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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARIA LUISA JOHNSON, CARMELIA  
DAVIS-RAINES, CHERYL MUSKELLY,  
PAULINE ROBINSON, ELAINE SEAY-  
DAVIS, TONI WILLIAMSON, and LYNDA  
JONES,

Plaintiffs,

v.

SEATTLE PUBLIC UTILITIES, a department  
of the CITY OF SEATTLE, a municipality,

Defendant.

NO. 15-2-03013-2 SEA

DEFENDANT SEATTLE PUBLIC  
UTILITIES' OPPOSITION TO  
PLAINTIFFS' MOTION TO  
COMPEL TESTIMONY OF  
ROGER FAUSTINO

TRIAL DATE: July 11, 2016

**I. INTRODUCTION**

Plaintiffs' counsel deposed SPU employee Rogerich "Roger" Faustino on May 5, 2016, and closed the deposition when he finished his questioning. Two hours later, he asked SPU if he could conduct a follow-up deposition regarding photographs that he had subpoenaed from Mr. Faustino, which had been timely produced at the deposition on a thumb drive that Plaintiffs' counsel had trouble accessing. SPU noted that counsel had already closed Mr. Faustino's deposition, but, in the spirit of cooperation, agreed to an additional deposition on the condition that all questions be limited to the photos produced on the thumb drive. Although

1 Plaintiffs' counsel appeared to agree to limit his questions to the documents produced pursuant  
2 to his subpoena, at Ms. Faustino's second deposition he immediately tried to question him on a  
3 new and unrelated area – that he supposedly “lied” during his first deposition about making  
4 racially inappropriate comments. It is undisputed that Mr. Faustino played no role whatsoever  
5 in any of the disciplinary decisions regarding the plaintiffs in this case. And, four days *after*  
6 the first Faustino deposition, Plaintiffs voluntarily dismissed their claims for hostile work  
7 environment. So, even assuming that it is true that Mr. Faustino lied about making racially  
8 inappropriate comments – which it is not -- the information Plaintiffs seek to obtain from a  
9 third Faustino deposition is completely irrelevant to their stated claims against SPU. Now,  
10 instead of taking time to prepare its case for trial, SPU is forced to respond to Plaintiffs'  
11 meritless discovery positions even though discovery closed on May 23. The Court should deny  
12 Plaintiffs' motion so the parties can turn their attention to the significant task at hand: preparing  
13 for the upcoming July 11 trial.

## 14 **II. STATEMENT OF FACTS**

15 On April 26, 2016, Plaintiffs' counsel issued a subpoena duces tecum commanding Mr.  
16 Faustino to appear for a deposition on May 5, 2016. Faustino Declaration (“Faustino Decl.”) at  
17 ¶ 1; Simpson Declaration (“Simpson Decl.”), Ex. A at 1. That subpoena also commanded him  
18 to bring to the deposition various categories of documents. Simpson Decl., Ex. A at 2. Mr.  
19 Faustino had no involvement in either the workplace investigations or disciplinary proceedings  
20 upon which Plaintiffs' claims in this lawsuit are based. Simpson Decl., Ex. B at 29:6-18.  
21 Plaintiffs have never alleged otherwise. *See* Docket No. 149 at ¶¶ 1.1–5.1 (Plaintiffs' Third  
22 Amended Complaint for Damages, Injunctive and Declaratory Relief or “Third Amended  
23 Complaint”).

24 Mr. Faustino duly attended his deposition on May 5, 2016, bringing with him a thumb  
25 drive that contained various responsive photographs and videos. Simpson Decl., Ex. B at 1;  
26 9:7-22. Plaintiffs' counsel was unable to access the files on Mr. Faustino's thumb drive for  
27 unknown technical reasons, so SPU's counsel agreed to make copies of the photographs and

1 videos it contained and provide them to Plaintiffs' counsel after the deposition. Simpson Decl.,  
2 Ex. B at 24:4-14.

