IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-00053-MSK-BNB

MAJOR JON MICHAEL SCOTT;

Plaintiff,

v.

CITY & COUNTY OF DENVER,

Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION TO DEEM REQUESTS FOR ADMISSION ADMITTED OR, IN THE ALTERNATIVE, TO COMPEL RESPONSES

Plaintiff, by and through his undersigned counsel, hereby respectfully submits his Reply Brief in Support of Motion to Deem Requests for Admission Admitted Or, In the Alternative, to Compel Responses.

Any Objections Not Raised in Defendant's Original Responses are Waived

1. Plaintiff propounded his First Requests for Admission to Defendant on November 2, 2012. Defendant responded on December 3, 2012. Robertson Decl. (Doc. 60-1), Ex. 1.

2. On December 7, 2012, Plaintiff moved pursuant to Fed. R. Civ. P. 36(a)(6) to deem the first 19 requests for admission ("RFAs") admitted or to compel responses. Doc. 60.

3. On January 7, 2013, Defendant filed its response to this motion, Doc. 87, as well as amended responses to Plaintiff's first 19 RFAs. Defendant's amended responses contained defenses that were not raised in Defendant's original responses to RFAs. *Compare* Robertson Decl. (Doc. 60-1), Ex. 1 *with* Doc. 87-2. Most notably, Defendant now objects -- for the first

time -- that RFAs 1 through 18 call for legal conclusions; Defendant's original responses contained no such objections.

4. Rule 36(a)(3) provides that responses or objections to RFAs must be filed within 30 days. Although Rule 36 -- unlike Rule 33 governing interrogatories -- does not contain a provision expressly waiving objections not raised within 30 days, many courts have held that it is appropriate to recognize such a waiver. *See, e.g., Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2012 WL 952254, at *2 (N.D. Cal. Mar. 20, 2012) (holding that objections to RFAs not raised in a timely response were waived); *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 423 (N.D. W.Va. 2006) (holding that "arguments against a request for admission not first raised in a timely objection are waived, unless the objecting party can show good cause for the failure."); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1992 WL 394425, at *4 (E.D. Pa. Dec. 28, 1992) (holding that objections to RFAs not raised in original response were waived).

5. Similarly, this court has held that it is appropriate to read such a waiver into Rule 34, which -- like Rule 36 at issue here -- does not contain an express waiver provision. *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 661-62 (D. Colo. 2000) (citing *Deal v. Lutheran Hosps. & Homes*,127 F.R.D. 166, 168 (D. Alaska 1989) for the proposition that "procedures respecting failures to assert timely objections should be similar under Fed. R. Civ. P. 33 (interrogatories), 34 (production requests), 36 (admission requests), and 45(d)(1) (subpoenas to produce documents)).

6. Any objections not raised by Defendant in its original December 2, 2012 responses to RFAs -- specifically, the new objections that certain RFAs call for legal conclusions -- were waived and should not be considered by the Court in evaluating Defendant's response to Plaintiff's motion.

Defendant's "Legal Conclusion" Objection Is Meritless

7. Should this Court hold that Defendant has not waived objections raised for the first time in its amended responses, Plaintiff respectfully submits that the new "legal conclusion" objection in RFA No. 1 should be overruled.[1]

8. The Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA") both define "disability" as a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A) (ADA); 29 U.S.C. § 705(9)(B) (RA; incorporating by reference § 12102).

9. Plaintiff's RFA No. 1 asks Defendant to admit that "Major Jon Michael Scott is substantially limited in the major life activity of hearing." Doc. 87-2 at 1.

10. Rule 36 permits a party to serve requests to admit "facts, the application of law to fact, or opinions about either." Fed. R. Civ. P. 36(a)(1)(A). The rule was amended in 1970 specifically to eliminate a prior restriction to questions of fact. Advisory Committee Notes, 1970 Amendment. "An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial." *Id.*

11. Defendant objects that RFA No. 1 "improperly seeks the truth of a legal conclusion." Doc. 87-2 at 1; *see also* Doc. 87 at 5-6. To the contrary, the Tenth Circuit has held that, "whether [an] impairment substantially limits a major life activity is ordinarily a question of fact for the jury." *Sanchez v. Vilsack*, 695 F.3d 1174, 1178 (10th Cir. 2012). "Hearing" is

[1] Defendant raises "legal conclusion" objections to RFA Nos. 2 through 18, but does not rely on them in its response brief. *See* Doc. 87 at 6-8.

defined in the statute as a "major life activity." 42 U.S.C. § 12102(2)(A). Requesting Defendant to admit that Mr. Scott is substantially impaired in the major life activity of hearing is a purely factual question or at most an application of law (section 12102) to fact (Mr. Scott's hearing loss).

12. "As a general rule, '[r]equests for admission . . . are not objectionable even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case.'" *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 3171768, at *5 (D. Kan. Oct. 29, 2007) (internal citations omitted). *Reichenbach v. City of Columbus*, 2006 WL 143552 (S.D. Ohio Jan. 19, 2006), provides an instructive contrast. The plaintiffs in that case had asked the defendants to admit that it was not in compliance with 28 C.F.R. § 35.150(d), the ADA regulation requiring development of a transition plan. *Id.* at *2. The court held that this required a legal conclusion, but that it would not have called for an improper legal conclusion to ask the defendants to admit that they "adopted a transition plan within six months of January 26, 1992, as required by 28 C.F.R. 35.150(d)(1)." *Id.*, at *2 n.3.

13. RFA No. 1 in the present case resembles the approved language in *Reichenbach*: it requests a factual admission, using language drawn from the statute.

14. The cases on which Defendant relies address RFAs that are purely legal; they are thus inapposite. In *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 234 F.R.D. 1 (D.D.C. 2006), for example, the requests in question asked the plaintiff to admit that there was no provision of the ADA or related statutes that applied to its claims and that these statutes did not require certain measures. *Id.* at 2-3. These were raw legal conclusions, with no reference to the facts in the case. Similarly, in *Cunningham v. Standard*

Insurance Co., 2008 WL 2247860 (D. Colo. May 29, 2008), the plaintiff asked the defendant insurance company to admit to its "legal obligations and duties relating to reasonable standards" for certain generic measures in the insurance business. *Id.* at *3. The court concluded that "[a]lthough Rule 36 allows a request for admission regarding the application of law to fact, it does not permit requests for admissions related to legal conclusions that are not applied to any particular facts of a case." *Id.*; *see also id.* at *4 (rejecting other RFAs on the grounds that "the questions [were] not contextualized by the particular facts of this action.").

15. In contrast, again, RFA No. 1 asks a highly factually contextualized question about Mr. Scott's hearing loss. It is thus appropriate under Rule 36(a)(1)(A), and Defendant's legal conclusion objection should be overruled.

CONCLUSION

For the reasons set forth above and in Plaintiff's motion, Doc. 60, Plaintiff respectfully requests that his RFAs 1 through 19 be deemed admitted or, in the alternative, that Defendant be required to admit or deny them.

Respectfully submitted,

/s/ Amy F. Robertson

Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
303.595.9700 (voice)
303.595.9705 (fax)
arob@foxrob.com

Carrie Ann Lucas
The Center for Rights of Parents with Disabilities
P.O. Box 756
Windsor, CO 80550
720.363.1131 (voice)
970.818.9295 (fax)
clucas@disabledparentrights.org

Attorneys for Plaintiff

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