

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ANGELA FUSCO,

Plaintiff,

v.

C.A. No. 91-0333-L

DAVID MEDEIROS, WILLIAM FILENE'S  
SONS COMPANY, MAY DEPARTMENT  
STORES COMPANY, MARSHA FOGARTY,  
JOSEPH KOECHEL, and BEVERLY SHEA,

Defendants.

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge.

This matter is before the Court on the objection of respondent Attorney Ina P. Schiff ("Schiff") to the Report and Recommendation of Magistrate Judge Timothy M. Boudewyns dated March 11, 1996. In his Report, the magistrate judge recommends that the Court grant the motion of defendants David Medeiros, William Filene's Sons Company, May Department Stores Company, Marsha Fogarty, Joseph Koechel, and Beverly Shea (collectively, the "Filene's defendants") for sanctions and attorneys' fees pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 as to Schiff, deny the motion as to plaintiff Angela Fusco ("Fusco"), and deny the Filene's defendants' request for reimbursement of attorneys'

fees under 42 U.S.C. § 1988.

### I. Discussion

The Court concludes, as did the magistrate judge, that Schiff's filing of Fusco's verified complaint was in violation of Fed. R. Civ. P. 11 and that her subsequent conduct violated 28 U.S.C. § 1927. The facts as set forth in the magistrate judge's exhaustive and thoughtful Report and Recommendation establish that each and every count of Fusco's complaint was frivolous in that each count was either without factual support or legal basis. Similarly, the magistrate judge's recitation of Schiff's actions after the filing of the Complaint recounts a tale of proceedings multiplied "unreasonably and vexatiously[.]" 28 U.S.C. § 1927.

Schiff's arguments in opposition to the Report and Recommendation are without merit; ad hominem attacks on the magistrate judge's impartiality and repetition of the fanciful legal theories that spawned this lawsuit do nothing to justify Schiff's actions. The facts as detailed in the Report are sufficient to refute her contentions, and the Court will add nothing more on that score.

The primary legal issue facing this Court is whether Schiff's conduct is to be judged by the standards of the Rule 11 in force prior to the December 1, 1993 amendments to the Federal Rules of Civil Procedure (the "old Rule 11") or whether the post-amendment rule (the "new Rule 11") must be applied. The Court

recognizes that amendments to the Federal Rules enjoy the presumption of retroactivity, see Moreno Vda. Acosta v. Hospital Bella Vista, 164 F.R.D. 140, 142 (D.P.R. 1995), and that the Supreme Court's order of April 22, 1993 stated:

[T]he foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

113 S.Ct. CDLXXVII (emphasis added); see also 28 U.S.C. § 2074 (1994) (the Supreme Court may order new rules applied to pending proceedings, except where the application of such rule "would not be feasible or would work injustice[.]"). Nevertheless, in Silva v. Witschen, 19 F.3d 725 (1st Cir. 1994), the First Circuit stated that the 1993 promulgation order precluded application to pending cases if "it would be unjust or impracticable to do so." Id. at 728 (emphasis in original).<sup>1</sup> The Silva Court held that, although the respondent's appeal was pending at the time of the December 1, 1993 amendments, application of the new Rule 11 would require a burdensome, impractical remand and continued unfairness

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<sup>1</sup> Some courts have read "insofar as just and practicable" as an exhortation to apply the amended rules "to the maximum extent possible[.]" Skoczylas v. Federal Bureau of Prisons, 961 F.2d 543, 546 (5th Cir. 1992) (applying a 1991 amendment to Fed. R. Civ. P. 15(c)); see also, Burt v. Ware, 14 F.3d 256, 258-259 (5th Cir. 1994) (applying Skoczylas to the 1993 amendments to the Federal Rules of Appellate Procedure). However, in Silva, the First Circuit read the promulgation order as containing a prohibition rather than a call to arms, 19 F.3d at 728; hence, the Court feels free to treat the issue as a simple matter of justice and practicality.

