UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LEAH BEH-HANSON, Plaintiff,	:	
v.	:	CA 03-263ML
ARCONIUM SPECIALTY ALLOYS CO., FRY TECHNOLOGIES, INC., and FRY'S METALS, INC., and JOHN RYCZEK, INDIVIDUALLY AND IN HIS CAPACITY AS PRODUCTION MANAGER ASSISTANT, and PAUL TITZLER, INDIVIDUALLY AND IN HIS CAPACITY AS HUMAN RESOURCES DIRECTOR, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Defendants' Motion for Sanctions ("Motion for Sanctions" or "Motion") (Document #33). Although the Motion was referred for determination, the nature of the relief being sought, the imposition of sanctions, causes the court to treat the Motion as if it were referred for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on June 7, 2004.[1] For the reasons stated herein, I

[1] The hearing was scheduled for 2:00 p.m. Although Plaintiff's counsel was present, counsel for Defendants did not appear until 2:15 p.m., after being called by the clerk. Defendants' counsel explained that his office had calendared the hearing for a later date and apologized for his tardiness. While accepting this explanation and apology, the court stated that if it determined that Defendants' Motion for Sanctions (Document #33) ("Motion for Sanctions" or "Motion") should be granted, it would recommend that the amount of any monetary sanctions awarded be reduced by an amount equal to the reasonable hourly compensation of Plaintiff's counsel for one quarter hour of his time. The court, now having concluded that the Motion for Sanctions should be granted, recommends that the amount of any monetary sanctions awarded be reduced by this amount.

recommend that the Motion be granted.

Facts

Defendants filed the instant Motion on April 21, 2004, pursuant to Fed. R. Civ. P. 26(g) and 28 U.S.C. § 1927. The Motion seeks "imposition of sanctions, including an award of attorney's fees, against plaintiff and/or her counsel, for their conduct in connection with responding to Defendants' First Request for Production of Documents and the subsequent Motion to Compel." Motion for Sanctions.

The conduct about which Defendants complain is set forth in their memorandum:

> During discovery, Defendants served upon plaintiff their First Request For Production of Documents and First Set of Interrogatories. Plaintiff objected to a number of Defendants' discovery requests on the grounds of relevance, attorney-client privilege, and work product. Plaintiff did not indicate whether she had documents in her possession responsive to these requests, and did not produce a privilege log. Defendants sought to obtain responses to these requests and a privilege log from plaintiff without Court action. (See letter attached as Exhibit A). Plaintiff's counsel did not respond to Defense counsel's letter. Defendants subsequently moved to compel and submitted a supporting memorandum of law.
>
> In response to Defendants' motion, plaintiff, rather than acknowledging that she possessed no responsive documents to three of the four requests, filed a memorandum in opposition to the motion to compel, arguing the merits of her objections. (See Docket Entry # 26.) Defendants thereafter submitted a reply memorandum. On March 16, 2004, Magistrate Judge Martin conducted a lengthy hearing at which counsel for both parties fully argued the merits of plaintiff's objections to the pertinent discovery requests. Magistrate Judge Martin made rulings from the bench with respect to each matter in dispute and subsequently entered a written order compelling Plaintiff to respond to Defendants' requests for production numbers 8, 10, 12, and, as limited 14 (See Docket Entry # 32.) He also ordered plaintiff to respond to interrogatory number 14, as limited. (See id.) Defense counsel expended considerable time in preparing

> for and appearing at the hearing. Moreover, the court expended judicial resources in preparing for and conducting the hearing.
>
> Plaintiff subsequently complied with Magistrate Judge Martin's order by serving supplemental responses to Defendants' discovery requests. **Of the four specific requests for production on which Defendants had moved to compel, and for which plaintiff had been ordered to respond, Plaintiff responded in her supplemental response that she had no documents responsive to [three of] the request[s]**.

Defendants' Memorandum in Support of Motion for Sanctions ("Defendants' Mem.") at 1-2 (bold added).

Law

Federal Rule of Civil Procedure 26(g):

> requires that every discovery response bear the signature of the attorney, certifying "to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry" that the response is "(A) consistent with these rules ...; (B) not interposed for any improper purpose, such as to harass or cause unnecessary delay ...; and (C) not unreasonable ...."

Legault v. Zambarano, 105 F.3d 24, 27 (1st Cir. 1997)(quoting the Rule).

