

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

RUTH W. COLE, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil No. 04-27-B-W  
 )  
 DEAN NORTHEAST, LLC, )  
 )  
 Defendant. )

**ORDER ON MOTION TO STRIKE**

Ruth W. Cole has moved to strike (Docket No. 34) some 27 statements of material fact submitted by Dean Northeast, LLC, in support of its motion for summary judgment. In a related Recommended Decision, I have recommended that the court grant Dean's summary judgment motion against Cole's state law whistle blower protection and age discrimination claims. I address Cole's challenges to Dean's statements *seriatim*.

**Paragraphs 3 and 4**

In these paragraphs Dean sets forth excerpts from its internal code of ethics or code of business conduct. Dean did so in an effort to support an argument that Cole failed to follow internal procedures for addressing workplace harassment and discrimination. Cole argues that the document has not been properly authenticated and is hearsay. In my recommended decision I recommend that summary judgment enter based on a statute of limitation defense. Because Dean's code is immaterial to my decision, I have not incorporated these facts into my decision and overrule the objection as moot.

**Paragraphs 28, 29, 34, 41, 44, 49, 54, 56, 67, 81**

In each of these instances, Cole has moved to strike Dean's statement or a portion of a statement on the ground that the statement offered by Dean "is not accurately supported by the cited record reference." This is not an appropriate basis to file a motion to strike. Pursuant to Local Rule 56, the proper approach to this circumstance is for Cole to either deny or qualify the statement and then cite the portion of the record that supports the denial or qualification. D. Me. Loc. Rule 56(c). For example, in statement number 28, Dean asserted the following:

28. Economy decided to move Cole, the only employee in an enclosed office who did not supervise any employees, from an enclosed office to an open cubicle in the general administrative office, where the three other administrative employees worked. Economy Depo. 59:11-60:8.

The cited portion of the deposition transcript reads as follows:

- Q: Who worked in that general – how many people worked in that general office space?  
A: In the general office space there were three.  
Q: And who were they?  
A: They were Kim Hatch, Candy Dowling and Michelle Ivy.  
Q: Were there employees who kind of came through the general office space and would – would chat with the three?  
A: The – the case settlement, procedures when the drivers returned from their day's work on their – on their delivery routes, would come into the office and they would bring in their slips and their – their settlements, the cash in.  
When –when we did this, Candy's – Candy's desk was at the far end of that office. We relocated her cubicle adjacent to the door so that the drivers would now only have to come in and just go inside the doorway to do that.  
Kim Hatch's – Kim Hatch's office was adjacent to Candy's so that everything was kept at that lower end of the office so that the area back – Ruth's area was right next to Cindy's office. So it was at the very back of the office.

To the statement offered by Dean, Cole responded as follows:

**Plaintiff's Response:** See motion to strike.

The motion to strike then indicated:

Plaintiff moves to strike Paragraph 28 on the ground that it is not accurately supported by the cited record reference. See Economy Depo. 59:11-60:8.

For some reason, counsel found it more efficient to file two documents in this fashion rather than one. The appropriate response called for by the Local Rule is to deny or qualify the statement. For example:

28. Denied. The citation offered by the defendant does not support the statement that Cole was "the only employee in an enclosed office who did not supervise any employees." Economy Depo. 59:11-60:8.

Forcing an opponent to submit an opposition to a motion to strike and the court to review a motion to strike in this circumstance simply wastes everyone's time and money and invites a sua sponte award of attorney fees to the party forced to respond to such a frivolous motion. These objections are overruled.

### **Paragraph 31**

Cole moves to strike this statement on the ground that the deposition testimony cited in support of it was elicited through an improper question. The statement offered reads as follows:

31. Cole conceded that she does not have any basis to believe that any event after July 2001 was motivated by her request to be paid overtime compensation or to be re-classified. Cole Depo. 161:9-162:1.

The question asked and answered the cited portion of the deposition transcript was the following:

Q: Do you have any reason to believe anything was motivated by your request to be paid overtime in July, anything after that, do you have any basis to believe it was motivated by your complaints of overtime?

A.: No, I guess not.