to the movants-appellees. Id. at 729. Thus, the First Circuit declined to apply the new Rule 11 and the sanction order entered by this Court was reviewed "under the pre-amendment Rule 11 standards in force at the time the sanctioned conduct occurred." Id. In a similar vein, other courts have treated the date of the sanctionable conduct as presumptively determining which version of Rule 11 to apply. See Knipe v. Skinner, 19 F.3d 72, 78 (2nd Cir. 1994), cert. denied, 115 S.Ct. 424 (1994) ("Any further retroactive application of the amended Rule 11 would charge [counsel] with knowledge of a rule not in effect at the time of filing and therefore would not advance Rule 11's central goal of deterring baseless filings."); MacDraw Inc. v. CIT Group Equipment Financing Inc., 73 F.3d 1253, 1257 (2nd Cir. 1996) (district court "required" to apply pre-1993 Rule 11 to allegedly sanctionable conduct that occurred prior to effective date of amendments); Rodriguez v. Banco Cent., 155 F.R.D. 403, 405 n. 1 (D.P.R. 1994) ("Because all potentially sanctionable conduct in this case took place before December 1993, and the motions for sanctions were filed before that date, we will apply the version of Rule 11 which existed prior to the 1993 amendment.").

Looking to the dates of Schiff's sanctionable conduct, the Court finds that old Rule 11 is the rule properly applied to the Filene's defendants' motion for sanctions. But for a few weeks, Schiff's entire involvement in this matter occurred before the December 1, 1993 amendment of Rule 11. The offending complaint

was filed on July 1, 1991. As of that day, Schiff was guilty of making representations to this Court that were baseless and formed without reasonable inquiry. Not long into these proceedings, Schiff was on notice that her actions had drawn the Court's ire: On July 17, 1992, Magistrate Judge Jacob Hagopian fined Fusco \$625.00 for failing to comply with the Court's discovery orders. Subsequent sanctions were meted out on November 20, 1992, and on April 20, 1993. On August 10, 1993, Magistrate Judge Boudewyns recommended that Fusco's complaint be dismissed in toto as a penalty for her and Schiff's refusal to respond to discovery requests. This writer accepted the magistrate judge's report on December 15, 1993, as to the Filene's defendants<sup>2</sup> and dismissed the case against them as an explicit sanction for Schiff's continued, contumacious conduct.<sup>3</sup>

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<sup>2</sup>The City of Warwick defendants were not dismissed because they had not sought the discovery involved in Schiff's stonewalling tactics.

<sup>3</sup> In Cruz v. Savage, 896 F.2d 626 (1st Cir. 1990), the First Circuit wrote that under the old Rule 11, "attorneys [were] also under a continuing obligation to ensure that the proceedings do not continue without a reasonable basis in law and fact." Id. at 630. However, that commandment was cast into considerable doubt by O'Ferral v. Trebol Motors Corp., 45 F.3d 561, 563 & n.1 (1st Cir. 1995), where the First Circuit noted that Fifth Circuit precedents relied on in Cruz had been overruled. The O'Ferral court, however, refused to revisit the issue, and did not explicitly disown Cruz's "continuing obligation" language. O'Ferral, 45 F.3d at 563. Out of an abundance of caution, this Court will. Schiff's Rule 11 violation occurred when she filed the complaint; her subsequent conduct left her afoul of 42 U.S.C. § 1927, but not Rule 11. However, the Court considers the discovery sanctions awarded in this matter to be highly relevant

Fusco v. Medeiros, No. 91-0333L (D.R.I. December 15, 1993). One month later, on January 14, 1994, when the new Rule 11 was still wrapped in swaddling clothes, Fusco requested Schiff's withdrawal as her attorney.

The magistrate judge, in his Report and Recommendation, accurately predicted that the Court would apply the old Rule 11. The Court therefore adopts Magistrate Judge Boudewyns' careful analysis under the rule, and will not replicate it here.

Sanctions under the old Rule 11 were mandatory, Lancellotti v. Fay, 909 F.2d 15, 19 (1st. Cir 1990), and compensation of the prevailing party was a recognized purpose of the rule. Silva, 19 F.3d at 729 n.5. Thus, the Report and Recommendation of March 11, 1996 is accepted and adopted, and Schiff is hereby sanctioned and ordered to pay the Filene's defendants the sum of \$95,834.86, representing the costs and attorneys' fees incurred by them.