3 During the deposition, Mr. Faustino was questioned at length about comments that he  
4 had made on Facebook and other social media accounts that Plaintiffs' counsel suggested were  
5 racially discriminatory. Plaintiffs' counsel also repeatedly asked Mr. Faustino if he had made a  
6 recording of some of the plaintiffs in the workplace calling them racially derogatory terms. Mr.  
7 Faustino repeatedly denied doing so.<sup>1</sup> After questioning Mr. Faustino at length, Plaintiffs'  
8 counsel closed the deposition at 3:15 p.m. Simpson Decl., Ex. B at 28:19; 29:17-18. At 5:37  
9 p.m. that same day –only two hours after Mr. Faustino's deposition and before he had a chance  
10 to review what was on the thumb drive – Plaintiff's' counsel emailed SPU's counsel, ostensibly  
11 seeking to depose Mr. Faustino about the files on the thumb drive (although he had yet to  
12 receive or review them): "Portia . . . Could you send along Mr. Faustino's documents as soon  
13 as possible? I'll want to depose him again briefly once I have them." Simpson Decl., Ex. C at  
14 1.

15 On May 6, SPU's counsel responded to Plaintiffs' counsel's email, explaining that  
16 although SPU had no obligation to produce Mr. Faustino for deposition a second time since the  
17 prior deposition was closed, SPU would do so as a good faith gesture:

18 You finished Faustino's deposition. That was your choice. I will  
19 not let you open it up again to go over ground that you either  
20 forgot or chose not to do so. In an attempt to work with you, I am  
21 agreeing to allow you to question him about the documents that  
22 were on the flash drive that he *timely* produced, pursuant to you[r]  
[subpoena duces tecum] – although I have no obligation to do so.  
If we cannot agree to these parameters, please let me know. I will  
withdraw my agreement to produce him for a second time.

23 Simpson Decl., Ex. D at 1 (emphasis in original).<sup>2</sup>

24 <sup>1</sup> Every single one of the plaintiffs testified at their depositions that they "heard" that Mr. Faustino had made a  
25 video that was posted on You Tube where he referred to a number of plaintiffs as "coons." Every single one of the  
26 plaintiffs admitted however that they had never seen such a video; that Mr. Faustino had never admitted making  
such a video; and that they had never heard Mr. Faustino say anything that they considered racially derogatory to  
persons of color. See, Simpson Decl. at ¶ 8.

27 <sup>2</sup> Plaintiffs' motion conspicuously omits from its factual summary SPU's counsel's email responses to Plaintiffs'  
counsel.

1 Plaintiffs' counsel's response ten minutes later indicated assent to these parameters, and  
2 certainly did not express any disagreement:

3 You are honorable, and a good lawyer. I'm going to trust that you  
4 will evaluate each question at the time it is asked to decide if you  
5 will object. I don't think you will – although of course I can't  
6 share my strategy with you. I will certainly ask the witness about  
7 the documents produced on the thumb drive.

8 Simpson Decl., Ex. D at 1.

9 On May 9, 2016, (just four days after Mr. Faustino's deposition) Plaintiffs filed their  
10 Third Amended Complaint, which dropped their disparate impact and harassment/hostile work  
11 environment claims against SPU. *Compare* Docket 146 at ¶¶ 3.2, 3.3<sup>3</sup> with Docket 149 at  
12 ¶ 3.2. Significantly, there is not a single allegation regarding Mr. Faustino or any of his  
13 alleged conduct anywhere within this 25-page complaint. *See* Docket 149 at ¶¶ 1.1-5.1.

14 On May 11, 2016, SPU's counsel reiterated that it was agreeing to produce Mr.  
15 Faustino a second time as a courtesy, but only to address the documents Mr. Faustino brought  
16 to the May 5 deposition:

17 Faustino can be available for deposition on the limited questions of  
18 the documents included on the flash drive that he timely produced  
19 pursuant to your subpoena on the afternoon of May 18<sup>th</sup>. I assume  
20 that the deposition will take no longer than 45 minutes. Please  
21 confirm.

22 Simpson Decl., Ex. E at 1. Plaintiffs' counsel tersely indicated assent (or sought to give that  
23 impression): "How about 4:00?"<sup>4</sup> Simpson Decl., Ex. E at 1.

24 Pursuant to this understanding, SPU's counsel produced Mr. Faustino for a second  
25 deposition on May 18, 2016. Simpson Decl., Ex. F at 1. At the outset of the deposition, SPU's  
26 counsel again emphasized the deposition's limited scope:

27 The last round of Mr. Faustino's deposition occurred on May 5,  
2016. That deposition was closed at the end. Our office has  
communicated with Mr. Sheridan for purposes of allowing a

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<sup>3</sup> Docket 146 is Plaintiffs' Second Amended Complaint for Damages, Injunctive and Declaratory Relief.

