**Legault v. aRusso et al** **CV-93-365-B 03/29/96**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF RHODE ISLAND**

Michelle Legault

RI Civil No. 93-CB-243-P
v. NH Civil No. 93-365-B

Ralph aRusso, et al.

**O R D E R**

Michelle Legault based this employment discrimination case primarily on her assertion that a series of objective tests ostensibly used by the Johnston Fire Department to select new firefighters had an unlawful disparate impact on women.[1] Relying on this theory, Legault retained an expert, engaged in discovery, and obtained a preliminary injunction requiring the Town of Johnston to employ her as a firefighter pending the outcome of her case. Defendants responded to the lawsuit by defending the Town's testing procedures.

Legault eventually learned that the Town's objective testing procedures were nothing more than a sham. As a result, she moved for sanctions against the defendants arguing that defendants'

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[1] She also based her right to relief on her intentional discrimination and breach of contract theories.

counsel, Thomas DiLuglio, defendant Alan Zambarano, and defendant Ralph aRusso, repeatedly lied to the court and plaintiff's counsel in their pleadings and discovery responses describing the way in which the tests were used. Legault also claimed that the defendants and their counsel intentionally withheld documents that would have conclusively demonstrated that the Town actually used undisclosed subjective criteria rather than objective tests to select its firefighters.[2] In an order partially granting Legault's motion, I determined that Zambarano should be sanctioned pursuant to Fed. R. Civ. P. 26(g) because he deliberately gave a misleading answer to one of Legault's interrogatories. I also concluded that aRusso and DiLuglio should be sanctioned because they failed to fulfill their obligations under Fed. R. Civ. P. 11 and Rule 26(g). DiLuglio, aRusso, and Zambarano have asked me to reconsider this order. For the reasons described below, I reject their request.

## I. PROCEDURAL BACKGROUND

Magistrate Judge William Barry held a hearing on Legault's motion for a preliminary injunction on August 16, 1993. The

[2] Legault also cited numerous other discovery abuses in support of her motion for sanctions.

parties stipulated at the hearing that Johnston used a three-stage process to select firefighters. The first stage required each applicant to complete an application, pass a criminal record check, and demonstrate that he or she had a valid driver's license and an EMT certificate. Applicants who passed the first stage were subjected to a series of physical agility tests that included a 1.5 mile run. Only applicants who passed the physical agility tests were permitted to move on to the third stage which consisted of a written examination and three additional tests collectively referred to as the "obstacle course."[3]

Three days before the preliminary injunction hearing, DiLuglio sent a letter to Attorney Schiff and the court. The stated purpose of the letter was to advise Legault's counsel and the court that the Town had unintentionally used an incorrect qualifying time for a the 1.5 mile run. The letter also stated that "[t]hose candidates who pass the physical agility test and successfully complete the obstacle course, are then allowed to take the written exam. Standings in the obstacle course and the written exam determine overall standings in the application

[3] The testing process is described in greater detail in Legault v. aRusso, 842 F. Supp. 1479 (D.N.H. 1994).

process." DiLuglio made a similar representation in a memorandum he filed opposing Legault's request for injunctive relief.[4]

Magistrate Judge Barry relied on defendants' explanation of the Town's testing procedures in ruling on Legault's request for a preliminary injunction. In a report dated August 20, 1993, Magistrate Judge Barry recommended that I grant the motion in part, but not require Johnston to immediately hire Legault as a firefighter. Legault objected to the Magistrate Judge's Report and Recommendation and, on February 10, 1994, I granted Legault's request that the Town employ her as a firefighter until a decision could be reached on the merits of her claim. My ruling accepted as true defendants' contention that Johnston hired firefighters based on their performance on the obstacle course and the written exam. Id. at 1482.

Zambarano and aRusso answered Legault's interrogatories in September 1993. Both defendants stated in their answers that

> [s]cores for the obstacle course (60%) and the written exam (40%) were calculated to create an overall class standing. The top 12 people (because only twelve recruits were needed) were put into the two-month February and March training session. At this point, class ranks were for the most part fixed.

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[4] DiLuglio alleged in the July 23, 1993, memorandum that "potential employees are ranked according to the obstacle course test and the written exam."

> However, if someone failed or received an absence failure in the training session, this could eliminate them from the potential employee list.

ARusso answered requests for admission at the same time in which he stated that "the Town of Johnston hired from a list developed from scores on an obstacle course and a standardized written examination. The candidates were hired from the top of the list." Finally, also in September 1993, DiLuglio signed a response to Legault's requests for documents seeking, among other things, any hiring lists and any materials used by the Town in evaluating participants in the firefighter training program. The response DiLuglio made to the request omitted several documents that would have demonstrated that the Town did not use the obstacle course and the written exam to select firefighters.