The Court wishes to note, however, that the choice of the old Rule 11 over the new Rule 11, to a great degree, is an academic one. The Court is convinced that even under the new Rule 11, Schiff would suffer the same sanction. The rule states:

**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that

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to the determination of the nature and purposes of the Rule 11 sanctions hereby to be imposed. See, e.g., Kramer v. Tribe, 156 F.R.D. 96, 104-108 (D.N.J. 1994), aff'd 52 F.3d 315 (3rd Cir. 1995) (listing 36 separate instances in which respondent Kramer was punished, sanctioned, or admonished by other courts).

to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

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(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Fed. R. Civ. P. 11(b) & (b)(3). In contrast to the old Rule 11, under which attorneys had to certify "after reasonable inquiry" that their representations were "well grounded in fact," Fed. R. Civ. P. 11 (1983), the new Rule 11 mandates only that an attorney certify that "to the best of the person's knowledge[,] formed after an inquiry reasonable under the circumstances," the allegations "have [or] are likely to have evidentiary support[.]"

Fed. R. Civ. P. 11(b) & (b)(3). The investigatory burdens on an attorney prior to filing have thus been lightened. See Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1329-30 (2nd Cir. 1995)

(holding that "an attorney is entitled to rely on the objectively reasonable representations of the client"). Yet Schiff's actions would run afoul of even the new standard: The Report and Recommendation makes clear that Schiff did not conduct an "inquiry reasonable under the circumstances," that she provided some of the most outlandish facts to Fusco,<sup>4</sup> and that very few of her allegations had any evidentiary support. Nor would they ever -- despite Schiff's abusive and harassing discovery requests.

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<sup>4</sup> Schiff's invention of the 200 victims of sexual discrimination underlay the class action element of the case.

Thus the facts set forth in the Report and Recommendation equally support a violation of the new Rule 11(b)(3).

The purpose of sanctions under the new Rule 11 "is to deter rather than compensate." Fed. R. Civ. P. 11 advisory committee notes. However, Rule 11(c)(2) provides that:

[If] imposed on motion and warranted for effective deterrence, [the sanction may consist of] an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

The advisory committee notes to the 1993 amendments state that an award of attorneys' fees may occur "under unusual circumstances[.]" There was nothing usual about this litigation at all: The charges leveled by Schiff were extravagant, paranoid, and totally devoid of merit. The Filene's defendants were forced to defend themselves against § 1983 claims born of groundless theories of state actorship, Title VII claims that had not been presented to the proper administrative agencies, obstruction of justice claims that relied on the flimsiest of hearsay, and intentional infliction of emotional distress claims that never should have been brought to this Court. Schiff's subsequent conduct during the discovery phase caused the Filene's defendants to spend tens of thousands of dollars more than would normally be spent defending a legitimate sexual harassment suit. They expended additional sums to overcome the stonewall she constructed against movants' discovery requests which finally was the direct and proximate cause of the Court's dismissal of the

case against them. That Schiff should be ordered to reimburse the Filene's defendants for their costs and attorneys' fees is not only appropriate, but really the only way truly to do justice in this case, given the surreal nature of Fusco's complaint and what followed.

Nor would the Court be willing, under the new Rule, to reduce the sanctions award below the \$95,834.86 recommended. The Court acknowledges that sanctions under the new Rule 11(c)(2) "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Id. Still, when applying the factors enumerated in the 1993 advisory committee notes,<sup>5</sup> the Court finds that Schiff's inflation of the claims in this matter was willful and continued; that it was the first note in a symphony of evasions, discovery abuses, and insults to this Court; and that the entire complaint was infected by her unsupportable claims. The effect on the litigation was an outrageous escalation of time and costs, and the Court's willingness to sanction Fusco repeatedly for Schiff's

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<sup>5</sup> The advisory committee notes to the 1993 amendments state: "Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations."