In addition, Title 28, U.S.C., § 1927 states that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

The United States Court of Appeals for the First Circuit has provided the following guidance to district courts regarding the application of § 1927:

> [W]e do not require a finding of subjective bad faith as

> a predicate to the imposition of sanctions. Behavior is vexatious when it is harassing or annoying, regardless of whether it is intended to be so. Thus, if an attorney's conduct in multiplying proceedings is unreasonable and harassing or annoying, sanctions may be imposed under section 1927. The attorney need not intend to harass or annoy by his conduct nor be guilty of conscious impropriety to be sanctioned. It is enough that an attorney acts in disregard of whether his conduct constitutes harassment or vexation, thus displaying a serious and studied disregard for the orderly process of justice. Yet, we agree with other courts considering this question that section 1927's requirement that the multiplication of the proceedings be vexatious necessarily demands that the conduct sanctioned be more severe than mere negligence, inadvertence, or incompetence. Finally, in assessing whether an attorney acted unreasonably and vexatiously in multiplying proceedings, the district courts in this circuit should apply an objective standard.

Cruz v. Savage, 896 F.2d 626, 631-32 (1st Cir. 1990)(citations and internal quotation marks omitted).

Other courts have also concluded that there is no requirement under § 1927 that an attorney be found to have acted in bad faith before sanctions may be imposed. See Lyn-Lea Travel Corp. v. American Airlines, Inc., 283 F.3d 282, 291 (5th Cir. 2002)("All that is required to support § 1927 sanctions is a determination, supported by the record, that an attorney multiplied proceedings in a case in an unreasonable manner."); Ridder v. City of Springfield, 109 F.3d 288, 298 (6th Cir. 1997) ("Fees may be assessed without a finding of bad faith, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims.") (internal quotation marks omitted).

Discussion

Plaintiff makes four arguments in opposition to the Motion for Sanctions. First, she charges that Defendants have engaged

in bad faith conduct in this litigation. Second, Plaintiff contends her conduct is distinguishable from that found sanctionable in Tise v. Kule, 37 Fed. R. Serv. 2d 846 (S.D.N.Y. 1983), a case cited by Defendants and attached to Defendants' memorandum. Third, Plaintiff faults Defendants for inaccurately stating that she has not previously produced any documents in response to request number 10. Fourth, Plaintiff argues that although there were no responsive documents at the time of the hearing on the Motion to Compel, there are now and that the only way she could have preserved her claim of privilege as to these documents (and others which may come into existence in the future) was by objecting at the time of the request.

Plaintiff's first contention is that Defendants have engaged in bad faith conduct and that the instant Motion is the "fourth" such instance. Plaintiff's Memorandum in Support of her Objection to Defendants' Motion for Sanctions ("Plaintiff's Mem.") at 1. Plaintiff initially complains that after two and one half hours of mediation Defendants made "a nuisance-value offer and stated they were confident that they would win on summary judgment," id. at 2, and that if Plaintiff had known this she would not have agreed to mediation at the pretrial conference, see id. In Plaintiff's view, Defendants' conduct made "a mockery out of the mediation," id., wasted the time of the mediator, Plaintiff, and Plaintiff's counsel, see id., and was "the type of conduct that Rule 26(g) and 28 U.S.C. § 1927 contemplate," id.,[2] as being sanctionable.

---

[2] Plaintiff also asserts that at the mediation "Defendants denied there was insurance to cover these allegations," Plaintiff's Memorandum in Support of her Objection to Defendants' Motion for Sanctions ("Plaintiff's Mem.") at 1, but that on February 4, 2004, Defendants produced an insurance policy for the period of October 1, 2000, to October 1, 2001. Plaintiff describes the policy as being a "renewal policy," id. at 2, and appears to imply that Defendants' earlier denial of insurance was not true, see id. If so, the court does not condone Defendants' misstatement. However, it does not

The next instance of alleged bad faith conduct, according to Plaintiff, is Defendants' "failure to produce the evidence of the Plaintiff allegedly stealing buckets for which she was fired." Id. at 3. Plaintiff states that Defendants' former general manager and former plant manager testified at their depositions to viewing a videotape which showed Plaintiff stealing buckets, but that Defendants have failed to produce the videotape despite a request for production seeking it. See id.

