IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ELVIRA M. JIMENEZ,

Plaintiff,

v.

MADISON AREA TECHNICAL COLLEGE, JACKYE THOMAS, CAROL BASSETT and WILLIAM STRYCKER,

Defendants.

OPINION AND ORDER

00-C-0424-C

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An evidentiary hearing was held in this case on August 10, 2001, to allow Willie J. Nunnery, attorney for plaintiff Elvira M. Jimenez, to show cause why sanctions should not be imposed upon him for violations of Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Both Nunnery and plaintiff appeared at the hearing and testified and produced documentary evidence. Defendants were present in person and by counsel, Peter Albrecht, Jon Anderson and Brandon Krueger.

In a ruling from the bench at the conclusion of the hearing, I found that Nunnery had violated Fed. R. Civ. P. 11 and that the sanctions for the violation would be dismissal of this

suit, payment by Nunnery of the attorney fees incurred by defendants since the filing of the second amended complaint on November 13, 2000, and notification to the Office of Lawyer Regulation. The reasons for this ruling follow, beginning with the facts, which I find from the court's records and the evidence adduced at the evidentiary hearing.

## FACTS

Plaintiff started work for defendant Madison Area Technical College in September 1989. At the time she had a bachelor's degree and two master's degrees. Initially, she worked in the Paraprofessional Business Lab. From April through December 1993, she worked in Adult Basic Education under the dean of Alternative Education. In November 1994, she began working in Student Services, where she held the title of Affirmative Action Liaison and was involved with counseling services and women's initiatives. At some time in 1994, she asked to be reclassified but was turned down. At some time in 1997, plaintiff took a leave of absence from work, alleging stress. She filed a worker's compensation claim against the college.

In support of plaintiff's claim for compensation, Nunnery, acting as plaintiff's counsel, sent counsel for defendant MATC thirteen documents that plaintiff had allegedly received from defendants and others during the years 1993-1997. Among those documents were the following:

1. A paper copy of an email, Dfts.' Exh. #105, supposedly sent to plaintiff on October 31, 1995, by defendant Carol Bassett. The email shows the date as October 31, 1995 and the day as Monday, although October 31, 1995 was a Tuesday. The email has a heading, "Districts ADA Manual." It reads in full as follows:

> You know Vira, this is just another prime example of your inability to perform you functions. Maybe Jackye is right, I guess you are merely a stupid mexican after all. That's too bad, I thought you were going to be harder to get rid of but then this. Your nothing more then a little, bitchy, money-hungry, spic but dont you worry, you wont be here for long, not if I can help it! Besides, its obvious that you have a problem with the English language so save your disgrace and leave.

There is no reference to an ADA manual.

2. A paper copy of an email supposedly sent to plaintiff on May 5, 1995, by defendant Jackye Thomas, Dfts.' Exh. #108. Again, this email shows that it had been sent on Monday, although May 5, 1995 was Friday. This email reads as follows:

> I hope you understand when I commented on your Hispanic ancestry in the past, it was only to help you. I did not know that calling you mo-how and offering my assistance to you in learning the English language would offend you. I thought you were used to all of this and expected it? I mean, as I told you before there are many of your kind or your people in the college and I'm sure there's a reason for it, don't you think? Anyway please see me and we can talk about this. Jackye

3. A paper copy of an email supposedly sent to plaintiff on September 26, 1995 by Bonnie Vandre-Blewett, a union representative. Plt.'s Exh. ##4 and 5. Again, the email shows a day of Monday although September 26, 1995 was a Tuesday. This email purported to be in two pages. The first page breaks off in mid-sentence; "page 2" starts "P.S. I also

wanted to apologize for my call earlier today. My tone was uncalled for and it was wrong for me to call you a loud mouthed, power-monging spic and compare you to Fidel Castro's dictatorship style of leadership."

4. A communication dated June 19, 1996, purporting to be a memorandum to plaintiff from Bassett, Dfts.' Exh. #106. The memo starts out by explaining the attached summary of a final appeal of plaintiff's classification rating and then adds several sentences to the effect that "just because you're a mexican does not guarantee a promotion" and "[s]ince you are mexican and obviously have a problem interpreting or fully comprehending use of the English language I am empathetic to your language barrier and am offering my assistance in helping you overcome this failure."

5. A letter addressed to plaintiff and dated July 2, 1997, purporting to be from defendant Will Strycker, Vice-President of Human Resources, Dfts.' Exh. #100, in which Strycker apologized for his "violent sexual actions against" plaintiff, which were described in salacious detail, and "confessed" his inability to stop thinking about her. He also told her that everything she had been saying about the way defendants and others at MATC had been treating her was true.