<sup>4</sup> Plaintiffs' counsel's complete omission of this response from Plaintiffs' motion is particularly notable, as it is the clearest indication of his assent to the limited scope of the second deposition.

1 second round of the deposition to go forward for the *express and*  
2 *limited purpose of discussing documents that [Mr. Faustino]*  
3 *brought with him on a thumb drive* pursuant to a previously  
4 issued subpoena.

5 Simpson Decl., Ex. F at 4:17-23 (emphasis added).

6 Plaintiffs' counsel did not indicate he had a different understanding of the deposition's  
7 scope, stating only "So I – I think we can address whether it was actually closed at a later time,  
8 but I welcome your making the record." Simpson Decl., Ex. F at 4:24-25.

9 After questioning Mr. Faustino for several minutes about innocuous photographs from  
10 his thumb drive, Plaintiffs' counsel began asking questions obviously outside of the agreed-to  
11 scope: "*After the last deposition, after you walked out, did you talk to Toni Williamson?*"  
12 Simpson Decl., Ex. F at 11:17-18. SPU's counsel instructed Mr. Faustino to not answer the  
13 question and once again informed Plaintiffs' counsel "[W]e brought him here with the sole  
14 understanding that we're limiting it to things on the [memory] stick, and that's what we're  
15 sticking to" and "Jack, you brought us here under false pretenses . . . We told you that the  
16 deposition is limited." Simpson Decl., Ex. F at 11:1-12:3; 12:6-13:10.

17 After SPU's counsel informed Plaintiffs' counsel he would continue to instruct Mr.  
18 Faustino not to answer questions outside the agreed-to scope of the deposition, Plaintiffs'  
19 counsel attempted to end the deposition. Simpson Decl., Ex. F at 13:22-25. SPU's counsel  
20 informed Plaintiffs' counsel that he would enter as exhibits emails in which Plaintiffs' counsel  
21 had agreed to limit the scope of the deposition, and Plaintiffs' counsel then exited the room  
22 with his clients as SPU's counsel 'did so. Simpson Decl., Ex. F at 13:22-15:25. SPU's counsel  
23 then closed the deposition in Plaintiffs' counsel's absence. Simpson Decl., Ex. F at 15:16-16.

24 According to the "Declaration of Toni Williamson", which was executed hours after the  
25 first day of Mr. Faustino's deposition, Plaintiff Williamson confronted Mr. Faustino after the  
26 deposition and accused him of lying. Sheridan Declaration, Ex. 3 at Ex. 9. According to  
27 Plaintiff Williamson, Mr. Faustino responded "I'm sorry. I'm scared." Sheridan Declaration,  
28 Ex. 3 at Ex. 9.

1 Plaintiff's counsel now argues that Mr. Faustino thus "admitted . . . that he had just  
2 lied." Plaintiff's Motion to Compel Testimony of Roger Faustino at 1:2-3. Mr. Faustino,  
3 however, did no such thing. To the contrary, he has submitted a sworn statement that he did  
4 not lie at his deposition. Instead, he apologized to Plaintiff Williamson only because he felt  
5 that Plaintiffs' counsel had wrongfully accused him of being a racist in front of Plaintiffs, who  
6 are his current and former work colleagues. Faustino Decl. at ¶¶ 2-5.

### 7 III. EVIDENCE RELIED UPON

8 SPU relies on the pleadings and evidence in the Court's file for this matter, the  
9 Declaration of Arthur Simpson, and the Declaration of Rogerich Faustino.

### 10 IV. ARGUMENT

#### 11 A. Plaintiffs' Motion Should be Denied Because of Plaintiffs' Counsel's Bad 12 Faith Conduct.

13 "[T]he spirit of the [discovery] rules is violated when advocates attempt to use  
14 discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by  
15 overuse of discovery or unnecessary use of defensive weapons or evasive responses."  
16 *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 341, 858  
17 P.2d 1054 (1993) (citations and quotations omitted). "[A] spirit of cooperation and  
18 forthrightness during the discovery process is necessary for the proper functioning of modern  
19 trials." *Id.*

20 SPU made every effort to accommodate Plaintiffs' counsel, helping him retrieve  
21 documents from Mr. Faustino's thumb drive and then agreeing to produce Mr. Faustino for a  
22 second deposition without the issuance of a second subpoena or a court order to question Mr.  
23 Faustino about those documents, which – again – it had no obligation to do. For his part,  
24 Plaintiffs' counsel originally *appeared* to agree to limit the scope of the second Faustino  
25 deposition to the contents of Mr. Faustino's thumb drive. Despite his apparent assent,  
26 Plaintiffs' counsel tried to blindside SPU's counsel at the May 18 deposition using his client's  
27 declaration. The timing of Plaintiffs' counsel's request for a second deposition of Mr. Faustino

1 – within three hours after he concluded his deposition, *before* he knew what was on the thumb  
2 drive, but *after* he had spoken to his client – certainly suggests subterfuge.