## II. THE MOTION FOR SANCTIONS

Legault moved for sanctions on April 4, 1994, and I held a hearing on Legault's motion on April 29 and May 4, 1994. During the hearing, Legault produced: (1) a copy of the stage three test results for each of the thirty-two applicants who participated in the obstacle course; (2) a copy of the report prepared by the Town's consultant, McCann Associates, Inc., describing the written test; (3) a sheet containing a code number

assigned to each applicant by the McCann report;[5] and (4) the Town's hiring list ranking the top twelve applicants. Using these documents, Legault demonstrated that, notwithstanding defendants' contrary assertions, performance on the obstacle course test and the written examination bore no relationship to an applicant's rank on the hiring list. Legault also demonstrated that all of the documents needed to establish this conclusion were in defendants' possession when they were required to answer Legault's document request, that the documents should have been produced in response to the request, and that a reasonable person in the position of the defendants and their counsel would have both discovered the documents and understood their significance after conducting a reasonable investigation.

Defendants did not contest Legault's assertion at the sanctions hearing that performance on the obstacle course test and the written examination were unrelated to the Town's eventual hiring decision. Moreover, neither Zambarano nor aRusso offered any explanation for their earlier incorrect discovery responses.[6]

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[5] This sheet was needed to determine the score earned by each applicant on the written exam.

[6] Neither Zambarano nor aRusso admit that they were aware of the actual criteria used to select applicants. Schiff obtained a version of the hiring list during discovery that purported to rank applicants on the basis of their performance on

DiLuglio blamed his incorrect statement in the August 13, 1993, letter and his failure to produce the documents in response to Legault's document request on ignorance and neglect.

In partially granting Legault's motion, I determined that Zambarano violated Fed. R. Civ. P. 26(g) by giving an intentionally misleading answer to her interrogatory asking for a description of the department's hiring procedures. I also determined that aRusso had breached his duty of reasonable inquiry under Rule 26(g) when responding to Legault's interrogatories and requests for admission and that Diluglio had breached his duty of reasonable inquiry under both Rule 11 with respect to the August 13 letter and Rule 26(g) with respect to his response to Legault's request for documents.[7]

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the physical tests and written examination, as well as a third category, entitled "chief's points." Zambarano admits that he was aware of this list when applicants were selected for the training program, but claims that he did not instruct the personnel department to use chief's points in the hiring process. While this list is significant in evaluating the truthfulness of Zambarano's interrogatory answer, it is otherwise of limited importance because the actual hiring list bears no resemblance to the hiring list established by using chief's points.

[7] Significant amendments to Rules 11 and 26(g) became effective on December 1, 1993. With the defendants' concurrence, I based the sanctions order on the version of each rule that was in effect prior to December 1, 1993, because each act of misconduct occurred prior to that date. See 28 U.S.C.A. § 2074 (amendments will not be applied to pending cases if the court determines that retrospective application "would not be feasible

## III. ANALYSIS

DiLuglio, aRusso, and Zambarano each argue that their conduct was not sanctionable. They also challenge the magnitude of the sanction. I address their arguments below.

### A. Thomas DiLuglio

#### 1. The August 13, 1993 Letter

DiLuglio challenges my conclusion that he violated his obligation under Rule 11 when he sent the August 13, 1994, letter because, he contends, the letter does not qualify as an "other paper" as that phrase is used in Rule 11.

Letters to opposing counsel do not ordinarily qualify as "other papers" as that term is used in Rule 11. See Curley v. Brignoli, Curley & Roberts, Assoc., 128 F.R.D. 613, 615 (S.D.N.Y. 1989). However, the letter at issue was filed with the court three days prior to the preliminary injunction hearing and DiLuglio states in the letter that its purpose was "to advise the court and all parties" of the Town's use of an incorrect qualifying time for the 1.5 mile run. Since DiLuglio plainly intended the letter to influence Magistrate Judge Barry's consideration of Legault's request for injunctive relief, it

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or would work injustice").

qualifies as an "other paper" sufficient to support a request for sanctions.[8]

**2. The Response to Plaintiff's Discovery Request**

I sanctioned DiLuglio pursuant to Rule 26(g) because he unreasonably failed to produce a number of important documents in response to Legault's document requests. DiLuglio does not contest my finding that he acted unreasonably. Instead, he argues that I lack the authority to sanction his unreasonable behavior under Rule 26(g).

The advisory note discussing the 1983 amendment to Rule 26 states that an attorney's signature on a response to a discovery request "certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." This duty plainly derives from the signing lawyer's obligation under Rule 26(g) to certify that he has undertaken a reasonable inquiry to insure that the response "is consistent with" the Federal Rules of Civil Procedure. Since DiLuglio failed to conduct such an inquiry and, as a result, failed to produce a number of important documents called for by Legault's

[8] This point is largely academic since DiLuglio made a substantially similar misrepresentation in his memorandum objecting to Legault's request for injunctive relief.

request, his signature on the response subjects him to sanctions under Rule 26(g).