Defendant MATC's worker's compensation insurer began investigating plaintiff's claim. In the course of the investigation, the insurer found evidence that it thought showed that plaintiff had forged certain documents. It arranged for an independent medical

examination of plaintiff by a psychiatrist, who concluded that plaintiff was both a malingerer and a sufferer from factitious disease. (Factitious disease is defined as being "characterized by physical or psychological symptoms that are intentionally produced or feigned in order to assume the sick role . . . [Individuals with the disorder] may engage in pathological lying, in a manner that is intriguing to the listener, about any aspect of their history or symptoms." Diagnostic and Statistical manual of Mental Disorders IV at 471-72). Plaintiff's worker's compensation claim was denied. Plaintiff did not return to work and was terminated by defendant MATC sometime in 1998.

Jon Anderson, counsel for defendant MATC in the worker's compensation matter, wrote Nunnery on November 12, 1997 and advised him that the writers of the various communications had all denied writing them. He asked for an opportunity to view the original documents; they were never produced.

In January 1998, plaintiff brought suit against these defendants, alleging a violation of her civil rights. Her counsel at that time was Hal Harlowe. After defendants moved to dismiss, plaintiff dismissed her suit voluntarily. She filed this lawsuit on July 5, 2000, represented by Nunnery, alleging that defendants had violated 42 U.S.C. §§ 1981 and 1983 and the Fifth and Fourteenth Amendments of the United States Constitution by treating her differently from other employees of defendant MATC because of her sex, ethnic origin and race.

Sometime in the late spring or early summer of 2000, Peter Albrecht, counsel for defendants, arranged to have lunch with Nunnery to discuss this case. Albrecht reviewed with Nunnery the fact of the 1997 independent medical examination of plaintiff, the fact that all of the defendants had denied writing the communications attributed to them, the inherent inconsistencies in the communications, the unlikelihood that any case would contain one smoking gun, let alone thirteen or more, and other reasons why he thought plaintiff and her counsel were ill-advised to pursue the suit. On July 20, 2000, Albrecht sent Nunnery a copy of the independent medical examination. Nunnery was undeterred.

Nunnery filed an amended complaint on plaintiff's behalf before defendants had answered the original one; defendants responded to the amended complaint with a motion to dismiss filed on August 8, 2000. This motion was granted in an order entered on October 13, 2000, for the reason that plaintiff had provided no allegations of fact to support her contentions that she had been the victim of discrimination. Moreover, she had not identified the statute under which she was proceeding in her first claim of action or identify her race and she had not alleged any facts from which it could be inferred that males or persons of other races were treated more favorably. Plaintiff had alleged that each of the individual defendants had made at least one discriminatory comment to her over the course of three years; I found these allegations insufficient to set out a claim of racial harassment in the workplace. There were other deficiencies in the pleadings that made it impossible to

know what plaintiff's claims might be with respect to each defendant. Plaintiff made no reference in either her original or her first amended complaint to the communications at issue. She was given leave to file a second amended complaint before November 6, 2000.

After plaintiff's case was dismissed on October 13, 2000, Nunnery filed a timely complaint on plaintiff's behalf, fleshing it out with allegations based upon the questioned communications described above and others. For example, plaintiff relied upon an unsigned and undated communication, Plt.'s Exh. #2, that she attributed to defendant Bassett. This letter begins with two and one-half paragraphs of explanation to plaintiff about why she would have to pay back certain unauthorized leave time to the college because the insurer had determined that she had reached an "end of healing" on September 4, 1992. The third paragraph of the communication reads as follows.

> You inquired as to the application of the 190 day provision in VII(D)(2) of the PSRP contract. First, this is not applicable in your case because there is no question that your injury was covered by Worker's Compensation and even if this was an option I cannot imagine any other logical interpretation of the English language that would have the 190 day days [sic] start at any point other than the date of injury which would have ended in late October of 1992. As I told you yesterday, Vira, I know that you are a mexican but this clearly demonstrates your lack of ability to understand the full meaning of the English language. In light of this issue you are merely being greedy and giving yourself the reputation of being nothing more than a little dirty, money-hungry spic. The college has been more than generous in continuing your salary throughout this time and now you have the gall to demand for more? This displays an inconsiderate and ungrateful attitude on your part and being from another country you should be less offensive and do as you're told. I can see that you will not be employed here for long especially with your bad attitude, your kind never seems to last once the pressure is on. You may seriously consider saving yourself the

embarrassment and resign while that's still an option.

