

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NANCY OTIS,)
)
 Plaintiff)
)
 v.) Civil No. 98-0187-B
)
 TOWN OF MADISON, et al.,)
)
 Defendants)

***ORDER ON DEFENDANTS’ MOTION TO STRIKE
PORTIONS OF PLAINTIFF’S AFFIDAVIT***

Defendants request the Court strike portions of Plaintiff’s Affidavit, submitted in support of her objection to their Motion for Summary Judgment. As grounds for the Motion to Strike, Defendants assert that the testimony presented in the Affidavit is clearly contradictory to Plaintiff’s earlier deposition testimony. *Colantuoni v. Alfred Calcagni & Sons*, 44 F.3d 1 (1st Cir. 1994). As the First Circuit Court of Appeals stated in *Colantuoni*, “[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.” *Id.* at 4-5.

As a preliminary matter, the Court notes that Plaintiff’s counsel sought an opportunity to reopen Plaintiff’s deposition, over Defendants’ objection, for the

purpose of clarifying some of her direct testimony through cross-examination. The Court, in its Order dated May 11, 1999, indicated that Plaintiff could instead file an Affidavit for that purpose. Much of Defendants' Motion directs the Court's attention to discrepancies that could easily have been explained through cross-examination, and the Court will not penalize Plaintiff for having been afforded no opportunity to do so.

In addition, in many cases, Defendants reference discrepancies that are clearly irrelevant to the main point of the paragraph Defendants seek to challenge. For example, Defendants assert that paragraph 27 of the Affidavit should be stricken because Plaintiff had stated at her deposition that she borrowed a Beretta of a different model to use for practice, and in her Affidavit stated it was a Rugar semi-automatic. The point of paragraph 27 is that Plaintiff borrowed a weapon, and purchased ammunition, range time, and targets at her own expense, in order to train herself to qualify on the Beretta. The same is true of Plaintiff's testimony that her announcement of her pregnancy "started a series of questions" about her return to work after having the baby. Plaintiff's deposition testimony to the effect that these questions were raised in April of that year is a distinction without a difference. The same is also true of the question whether Plaintiff spoke to Mr. Beane in person, or

on the telephone. It can hardly be said in these circumstances that Plaintiff is attempting to create a disputed issue of fact for summary judgment.

Further, many of the discrepancies to which Defendants object are simply not ‘clear contradictions of unambiguous testimony.’ By way of example:

1. Plaintiff’s deposition testimony about Chief Dunlap’s statements to her about ‘coming to him if anyone gave her a hard time,’ and her testimony about a portion of her training involving the personnel manual do not directly contradict her statement that Chief Dunlap *said* nothing to her about the *Town’s* policy on sexual harassment.
2. Plaintiff’s deposition testimony that she did not know if *all* males were required to document their training does not contradict her statement that submitting extra documentation was “something male officers were not required to do,” particularly when she testified at deposition that she knew “for a fact” that two male officers hired after her were not required to submit such documentation.
3. Plaintiff does not state in paragraph 11 of her Affidavit that the comment about being careful with her because she is a woman was *attributed* to either Dunlap or Gordon.

4. The fact that Sergeant Gordon's wife worked outside the home at the time of the events giving rise to this action, or since, says nothing about whether Sergeant Gordon made the comment attributed to him.
5. The fact that Dunlap was out of work during the time Plaintiff was hired for the dispatcher position does not contradict her testimony that he came in for the limited purpose of filling that position.

In the end, the Court can find only one directly contradictory statement for which Plaintiff has offered no adequate explanation. Her statement in paragraph 44(a) of her Affidavit to the effect that she "had not been trained on the Beretta" is hereby STRICKEN. The Motion to Strike is DENIED in all other respects, including as it relates to the remainder of paragraph 44(a). Plaintiff's request for attorneys fees and costs relative to the Motion to Strike is DENIED.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on: August 9, 1999