3 If Plaintiff's counsel wanted to depose Mr. Faustino about Plaintiff Williamson's  
4 declaration or events occurring after the May 5 deposition, he could have and should have  
5 either informed SPU's counsel of the same or issued a second subpoena for a second  
6 deposition. That way, the parties could have resolved the propriety of a second deposition and  
7 its scope weeks ago. Instead, Plaintiffs' counsel chose to sandbag SPU. The Court should not  
8 reward such behavior by permitting Plaintiffs' counsel to conduct a *third* deposition of Mr.  
9 Faustino after discovery has closed.

10 **B. Plaintiffs' Motion Should be Denied Because the Testimony Sought is**  
11 **Irrelevant.**

12 Notwithstanding Plaintiffs' counsel's questionable discovery practices, Plaintiffs'  
13 motion should be denied because the testimony Plaintiffs seek from Mr. Faustino is *completely*  
14 *irrelevant* to their claims of disparate treatment<sup>5</sup> and retaliation.<sup>6</sup>

15 "A discovery request must be relevant to the subject matter of the suit. A discovery  
16 request must be reasonably calculated to lead to the discovery of admissible evidence."  
17 *Neighborhood All. of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 747, 261 P.3d 119  
18 (2011) (citing CR 26(b)(1)). "Relevant evidence" means evidence having any tendency to  
19 make the existence of any fact that is of consequence to the determination of the action more  
20 probable or less probable than it would be without the evidence." ER 401.

21 Plaintiffs' Third Amended Complaint, which was filed only four days after the May 5  
22 deposition of Mr. Faustino, does not contain a single allegation against him. Nor could

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23 <sup>5</sup> "The plaintiff's ultimate burden at trial in a disparate treatment lawsuit is to present evidence sufficient for a  
24 reasonable trier of fact to conclude that *the defendant's alleged discriminatory motive was more likely than not a*  
25 *substantial factor in its adverse employment action.*" *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn.  
26 App. 137, 149, 279 P.3d 500 (2012) (emphasis added).

27 <sup>6</sup> To establish a prima facie retaliation case, a plaintiff must show that (1) he engaged in statutorily protected  
activity, (2) *his employer took an adverse employment action against him*, and (3) there is a causal link between  
the activity and the adverse action. *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 753-54, 315 P.3d  
610 (2013).

1 Plaintiffs have so alleged in good faith, as Mr. Faustino had nothing to do with the disciplinary  
2 actions underpinning Plaintiffs' claims against SPU. The only conceivable claim Plaintiffs'  
3 could bring based upon the conduct of a supervisor such as Mr. Faustino who played no role in  
4 any specific disciplinary action is a claim for hostile work environment.<sup>7</sup> Yet Plaintiffs  
5 voluntarily dismissed their hostile work environment causes of action *four days after* deposing  
6 Mr. Faustino. Plaintiffs' merely seek to bog the litigation down with an irrelevant sideshow in  
7 violation of the Civil Rules. The Court should not permit them to do so, and it should deny  
8 their motion.

9 **V. CONCLUSION**

10 For the foregoing reasons, Defendant SPU respectfully requests that the Court deny  
11 Plaintiffs' motion to compel.

12  
13 DATED this 27th day of May, 2016.

14 Davis Wright Tremaine LLP  
15 Attorneys for Defendant Seattle Public Utilities

16  
17 By /s/ Arthur Simpson

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25  
26 <sup>7</sup> To establish a prima facie case for a hostile work environment claim based on race, the plaintiff-employee must  
27 show (1) the harassment was unwelcome, (2) the harassment was because of race, (3) the harassment affected the  
terms or conditions of employment, and (4) the harassment is imputed to the employer. *Washington v. Boeing  
Co.*, 105 Wn. App. 1, 12-13, 19 P.3d 1041 (2000).

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the document to which this certificate is attached to be served in the manner as indicated below:

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Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 27th day of May, 2016.

/s/ Lynn Nydam  
Lynn Nydam