After additional informal attempts to persuade Nunnery to withdraw the lawsuit, Albrecht wrote him on March 1, 2001, enclosing a proposed motion for sanctions and providing him with 21 days' notice that defendants would be filing a motion for sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Defendants filed the motion in the court on March 27, 2001. In an order entered on June 7, 2001, I found that the record suggested strongly that plaintiff's allegations were based on forged documents and that sanctions might be warranted but that an evidentiary hearing would be necessary to determine the facts. (I believed at the time that defendants' counsel had not followed the "safe harbor" rule of Rule 11; that belief was mistaken and was corrected in a follow up order entered on June 13, 2001.)

At the hearing, plaintiff proved to be a highly articulate speaker. Her grammar was excellent and she had no hint of an accent of any kind. Her advanced degrees suggest a high level of intelligence.

Plaintiff was asked at the hearing whether she had the originals of any of the communications on which she based the allegations in her complaint. She testified that she had laminated them to prevent them from being stolen and that she was afraid of theft because both her home and office had been burglarized and papers and computer discs had been taken. She believed the office burglary had been the work of defendants or others at

the college; she was less sure about the identity of the person or persons responsible for the burglary of her home.

Nunnery was asked whether he had ever seen the originals of the questioned documents; he replied that he had not. However, when plaintiff explained about the laminated documents, Nunnery said that he had them in his office. He was directed to bring them to court immediately, which he did. It is impossible to tell from the documents whether they contain original signatures; they do not appear to.

Nunnery believes that in representing persons who consult him about alleged violations of their civil rights, his role is to accept what they tell him, incorporate the allegations in a complaint and let the crucible of cross-examination and discovery lead to the truth. He did not question plaintiff in any depth about the legitimacy of the documents she provided him other than to ask her whether they were genuine, although he did warn plaintiff about the penalties of perjury and the risks she would run if she swore to something that was not true. He spoke to plaintiff at length and consulted with her mother and husband. In addition, he met with Richard Harris, Affirmative Action Officer at defendant MATC, and discussed matters having to do with plaintiff's attempt to obtain an investigation of her harassment complaints and the treatment of other employees who had made similar efforts. In his experience, it is to be expected that individuals and institutions such as MATC will deny having made any discriminatory comments or taken any

discriminatory actions so he did not place any weight on defendants' denial that they had written the questioned documents. Nunnery did not say that he had noticed the inconsistency of the dates and days on the emails or checked for the original emails. He did not conduct any discovery into the documents. He did not press his client to provide originals of the documents she showed him.

None of the individual defendants wrote the emails, memoranda or letters attributed to them by plaintiff. Defendant Bassett is the benefits administrator at defendant MATC; she has been employed in human relations jobs for over twenty years. The undated letter plaintiff says Bassett wrote, Plt.'s Exh. #2, begins with the same paragraph as does a letter Bassett wrote to plaintiff on November 30, 1993, Plt.'s Exh. #9; the third paragraph in the purported letter contains the same first sentence as the third paragraph in Plt.'s Exh. #2. The next four sentences of the November 30 letter repeat generally what is in the second sentence of Exh. #2, but do not contain any of the objectionable sentences contained in Exh. #2.

Bassett never uses the kind of language in the communications plaintiff produced bearing Bassett's name. When she first became aware of the alleged communications she found it painful to think that anyone would believe she might say such things.

Defendant Thomas is the director of counseling services at the college. She began her employment with defendant as part of the affirmative action office and has handled

approximately 300 affirmative action complaints. She does not use the kind of language plaintiff attributed to her. In fact, she does not know what some of the words in the email mean.

When Vandre-Blewitt learned that plaintiff was alleging she had written a demeaning email to plaintiff, she tried to retrieve the original and correct versions of her email messages to plaintiff. She was unable to do so because of the passage of time and a change in the email program at the college.

Defendant Strycker is Vice President, Human Resources, at defendant MATC. He was outraged, hurt and humiliated to read the letter purporting to be from him, describing violent sexual actions taken allegedly against plaintiff. He was particularly disappointed to think that Nunnery was relying on such a document because he knew Nunnery personally and had worked with him on a number of community projects. He showed the letter to his wife, who knows him well enough not to believe he could have committed any of the acts described in the letter. He believes the letter reflects adversely upon defendant MATC.

## OPINION

From the facts of record, it is apparent that Willie Nunnery does not understand the obligations imposed upon a party and her attorney under Fed. R. Civ. P. 11. Under that rule, by the act of submitting a pleading to the court, a lawyer certifies that to the best of his

information, knowledge and belief, formed after *inquiry reasonable under the circumstances,* the allegations of the pleading have evidentiary support. Rule 11(b)(3) (emphasis added). Nunnery does not acknowledge his responsibility for undertaking a reasonable inquiry but maintains his position that, as a matter of principle, he relies upon his clients to tell him what the facts of a case are and to leave the testing of those statements to discovery.