Yet another episode of Defendants' bad faith conduct, in Plaintiff's view, occurred when Defendants "filed a motion for summary judgment based on the statute of limitations, despite the fact that all of the Defendants admitted in their answer[s] that the charges were timely filed." Id. Plaintiff contends that this is the type of conduct contemplated by the court in Tise v. Kule, 37 Fed. R. Serv. 2d 846 (S.D.N.Y. 1983). See Plaintiff's Mem. at 3.

To the extent that Plaintiff is arguing that the Motion for Sanctions should be denied because Defendants are themselves guilty of bad faith conduct, the court is unpersuaded. Even if Defendants were guilty of such conduct, that fact would not justify or excuse Plaintiff engaging in sanctionable behavior in retaliation or otherwise. If Defendants have engaged in such conduct, the proper recourse for Plaintiff is to bring it to the attention of the court via a motion for sanctions, preferably soon after the conduct occurs. This would allow the court to address the matter while the events surrounding it are still fresh. Moreover, the court has serious doubts that any of the actions about which Plaintiff now complains rise to the level of bad faith conduct.

---

appear that the denial caused or contributed to conduct which is the subject of the present Motion for Sanctions. For that reason, the court considers the alleged misstatement as not relevant to its determination of the instant Motion for Sanctions.

The fact that Defendants made only a "nuisance value offer" at the mediation conference is not by itself sanctionable. While Plaintiff states that she would not have agreed to the mediation had she known that this would be Defendants' position, the court declines to find that a party's failure to offer more than nuisance value at a mediation conference, in the absence of other circumstances, constitutes bad faith conduct. Plaintiff has not alleged that Defendants made any affirmative representations that they would offer more than "nuisance value" if she agreed to participate in the mediation.

As for Plaintiff's argument that Defendant's failure to produce the videotape constitutes bad faith conduct, the court notes that Plaintiff has not filed a motion to compel the production of this evidence. While Defendants are required to produce the videotape without such a motion,[3] a motion to compel would be the appropriate remedy when production is late. The court declines to find that delay in producing materials in response to a request for production, by itself, constitutes bad faith where there has been no motion to compel, the delay is only a few months, and there is no apparent prejudice as of yet to Plaintiff.

Plaintiff's contention that Defendants are guilty of bad faith conduct because they have filed for summary judgment based on the statute of limitations is difficult to understand. Plaintiff does not cite any specific paragraphs of Defendants' answers in support of her claim that Defendants have admitted the charges were timely. On the other hand, Defendants in their Answers specifically plead that "[t]he complaint, or portions thereof, is barred by the applicable statutes of limitations." See Answer of Paul Titzler (Document #3) at 6; Answer of

[3] The court assumes that Plaintiff has sought this evidence by way of a properly served request for production.

Defendants Arconium Specialty Alloys Co., Fry Technologies, Inc. and Fry's Metals, Inc., and John Ryczek (Document #2) at 8. Thus, the premise for this claim of bad faith conduct appears to be faulty.

Furthermore, the fact that a claim is time barred may not be clear at the time an answer is filed and may only become known after discovery has been conducted. The court rejects Plaintiff's contention, at least in the circumstances here, that a party's attempt to raise a defense which has allegedly been waived, without more, constitutes bad faith conduct. If Plaintiff is correct that Defendants have waived their statute of limitations defense, a ruling by the court to that effect will fully protect Plaintiff. The court declines to elevate to the level of bad faith conduct an attempt by a party to raise a defense which may have been inadvertently or improvidently waived.

Plaintiff's second argument against the Motion is that her conduct is distinguishable from that found sanctionable in Tise v. Kule, 37 Fed. R. Serv. 2d 846 (S.D.N.Y. 1983). Plaintiff notes that here "only three requests [for production] out of fifteen [are] at issue," Plaintiff's Mem. at 3, while in Tise the offending counsel had responded "Not Applicable" to two thirds of the requests, Tise, 37 Fed. R. Serv. 2d at 848. Plaintiff's focus on the original request for production is misplaced. What prompted the instant Motion for Sanctions was Plaintiff's conduct relative to Defendants' Motion to Compel Production of Documents and Answers to Interrogatories ("Motion to Compel") (Document #14). That motion sought responses to four specific document requests, numbers 8, 10, 12, and 14, and one interrogatory. See id. at 1. Plaintiff objected to the motion. See Plaintiff's Objection to Defendants' Motion to Compel Production of Documents and Answers to Interrogatories ("Plaintiff's Objection to Defendant's Motion to Compel") (Document #26). After the court

ordered Plaintiff to respond to the four document requests and the single interrogatory, see Order dated 3/23/04 (Document #32), Plaintiff did so by stating that as to document requests 8, 10, and 12 there were no documents to be produced,[4] see Defendants' Mem. at 3 (quoting Plaintiff's supplemental responses). Thus, of the five matters which were the subject of the March 16, 2004, Motion to Compel hearing, three of them are at issue. This is equivalent to sixty percent of those matters, a proportion which is close to the "two-thirds" at issue in Tise. See Tise v. Kule, 37 Fed. R. Serv. 2d at 848.