conduct did nothing to stop Schiff -- until the day when the Court dismissed the case as punishment for that conduct. Despite her expertise in civil rights law, Schiff still has not realized that Fusco never had a case. The only way the Court can imagine that Schiff would be deterred from launching another Fusco fiasco is by ordering her to make full amends for the expense she inflicted on movants. Hence, the Court would issue the same order under the new Rule 11(c)(2) that it issues today under the old Rule 11. Cf. Giangrasso v. Kittatinny Reg. High Sch. Bd. of Educ., 865 F.Supp. 1133, 1142 (D.N.J. 1994) (awarding \$100,000 in attorneys' fees to movants, on grounds that large sum is necessary "[to] satisfy the requirement that sanctions be sufficient to deter repetition."); Kramer v. Tribe, 156 F.R.D. 96, 111 (D.N.J. 1994), aff'd 52 F.3d 315 (3rd Cir. 1995) (awarding \$70,289.00 in attorneys' fees and costs under the new Rule 11 and 28 U.S.C. § 1927).

Lastly, the Court opines that 28 U.S.C. § 1927, for the reasons set forth in the Report and Recommendation, provides an independent statutory basis for the full award of attorneys' fees and costs to the Filene's defendants. See Cruz v. Savage, 896 F.2d 626, 634-35 (1st Cir. 1990) (affirming the district court's sanctions order under both 42 U.S.C. § 1927 and the old Rule 11).

## II. Conclusion

The Court hopes -- nay, expects -- that the sanctions assessed today will ring down the curtain on this long-running

litigation tragedy.<sup>6</sup> The victims of Schiff's hubris lie scattered across five years of litigation, from the defendants who were wrongfully accused, to the lawyers marshaled in their defense, to Angela Fusco, who sought aid from Schiff and wound up with disaster. The magnitude of the sanctions hereby awarded is commensurate with the harm done, and reflects the Court's determination to protect the public from those, like Schiff, who turn honorable advocacy into wanton attack.

The Report and Recommendation of Magistrate Judge Timothy M. Boudewyns dated March 11, 1996 is hereby accepted and adopted. The motion of defendants David Medeiros, William Filene's Sons Company, May Department Stores Company, Marsha Fogarty, Joseph Koechel, and Beverly Shea for sanctions and attorneys' fees pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 is granted as to Attorney Ina P. Schiff and denied as to plaintiff Angela Fusco. The defendants' motion for reimbursement of attorneys' fees pursuant to 42 U.S.C. § 1988 is denied.

Therefore, the Court sanctions Schiff under both Rule 11 and 42 U.S.C. § 1927 and directs her to pay the movants \$89,744.30 in attorneys' fees and \$6,090.56 in costs.<sup>7</sup> After consideration of

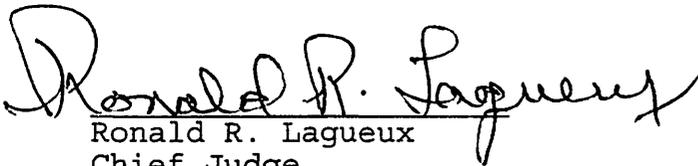
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<sup>6</sup>The case went to trial against the City of Warwick defendants and after Fusco testified on the first day, she and her new counsel gave up the chase and voluntarily dismissed that last phase of the case.

<sup>7</sup>The movants requested that the Court add to that award for this objection to the Report and Recommendation phase of the case but offered no evidence of the time expended hereon. Therefore,

Schiff's arrogant behavior, which has persisted through even the sanctions phase of this matter, the Court is convinced that only by burdening Schiff with the full weight of her actions will she be deterred from future, similar misadventures -- if and when she ever practices in this Court again.<sup>8</sup>

It is so ordered.



Ronald R. Lagueux  
Chief Judge  
August 6, 1996

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the Court leaves the magistrate judge's figure intact.

<sup>8</sup>Recently, the Rhode Island Supreme Court finally acted on Judge Ernest C. Torres' disciplinary complaint against Schiff arising out of her false representations under oath in an attempt to secure exorbitant attorneys' fees in Pontarelli v. Stone, 781 F.Supp. 114 (D.R.I. 1992) appeal dismissed as moot, 978 F.2d 773 (1st Cir. 1992) and suspended her from practice for 18 months commencing July 7, 1996. In the Matter of Ina P. Schiff, 677 A.2d 422 (R.I. 1996). That triggers an automatic suspension in this Court. Local Rule 4(e)(4) (1984).