The question is a perfectly proper question. In her motion to strike, Cole argues:

Plaintiff moves to strike Paragraph 31 on the ground that it is based on an improper question at Ms. Cole's deposition. Ms. Cole was asked why she believed that Mr. Economy's decision to move Ms. Cole from her enclosed office to a cubicle was based on her complaints regarding overtime compensation, and Ms. Cole explained why she believed that. See Cole Depo., pages 154-160. Ms. Cole appropriately noted that she could not read Mr. Economy's mind, and could only suspect what his true motivation was. Cole Depo. 161:20-21. After counsel pressed Ms. Cole at her deposition (which goes on for eight pages from page 154 to page 162) regarding why she believed the loss of her office was related to her complaints regarding overtime pay, counsel asked her[,] "Do you have any reason to believe anything was motivated by your request to be paid overtime in July, anything after that, do you have any basis to believe it was motivated by your complaint of overtime [sic]?", to which Ms. Cole responded, "No, I guess not." Having just given numerous reasons why she believed that the loss of her office was related to her complaints regarding overtime pay, Ms. Cole's answer must be taken in that context. Ms. Cole was essentially being asked to speculate on Mr. Economy's state of mind, which is inappropriate. Moreover, the assertion in Paragraph 31 is directly belied by the assertion in Paragraph 30. Paragraph 31 is based upon an inappropriate question and is taken out of context, and should be stricken.

(Docket No. 34 at 2-3.) Once again, the response called for by the Rule would be to deny or qualify the statement. For example, Cole might have responded:

Denied. Ms. Cole did not concede anything. In fact, she provided the following testimony concerning her basis for believing that she was retaliated against for requesting overtime: [State the facts and cite the record]. Moreover, the testimony highlighted by Dean was elicited on the heels of numerous confusing and inappropriate questions about another witness's state of mind and her response must be taken in context. [Cite the record.]

Cole's chosen method of response not only fails to indicate what basis she has to suspect retaliation, but also projects weakness or desperation, as though losing on the motion to strike means she loses on her whistle blower retaliation claim. The objection to the testimony is overruled.<sup>1</sup>

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<sup>1</sup> In my Recommended Decision on Dean's motion for summary judgment, I construed the testimony as an admission that Cole did not have any *direct* evidence of retaliation.

### Paragraph 35

The statement and response are as follows:

35. Before deciding to move Cole from her enclosed office to the cubicle, Economy investigated whether it was feasible to construct a new office space. The plant engineer told him that it would be expensive. Economy Depo. 56:6-22.

**Plaintiff's Response:** See motion to strike the second sentence. The first sentence of Paragraph 35 is admitted.

The motion to strike relates: "Plaintiff moves to strike the second sentence of Paragraph 35 on the ground that it is hearsay." (Docket No. 34 at 3.) In my view, a hearsay objection presents an appropriate basis for filing a motion to strike a summary judgment statement. Although as every good trial attorney knows, hearsay objections, unless truly significant are often simply disruptive to the flow of the proceedings and likely to fail. In this case I overrule the motion because, as Dean indicates in response, the statement is offered to support Dean's argument that Economy investigated the option of placing Cole in another office and, therefore, assuming the court were able to draw inferences in favor of Dean or were compelled to give Economy's testimony any weight, that Economy's decision to place Cole in a cubicle was not motivated by any unlawful animus. (Def.'s Response to Pl.'s Motion to Strike, Docket No. 41 at 9.)

### Paragraph 47

The statement and response are as follows:

47. Although Cole believed that Kilpatrick had "no right" to raise the issue of her retirement, Cole concedes that she does not have any reason to believe that Kilpatrick raised the issue of Cole's potential retirement because of Cole's age. Cole Depo. 176:23-177:1.

**Plaintiff's Response:** See motion to strike.

The motion to strike indicates:

Plaintiff moves to strike Paragraph 47 on the ground that it is based on an improper question at Ms. Cole's deposition. Ms. Cole was asked to speculate on the state of mind of Cindy Kilpatrick, which is an improper question to which counsel objected. Ms. Cole appropriately testified that she didn't know whether Ms. Kilpatrick raised the issue of her retirement because of [Cole's] age. Cole Depo. 175:13-177:5.

(Docket No. 34 at 4.) A "calls for speculation" objection is an appropriate objection to raise, assuming the objection was preserved during the deposition. The relevant deposition colloquy<sup>2</sup> was as follows:

Q. Now, do you believe that Cindy Kilpatrick's conduct was discriminatory based on your age?

MR. GREIF: Objection. No. 1, calls for a legal conclusion; No. 2, calls for speculation of the state of mind.

MR. STROCK: Under the Federal Rules all objections –

MR. GREIF: You don't have to educate me on the Federal Rules. I need to state the basis of the objection and I've just done that.

MR. STROCK: You don't, actually.

MR. GREIF: Actually, I do.

MR. STROCK: You –

MR. GREIF: If you have a problem with that objection, you call the magistrate. I need to state the basis so that you can restate the question.

MR. STROCK: You really don't, but that's okay.

Q. Do you understand my question?

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<sup>2</sup> I reproduce a longer passage of testimony than was cited by defense counsel because defense counsel cited a very narrow grouping of lines in the transcript. It is unclear to me whether counsel was trying to aid the court in the process of finding supporting testimony or trying to restrict the court from considering surrounding testimony. Citation to line numbers is often useful, but it in no way restricts the court's ability to consider additional material that comes to its attention in the process of "scanning" a passage in a deposition transcript. I note that Local Rule 56(e) does not speak to line citation, requiring only that a citation refer to the "specific page or paragraph of identified record material."

A. No, repeat it, please.

Q. Do you believe Cindy Kilpatrick's telling the drivers or the salesperson that you may be retiring was somehow discriminatory based on your age?

MR. GREIF: Same objection.

BY MR. STROCK:

Q. Do you understand my question?

MR. GREIF: You may answer, Ruth.

A. Yes.

Q. How is it discriminatory?

MR. GREIF: Same objection. You may answer, Ruth.

A. I don't know whether she was trying to get me out or what. I don't know, I can't read her mind. What reason would she possibly have, I don't know. I've gone over it and over it and over it, and I can't fathom why she would ever have said what she did. She had no right.

BY MR. STROCK:

Q. Do you have any reason to believe she said that you may be retiring because of your age?<sup>3</sup>

A. I don't know.

I overrule this objection because the "any reason to believe" form of the question is appropriate. This colloquy tends to establish that the witness believes that Kilpatrick's act was discriminatory, but that she does not know if she has any reason to believe it.

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<sup>3</sup> The meaning of the question is whether Cole had reason to believe that Kilpatrick assumed Cole was going to retire and told others Cole was going to retire simply because of Cole's age, rather than because of some other factor such as communications Cole had with Kilpatrick. This point is apparent from the context of the statements of fact, although is not clear from the quoted portion of the transcript. Obviously, many people retire because of age.

The appropriate response would be to deny or qualify the statement based on other testimony or evidence.

### **Paragraph 50 and 51**

Cole raises a hearsay objection to these statements. After reviewing the statements and the cited testimony and considering its role in the summary judgment dispute, I independently concluded that they did not materially advance any issue in dispute. Because I did not incorporate the statements into my factual recitation, the objection is moot.

### **Paragraph 53**

The statement and response are as follows:

53. Although Cole believes Ivey and Stoddard are “troublemakers,” Cole did not have any reason to believe that their conduct with respect to the ear plug incident was related to Cole’s age or her re-classification request (back in July 2001). Cole Depo. 121:23-122:15. Furthermore, Cole has no reason to believe, and no basis to allege, that the earplugs were put on her desk because of her age. Cole Depo. 182:3-9.

**Plaintiff’s Response:** See motion to strike.

The motion to strike indicates:

Plaintiff moves to strike Paragraph 53 on the ground that it is based on an improper question at Ms. Cole's deposition. Ms. Cole was asked to speculate on the states of mind of Michelle Ivey and Michael Stoddard, which is an improper question to which counsel objected. Cole Depo. 182:3-9.

(Docket No. 34 at 4-5.) A review of the transcript reveals that, as to the testimony that supports the first sentence of the statement, the objection was not preserved. As for the second sentence, the objection concerns another "do you have any reason to believe" question, which is an appropriate question. I overrule the objections. The appropriate response to this statement would be to deny it or qualify it based on record evidence.

The fact that I overrule these objections or other objections discussed herein does not mean that I felt compelled to incorporate the statements objected to into my Recommended Decision on the related motion for summary judgment. In other words, the statement and the underlying testimony are preserved for possible *de novo* consideration by a court reviewing my summary judgment recommendation. Were I to strike the evidence herein, the admissibility of the statement would depend on whether I committed clear error.

#### **Paragraph 59**

The objection set forth in opposition to the statement offered in paragraph 59 was not preserved. I therefore overrule the objection.

#### **Paragraph 62**

The statement and response are as follows:

62. Cole does not believe that any event on March 19th was motivated by either her age or her re-classification request in July 2001. Cole Depo. 84:15-85:12.

**Plaintiff's Response:** See motion to strike.

The motion to strike indicates:

Plaintiff moves to strike Paragraph 62 on the ground that it is based on an improper question at Ms. Cole's deposition. Ms. Cole's opinions as to the motives of other people [are] pure speculation and [are] not admissible on a motion for summary judgment.

(Docket No. 34 at 5.) The underlying deposition colloquy went as follows:

Q. So was there any conduct on the 19th that you remember that you allege was motivated by your age?

A. My age? No.

Q. Was there any conduct on the 19th of March 2002 that you allege was motivated by the fact that you requested to be paid overtime back in July of 2001?

A. No. How can I know that?

Q. I'm asking if you're alleging it, if you're claiming it, if you're making that accusation. Are you?

A. No, I'm only saying that they avoided me. All issues were not mentioned.

Q. They didn't avoid you because you requested to be paid overtime back in July of 2001; correct?

A. How would I know what their motivation was?

Q. I'm asking you, are you alleging that?

A. No, I'm not alleging that.

Q. You're not alleging that they avoided you because of your age on March 19th, 2002?

A. I don't know that.

Q. You're not alleging that?

MR. DALTON: She's answered.

THE WITNESS: Right.

The objection is overruled. The transcript reflects that the objection was not preserved. In any event, questions as to what a plaintiff is alleging are appropriate. The nature of a plaintiff's allegations is clearly material to a lawsuit. The appropriate response to the statement would be to deny or qualify the statement on the basis of the context in which the testimony was given or on the basis of other evidence establishing that Cole was asserting these allegations.

#### **Paragraph 64**

The objection is unreserved and overruled.

### Paragraph 65

The statement and response are as follows:

65. Cole contends that the reason she left Dean was that she came down with shingles. Cole Depo. 72:16-25. Cole further agrees that her shingles condition was “caused in whole or part by the earplug incident and the problems that [she] [was] having with the sales staff.” Cole Depo. 72:20-25. She agreed that her shingles were wholly caused by the earplug incident and the issues with the sales staff. Id.

**Plaintiff’s Response:** See motion to strike the second and third sentences. The first sentence is admitted.

The motion to strike indicates:

Plaintiff moves to strike the second and third sentences of Paragraph 65 on the ground that Ms. Cole is not a doctor and is not qualified to testify to the cause of her shingles.

(Docket No. 34 at 5.) The objection is overruled. The plaintiff is competent to testify as to what events in the workplace generated the distress that allegedly caused her shingles. This is not an appropriate objection to present in a motion to strike. The appropriate response would be to qualify the statement and identify other testimony by the witness or another qualified witness that might expand on what are the underlying causes of the plaintiff’s illness.

### Paragraph 69

The statement and response are as follows:

69. With regard to her telephone conversation with Kilpatrick, Cole concedes that “I think the way I put it to her, she may have misinterpreted....” Cole Depo. 216:15-20

**Plaintiff’s Response:** See motion to strike.

The motion to strike indicates:

Plaintiff moves to strike Paragraph 69 on the grounds that the cited statement by Ms. Cole was not responsive to the question asked and is

pure speculation on Ms. Cole's part as to what Ms. Kilpatrick may or may not have thought.

(Docket No. 34 at 6.) The underlying testimony:

Q. What was Cindy's first reaction to your telling her that you had shingles and might be out for three months?

MR. STROCK: Objection. Asked and answered.

MR. GREIF: You may answer.

A. I think the way I put it to her, she may have misinterpreted –

The motion to strike as non-responsive was not preserved and the testimony was elicited by plaintiff's counsel. Furthermore, this is the kind of testimony that, at trial, might or might not be erased from the fact finder's mind, even if a "curative" instruction were provided. I overrule the objection.

### **Paragraph 77 and 78**

The statements and responses are as follows:

77. Cole explained that the "attitude change" arose when she asked for a raise in 2000, and the change was a result of the fact that "[he] didn't have any respect or probably didn't have any knowledge of the workload that I carried." Cole Depo. 49:23-50:4.

**Plaintiff's Response:** See motion to strike.

78. Cole claims that Economy's attitude change [d] towards her, starting in 2000, when she asked for a raise. The attitude, accordingly to Cole, arose out of Economy's treatment of women. His attitude did not change through 2001 and 2002, when Cole left Dean. Cole Depo. 202:2-21.

**Plaintiff's Response:** See motion to strike the second sentence. The remainder of Paragraph 78 is admitted.

The motion to strike states:

Plaintiff moves to strike Paragraph 77 and the second sentence of Paragraph 78 on the grounds that they are inadmissible speculation on the part of Ms. Cole as to the reason for Mr. Economy's attitude change.