Plaintiff also argues that the transgressing counsel in Tise sought a protective order for privileged documents which did not exist, a circumstance which is not present in the instant matter. See Plaintiff's Mem. at 3. However, this court considers seeking a protective order to be an aggravating circumstance. Its absence does not preclude the granting of the present Motion if the court determines that action is warranted.

Plaintiff additionally argues that in deciding whether to impose sanctions the Tise court took into account the degree of success achieved by the defendants as a result of their actions. See Plaintiff's Mem. at 4. Plaintiff notes that as to requests 10 and 12 this Magistrate Judge effectively reduced by eight months the time period for which documents had to be produced. See id. The effect of this reduction was to narrow the time period from approximately 77 months to approximately 66 months. This slight modification cannot be reasonably characterized as significant success. More importantly, Plaintiff does not contend that the reduction had any effect on her response. At

[4] Plaintiff's supplemental response to document requests numbers 8 and 12 was "None." Her supplemental response to document request number 10 was: "None other than those already provided." Defendant's Memorandum in Support of Motion for Sanctions ("Defendants' Mem.") at 3 (quoting Plaintiff's supplemental responses).

the hearing on June 7, 2004, Plaintiff's counsel confirmed that even if the court had not narrowed the period by these eight months, her supplemental responses to requests 10 and 12 would have been the same.

Plaintiff's third argument carries somewhat greater weight. She contends that Defendants incorrectly state in their memorandum "that plaintiff has not previously provided any documents responsive to [request number 10]," Defendants' Mem. at 3 n.1. At the June 7, 2004, hearing, Plaintiff's counsel submitted a copy of Plaintiff's First Supplemental Response to Defendants' First Request for Production of Documents ("Plaintiff's First Supplemental Response"). That document, which is certified as having been mailed to Defendants' counsel on January 5, 2004, reflects that copies of four documents responsive to request number 10 were produced.[5] Plaintiff maintains that she "has produced all of the clinical psychologist's records and the treating physician's office notes that referred the Plaintiff to the clinical psychologist." Plaintiff's Mem. at 5. The persuasiveness of this argument, however, is significantly diminished by the fact that Plaintiff's counsel failed to disclose prior to (or at the very latest at) the March 16, 2004, hearing on the Motion to Compel that there were no additional documents responsive to this request. Both Defendants and the court were led to believe that there were such documents and that a hearing was necessary.

Plaintiff's fourth argument against the Motion for Sanctions is that:

Although there were no documents that fell into the

[5] The four documents were: 1) a March 29, 2000, letter from Michael E. Werle, Ed.D.; 2) a health insurance claim form submitted by Dr. Werle; 3) treatment notes of Dr. Werle; and 4) treatment notes of Michael F. Felder, D.O., M.A. See Plaintiff's First Supplemental Response to Defendants' First Request for Production of Documents, Attachments.

> aforementioned categories at the time of the Motion to Compel, there are now[6] and there could be more in the future. (The Plaintiff is preparing a supplemental response to one of the requests at this time). The only way the Plaintiff could preserve her privilege if such documents come into existence in the future was to object at the time of the request. Otherwise, she would have waived the right to assert the privilege.

Plaintiff's Mem. at 5. She further asserts that "it would have been irresponsible for the Plaintiff to simply answer 'none,'" id. at 7, because there was a "realistic potential," id., that responsive documents could come into existence in the future, see id. Plaintiff maintains that "she had a duty to assert privilege where the potential for it to apply existed." Id.

