IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

TOMMY "SHANE" BODEN **PLAINTIFF**

VS. **4:18-CV-00266-JM**

NUTRIEN AG SOLUTIONS, INC., formerly known as CROP PRODUCTION SERVICES, INC. **DEFENDANT**

ORDER

Pending are Defendant's Motion for Summary Judgment (Doc. No. 31) and Motion to Strike (Doc. No. 47). Plaintiff responded and Defendant replied.[1] For the reasons stated below, Defendant's Motion to Strike is GRANTED and the Motion for Summary Judgment is GRANTED in PART and DENIED in PART.

I. BACKGROUND

In March 2014, Defendant hired Plaintiff, who was 58 years old, as an agricultural salesperson at its Idaho Falls branch.[2] Later in 2014, Defendant's Idaho Falls branch stopped selling agricultural products, so Plaintiff was transferred to its Roberts, Idaho branch.[3]

On April 6, 2016, Plaintiff was injured at work,[4] and reported the injury to his supervisor, Greg Eames. On May 6, 2016, Plaintiff talked to Eames about seeing a doctor for his injury. Plaintiff also contacted Defendant's Safety Manager and was told how to make a worker's compensation claim. He filed the claim on May 7, 2016. On May 12, 2016, another supervisor, Jeremy Jensen, asked Plaintiff about the injury, and told him that he "knew better."[5] The parties disagree as to whether Jensen was referring to the accident or the filing of the claim.

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[1]Doc. Nos. 45, 53, 54.

[2]Doc. No. 31-2, p.3.

[3]*Id.* at 4.

[4]*Id.* at 6

Sometime before May 5, 2016, Jensen told Plaintiff that he must reach a $250,000 yearly sales goal to keep his job.[6] In October 2016, Defendant terminated Plaintiff's employment.[7] Jensen told Plaintiff that he was being fired because he failed to meet his sales goals.[8]

On April 4, 2017, Plaintiff filed a Charge of Discrimination with the Idaho Human Rights Commission ("IHRC") and the Equal Employment Opportunity Commission ("EEOC"). In March 2018, Plaintiff received Notice of Right to Sue Letters from both the IHRC and the EEOC. Plaintiff file this case alleging that he was fired based on his disability, age, and in retaliation for filing a worker's compensation claim.

II. APPLICABLE LAW

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[9] The Court's role at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[10] In considering a motion for summary judgment, the Court must "view[ ] the facts in the non-moving party's favor."[11] To defeat a motion for summary judgment, the respondent need only present evidence upon which "a

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[5] *Id.* at 8.

[6] *Id.*

[7] *Id.* at 6.

[8] *Id.*

[9] Fed. R. Civ. P. 56(a).

[10] *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (citation omitted).

[11] *Id.*

reasonable juror drawing all inferences in favor of the respondent could return a verdict in [his or her] favor."[12] On the other hand, as the Supreme Court has made clear: "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and summary judgment is appropriate.[13]

Accordingly, the Court must enter summary judgment if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[14] The respondent cannot simply rely on an unsworn affidavit or the pleadings to defeat a motion for summary judgment; rather the respondent must set forth the "specific facts," supported by evidence, with "reasonable particularity" that preclude summary judgment.[15]

III. DISCUSSION

A. Motion To Strike

Before considering Plaintiff's claims, the Court must address Defendant's Motion to Strike, given its potential impact on the Motion for Summary Judgment.

Defendant seeks to strike parts of the Statement of Facts, and the declarations by Plaintiff and Isaac Walker. Defendant argues that Plaintiff's declaration is inconsistent with his deposition testimony, and that he inappropriately used these statements in his disputed statement of facts, in violation of the sham affidavit rule. It also contends that Brown's declaration contains

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[12] *Id.* (citation omitted).

[13] *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

[14] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[15] *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).

hearsay and should not be considered. Plaintiff asserts that he merely elaborated, explained, and clarified his earlier answers and there is no "clear and unambiguous" discrepancy.

1. Sham Affidavit Rule

The "sham affidavit rule prevents a party who has been examined at length on deposition from raising an issue of fact simply by submitting an affidavit contradicting his own prior testimony."[16] However, "[t]he sham affidavit rule should be applied with caution because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment."[17] In addition, "the non-moving party is not precluded from elaborating upon, explaining, or clarifying prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit."[18]

The Court must determine whether the "inconsistency between [Plaintiff's] deposition testimony and his subsequent declaration is clear and unambiguous to justify striking the affidavit."[19] The declaration is a sham if "no juror would believe [Plaintiff]'s weak explanation for his sudden ability to remember"[20]

Plaintiff's declarations address two specific issues in the case: (1) whether Jensen was the sole person who hired him and (2) whether Jensen knew Plaintiff filed a worker's compensation claim before he informed Plaintiff of his $250,000 sales requirements for 2016.

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[16] *Id.* at 1080 (citations and punctuation omitted).

[17] *Id.* (citation and punctuation omitted).

[18] *Id.* at 1081 (citations omitted).

[19] *Yeager v. Bowlin*, 693 F.3d 1076, 1079 (9th Cir. 2010) (citations omitted).

[20] See *id.*

These specific statements impact elements of Plaintiff's claims. First, they impact whether the "same actor inference" is available to Defendant because the hiring and firing decision was made by the same person. Second, the retaliation claim incorporates a time line that shows Jensen knew about the worker's compensation claim before telling Plaintiff about his sales goals.

Plaintiff's deposition testimony clearly indicates that he contacted Jensen about the job, and Jensen approved his hiring, but left the final details to Michael Larkin because he would be the local manager where Plaintiff would be working.[21] It is undisputed that Jensen was the Division Manager who oversaw the sales staff in all of Defendant's Idaho stores.[22] Plaintiff's declaration attempts to diminish Jensen's participation in the hiring process to a mere introductory role, leaving Larkin as the sole hiring decision-maker, which is a clear contradiction to his previous testimony.[23] Additionally, during the deposition, Plaintiff was unsure how or when the final hiring decision was made,[24] but Plaintiff's declaration claims Larkin made the decision on his own, following a lunch meeting.[25]

Similarly, Plaintiffs' declaration inexplicably changed the date he first notified Defendant of his worker's compensation claim and the date Jansen told him about the new sales goals.[26] Plaintiff testified that Jensen told him he needed to increase his sales in a conversation before May 6, 2016. A series of e-mails, confirmed by Plaintiff during his deposition, dated

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[21]Doc. No. 45-3, pp. 6- 8.

[22]Doc. No. 31-2, p. 3.

[23]*Id.*

[24]Doc. No. 45-11, p. 3.

[25]Doc. No. 45-11, p. 3.

[26]Doc. No. 45-3, p. 8.

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