(Docket No. 34 at 6.) The underlying testimony was as follows:

*as to ¶ 77*

- A. Right. And Mr. Economy's attitude changed. Actually his attitude changed back the year before when I asked for a raise. He didn't have any respect or probably didn't have the knowledge of the workload that I carried. Probably that was a more accurate description of his attitude.

*as to ¶ 78*

- Q. You mentioned that John Economy's attitude changed when you asked for a raise back in 2000; do you remember that?
- A. Yes.
- Q. Was that the same attitude that carried forward through 2001 and ultimately through 2002 when you separated from your employment with Garelick?
- A. I think so, yes.
- Q. And that's the same attitude we've been talking about, his treatment of women and yourself?
- A. Yes.
- Q. Was there any change in John Economy's attitude towards you through 2001 or before you left in 2002?
- A. I didn't see much of him. I wasn't there long enough other than the short conversation we had telling me he was glad that I came back. Other than that I didn't see him.
- Q. Then in 2001 it was essentially the same attitude that related back to 2000; correct?
- A. Yeah.

The objections are unpreserved and, therefore, overruled. As to paragraph 77, witnesses sometimes volunteer things that they would be better served not to. The same might be

said with respect to paragraph 78. Cole's suggestion that Economy has a negative attitude toward women does not help advance her case, which does not include a sex discrimination claim. As to "speculation" about what is transpiring inside Economy's head, Cole is presumably drawing her conclusions based on changes in the outward behavior of Economy that caused her to conclude that his "attitude" had changed at some point in time.

### **Paragraph 79**

The statement and response are as follows:

79. Cole does not claim that she was (a) demoted, (b) lost benefits, (c) given a pay reduction, (d) received negative job evaluations, (e) received reduced duties, (f) lost any employment privileges, or (g) was fired or demoted, because she asked to be paid overtime in July 2001. Cole Depo. 151:17-153:24.

**Plaintiff's Response:** See motion to strike.

The motion to strike states:

Plaintiff moves to strike Paragraph 79 on the ground that it is based on improper questions at Ms. Cole's deposition. Ms. Cole's opinion as to whether any employment actions were based upon her complaint regarding overtime pay is pure speculation and is not admissible on a motion for summary judgment.

(Docket No. 34 at 6.) The objection is overruled. The underlying testimony involves answers to legitimate questions about what Cole is claiming in her suit. Also, the objection was not preserved. There is no need to present this kind of objection in a motion to strike. In this circumstance, the appropriate approach is to admit in an opposing statement of material fact that the testimony occurred, but explain why it lacks weight due to the form of the question. What the plaintiff is claiming is obviously

material to the disposition of a summary judgment motion, as is the evidence she presents in support of her claim.

### **Paragraph 85**

The statement and response are as follows:

85. Cole's own assessment of her work undermines her constructive discharge claim. She testified that, "I loved my job." In the employment applications she filled out after leaving Dean, she answered the question, "What did you like best about this job" and she answered "Everything. I loved my job." Cole Depo. 42:9-12, 105:4-25.

**Plaintiff's Response:** See motion to strike the first sentence. The remainder of Paragraph 85 is admitted.

The motion to strike indicates:

Plaintiff moves to strike the first sentence of Paragraph 85 as it is legal argument, not a fact.

(Docket No. 34 at 7.) The objection is sustained. However, there is absolutely no need to raise this kind of objection in a motion to strike. Cole would have been better served had she simply indicated in her opposing statement of material fact that the first sentence was denied on the ground that it presented inappropriate, editorial argument. Of course, although the objection able nature of the statement is obvious, one would still not want to admit the entire statement.

### **Conclusion**

Plaintiff's motion to strike (Docket No. 34) is overruled in part and sustained in part, as set forth above.

### **CERTIFICATE**

Any objections to this Order shall be filed in accordance with Fed. R. Civ. P. 72.

*So Ordered.*

Dated February 10, 2005

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

COLE v. DEAN NORTHEAST LLC

Assigned to: JUDGE JOHN A. WOODCOCK, JR

Case in other court: Penobscot County Superior  
Court, CV-04-00032

Cause: 28:1441 Petition for Removal- Civil Rights  
Act

Date Filed: 02/25/2004

Jury Demand: Plaintiff

Nature of Suit: 442 Civil Rights:  
Jobs

Jurisdiction: Federal Question

**Plaintiff**

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