Whether relying solely on the client's version of the suit could ever be sufficient to meet a lawyer's Rule 11 obligations is a complex question. As Nunnery pointed out, the imminence of an expiring statute of limitations or similar problem may well excuse what would otherwise be inadequate investigation. There was no such time deadline in this case, however. Instead, there were circumstances that made it wholly unreasonable and negligent for Nunnery not to undertake extensive inquiry of his client and her story before he filed the second amended complaint. Indeed, there is no imaginable justification for him to have filed the second amended complaint, knowing what he did about the supporting "evidence."

The documents plaintiff provided Nunnery were questionable on their face. With his extensive experience in civil rights actions, Nunnery must have realized how unusual it is to find a written admission of sexual harassment or ethnic origin discrimination in any case; to find many such admissions is completely implausible. It is unlikely that persons holding professional jobs in human relations or in the union would make the statements attributed to them in the communications; it is even more unlikely that they would document their

discriminatory statements in writing. It would be a geometric increase of unlikelihood to think that professionals would not only make discriminatory statements and document them but that all of them would make precisely the same kind of ungrammatical discriminatory statements and incorporate those statements into communications that are otherwise clearly written, professional in tone and content and grammatically correct. Add to this the peculiarity of the writers focusing on plaintiff's language deficiencies when she has none and the inconsistencies in the email days and dates and one is left with nothing but suspicions about the legitimacy of the documents. Under these circumstances, it is not enough to rely on the statements of the client and her family or to question the affirmative action officer about matters not relating to the questioned documents. No minimally proficient lawyer would proceed to file a lawsuit in the face of all of these obvious warning signs.

Nunnery had other warnings. As early as 1997, he became aware that plaintiff may suffer from factitious disorder and malingering. He knew that her worker's compensation claim had been denied because the insurer found her untruthful. He knew that the individual defendants denied writing any of the communications in question. He had had lunch with Albrecht and had been warned that he was taking a great risk in proceeding with the case. Nevertheless, for reasons of his own, he wrote and filed the second amended complaint, incorporating the humiliating, salacious and personally painful materials that plaintiff had furnished him.

At the very least, a minimally competent lawyer would have insisted on seeing the original documents. Nunnery said in court that he had never seen the originals. His client testified that she had laminated the originals and that Nunnery had them. Nunnery produced the laminated documents. The production introduced an interesting question. If Nunnery believed that the laminated documents were original documents, he was not candid with the court when he denied ever having seen the originals. If he did not believe that the laminated documents were originals (and it does not appear that they are), he was admitting in effect that he had had no legitimate ground for relying on them in drafting the second amended complaint.

Any minimally competent lawyer would have subjected his client to rigorous questioning and demanded corroboration of details before proceeding. There is no evidence that Nunnery did so. Rather, he proceeded to carry out the vindictive purposes of his client and blacken the reputations of professional employees in a public document, subject them to emotional anguish and force the college to incur the expenses of litigation.

This case is the single most blatant example of a Rule 11 violation that I have seen. Both plaintiff and her counsel share the blame for using obviously fraudulent documents to support allegations in a complaint. It is appropriate to dismiss the case as a sanction for their actions. Furthermore, it is appropriate to assess Nunnery the amount of the attorney fees defendants incurred in the defense of this case since the second amended complaint was

filed. No lesser monetary sanction would serve the purpose of deterrence.

Sexual, racial and ethnic origin discrimination is a profound problem in this nation. I do not want to suggest otherwise. It is important that lawsuits be brought to vindicate the rights of persons who are the subject of illegal discrimination. It does not follow, however, that the seriousness of the problem justifies the bringing of false, fraudulent and salacious charges of discrimination without a good faith basis for doing so.

ORDER

IT IS ORDERED that Willie J. Nunnery has violated Fed. R. Civ. P. 11 by certifying falsely to this court that to the best of his information, knowledge and belief formed after inquiry reasonable under the circumstances that the allegations in the second amended complaint had evidentiary support. As a sanction for this violation, this case is DISMISSED, with prejudice. The clerk of court is directed to enter judgment in favor of defendants Madison Area Technical College, Jackye Thomas, Carol Bassett and William Strycker and close this case.

FURTHER, IT IS ORDERED that Willie J. Nunnery is to pay to defendants the sum of $16,473 as an additional sanction for his violation of Rule 11.

Finally, because the facts of this case disclose legal representation so far below the minimal standards required of lawyers, I am sending a copy of this opinion and order to the

Office of Lawyer Regulation for its information.

Entered this 13th day of August, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge