibility, a district court should not
 11 reject the content of an affidavit even if it is at odds with statements made in an
 12 earlier deposition.

13 We conclude that the *Foster-Radobenko* rule does not automatically dispose of
 14 every case in which a contradictory affidavit is introduced to explain portions of
 15 earlier deposition testimony. Rather, the *Radobenko* court was concerned with
 16 "sham" testimony that flatly contradicts earlier testimony in an attempt to "create"
 17 an issue of fact and avoid summary judgment. Therefore, before applying the
 18 *Radobenko* sanction, the district court must make a factual determination that the
 19 contradiction was actually a "sham".

20 *Id.* at 266-67, quoting *Kennet-Murray Corp , v Bone*, 622 F.2d 887 (5th Cir. 1980),
 21 referring to *Perma Research and Development Co , v. Singer Co* , 410 F.2d 572 (2d Cir.
 22 1969) and *Radobenko v Automatic Equipment Corp* , 520 F.2d 540 (9th Cir. 1975).

23 This issue was addressed in a more recent Ninth Circuit case, *Leslie v Grupo*
 24 *ICA*, 198 F.3d 1152 (9th Cir. 1999) There the appellate court found that where a sworn
 25 declaration seeks to explain prior statements or testimony, the "sham affidavit" doctrine
 does not apply.

1 even under the "sham affidavit" doctrine, "the non-moving party is not precluded
2 from elaborating upon, explaining or clarifying prior testimony" and that "minor
3 inconsistencies that result from an honest discrepancy, a mistake, or newly
4 discovered evidence afford no basis for excluding an opposition affidavit "

5 *Id.* at 1158, quoting *Messick v Horizon Indus , Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995).

6 The *Leslie* Court also quoted approvingly from *T.W. Elec. Serv , Inc v Pacific Elec*

7 *Contractors Ass 'n*, 809 F.2d 626, 630-31 (9th Cir 1987):

8 at summary judgment, the judge must view the evidence in the light most
9 favorable to the nonmoving party: if direct evidence produced by the moving
10 party conflicts with direct evidence produced by the nonmoving party, the judge
11 must assume the truth of the evidence set forth by the nonmoving party with
12 respect to that fact.

13 In yet another Ninth Circuit opinion, the Court reversed summary judgment and held that

14 "[The non-movant's] declaration is to be accepted as true.. . [The non-movant's] evidence
15 should not be weighed against the evidence of the [movant] " *Eisenberg v Insurance Co*
16 *of N. Am* , 815 F.2d 1285, 1289 (9th Cir. 1987).

17 Conclusion


18 Defendant's claim that Ms. Martin has "changed her story" is false and an attempt
19 to deflect attention from its own discriminatory practices and misconduct in this case.

20 The assertion of this claim which turns on the credibility of Ms. Martin and other
21 witnesses involved confirms the presence of material facts precluding summary
22 judgment. Accordingly, Defendant's Motion for Partial Summary Judgment should be
23 denied.

1 Dated this 6 day of Sept, 2001.

2 Nevin, Herzfeld, Benjamin & McKay, LLP
3 Scott McKay

4 Law Office of Reba Weiss

5 
6 By REBA WEISS
SCOTT MCKAY

7 Attorneys for Plaintiff in Intervention Connie Martin
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