With this argument in mind, the court asked Plaintiff's counsel at the June 7, 2004, hearing why Plaintiff had not stated in her responses, after asserting the objection and the grounds therefor, that without waiving the objection she presently had no documents responsive to the requests. Plaintiff's counsel answered that such a response could constitute a waiver of the objection notwithstanding the specific disclaimer to the contrary. Counsel cited no authority for this proposition, and the court rejects it as illogical. Indeed, the court notes that it is not uncommon for attorneys to assert objections in response to requests for production and to also include the statement that, without waiving the objection, there are no responsive documents. Such a practice is to be encouraged because it helps all concerned avoid expending time and energy on resolving theoretical questions.

---

[6] Plaintiff's counsel indicated at the June 7, 2004, hearing that documents responsive to request number 8 have come into his possession since the hearing on the Motion to Compel. See also Plaintiff's Mem. at 6 (indicating that either a former or present employee of Defendant has given information to Plaintiff or her attorney since the March 16, 2004, hearing).

In summary, the arguments offered by Plaintiff in opposition to the present Motion are unpersuasive. After considering all of the circumstances in this matter, the court finds that the conduct of Plaintiff and/or her counsel violated the requirement of Rule 26(g) that a signature on an objection certify, "to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry," that the objection is "(A) consistent with these rules ...; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay ....; and (C) not unreasonable ...." Fed. R. Civ. P. 26(g)(2). The specific conduct, which cumulatively the court finds to be "unreasonable" and warranting the imposition of sanctions, is: 1) Plaintiff's response to Defendants' First Request for Production of Documents ("Request for Production") which asserted objections based on claims of privilege and relevancy as to request numbers 8 and 12 without disclosing that no documents responsive to these requests then existed; 2) the failure of Plaintiff's counsel to respond in any manner to the January 15, 2004, letter from Defendant's counsel despite the fact that the letter was largely devoted to requests numbers 8, 10, and 12 and called Plaintiff's attention to the requirement that she submit a privilege log;[7] 3) Plaintiff's objection to Defendant's Motion to Compel (and Plaintiff's memorandum in support thereof) which failed to disclose that no documents responsive to these three requests then existed (apart from those already produced on or about January 5, 2004, with Plaintiff's First Supplemental Response), see Plaintiff's Objection to Defendant's Motion to Compel; and 4) Plaintiff's failure to disclose at the March 16, 2004, hearing the non-existence of the documents.

Applying an objective standard, see Cruz v. Savage, 896 F.2d

[7] A copy of the January 15, 2004, letter from Defendants' counsel is attached at Exhibit A to Defendants' Mem.

626, 632 (1st Cir. 1990), I further find that Plaintiff's counsel acted unreasonably and vexatiously in multiplying the proceedings and that his conduct violates 28 U.S.C. § 1927. Plaintiff was obligated to make a reasonable inquiry regarding the existence of responsive documents and should have disclosed in her initial response that no responsive documents existed as to three of the requests for production. The need for such a response was even more apparent after Plaintiff's counsel received the January 15, 2004, letter from defense counsel which presented detailed argument regarding the requests. At the very latest, Plaintiff should have revealed the non-existence of responsive documents at the March 16, 2004, hearing on the Motion to Compel. Had she done so, the court could have focused on a single request for production rather than four. Plaintiff's failure caused Defendants and the court to expend time unnecessarily.

While there is no evidence that Plaintiff's counsel intended to harass or annoy Defendants, I find that his repeated failures (detailed above) to disclose that there were no responsive documents demonstrates that he "act[ed] in disregard of whether his conduct constitute[d] harassment or vexation, thus displaying a 'serious and studied disregard for the orderly process of justice,'" Cruz v. Savage, 896 F.2d at 632 (quoting United States v. Nesglo, Inc., 744 F.2d 887, 891 (1st Cir. 1984)); cf. Gutierrez-Rodriguez v. Cargtagena, 882 F.2d 553, 576 (1st Cir. 1989)("Discovery sanctions are appropriate 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'")(quoting Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976)). I also find that his conduct was more severe than mere negligence, inadvertence, or incompetence, see id., and that sanctions should be imposed.

Conclusion

For the reasons stated above, I recommend that the Motion for Sanctions be granted and that Defendants be awarded a reasonable attorney's fee for the time they expended after January 15, 2004, in an effort to obtain documents responsive to their requests for production numbers 8, 10, and 12. Because it appears that Plaintiff's counsel was responsible for the failure to disclose that there were no responsive documents, I further recommend that the sanctions be paid by Plaintiff's counsel.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

_____
David L. Martin
United States Magistrate Judge
June 18, 2004