**B. Ralph aRusso**

I sanctioned aRusso pursuant to Rule 26(g) because I determined that he failed to conduct a reasonable inquiry into the factual basis for his responses to Legault's interrogatories and requests for admission. ARusso does not challenge my fact finding in support of this ruling. Instead, he contends, without citing any supporting case law, that a represented party cannot be subject to sanctions pursuant to Rule 26(g) regardless of whether the party signs the discovery response that forms the basis for the sanction.

The short answer to this argument is that the Supreme Court has considered and rejected the same argument in a case construing almost identical language under Rule 11.[9] Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533 (1991). Since I have found no reported case suggesting that Business Guides is inapplicable in the context of a sanction issued pursuant to Rule 26(g), I reject aRusso's argument. See

[9] Although Rule 11 has been amended to prohibit an award of monetary sanctions against an unrepresented party since the decision in Business Guides, the analysis of nearly identical language remains instructive in this case. See Fed. R. Civ. P. 11(c)(2)(A).

Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1545 (11th Cir.) (imposing Rule 26(g) sanction against represented party), cert. denied, 114 S.Ct. 181 (1993).

**C. Alan Zambarano**

I sanctioned Zambarano pursuant to Rule 26(g) because I concluded that he deliberately offered a misleading answer to Legault's interrogatory seeking information concerning the hiring criteria used by the Town in selecting firefighters. In his motion for reconsideration, Zambarano argues for the first time that I should excuse his misleading answer because it was prepared by his attorney, he was given only a limited opportunity to review the answer, and he mistakenly assumed that the interrogatory in question only sought information concerning his hiring criteria rather than the criteria actually used by the Town in selecting firefighters.

Zambarano complains that he did not have an opportunity to offer his explanation for his misleading answer at the sanctions hearing because he did not receive notice that Legault was claiming that his interrogatory answer was misleading. I reject this argument. Legault's April 25, 1994, supplemental memorandum plainly identifies Zambarano's answer to Interrogatory 55 as one of the misleading discovery responses supporting her request for

sanctions. In any event, I am unpersuaded by Zambarano's belated explanation for his misleading answer. Zambarano was fully aware of the fact that Legault was challenging the criteria Johnston used in selecting firefighters and Interrogatory 55 asked Zambarano to "identify and/or describe each and every criterion used for the recruitment, selection, pre-employment training, and hiring" of firefighters (emphasis added). Zambarano did not need a law degree to understand what the interrogatory was seeking. Given Zambarano's statements concerning his knowledge of the Town's actual selection process, I conclude that his response was deliberately misleading.

**D. Awarding Attorney's Fees as a Sanction**

Both Rule 11 and Rule 26(g) authorize the court to sanction a party or an attorney who has violated the rule by requiring the sanctioned party to pay the opposing party's attorney's fees and expenses resulting from the violation. See, e.g., Silva v. Witschen, 19 F.3d 725, 732 (1st Cir. 1994) (allowing attorney's fees as a sanction for Rule 11 violation); Malautea, 987 F.2d at 1545 (allowing attorneys fees as a sanction for Rule 26(g) violation). DiLuglio and aRusso argue that an award of fees is unwarranted in this case because the sanctioned misconduct did not have a significant impact on the case. I disagree.

DiLuglio, aRusso, and Zambarano filed papers with the court and responses to discovery that mislead the court and opposing counsel about matters that were central to the issues raised in Legault's complaint. If DiLuglio's representations to the court had been accurate and if defendants' discovery responses had correctly and completely described the Town's hiring criteria, the court would not have had to struggle with a significant portion of Legault's disparate impact claims.[10] Further, had the defendants produced accurate responses to Legault's discovery requests when the responses were initially made in September 1993, Legault would not have had to go to the lengths she did in order to obtain the information she needed to prosecute her claims. In short, defendants' misleading discovery responses wasted the court's time, caused counsel to spend unnecessary time and money in seeking to obtain the discovery to which she was entitled, and delayed the resolution of the case. Under these

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[10] As long as Johnston maintained that it used the obstacle course and the written examination to rank applicants, I could not grant Legault's request for preliminary injunctive relief unless I concluded that the obstacle course had an unlawful disparate impact on women. Since the defendants did not reveal that the stage three tests were a sham until after I ruled on Legault's request for injunctive relief, I had to waste considerable time and effort in examining the alleged disparate impact of a sham testing procedure.

circumstances, it is not unreasonable to require DiLuglio, Zambarano and aRusso to compensate the plaintiff for harm caused by their improper conduct.

**E. Apportionment of the Sanction**

DiLuglio and aRusso argue that the sanction order should be modified because it arbitrarily assigns each of the sanctioned parties responsibility for one-third of the attorney's fees and costs resulting from their collective abuses. Again, I disagree. I cannot separately identify the costs attributable to each of the misrepresentations and omissions at issue. The misrepresentations and omissions all occurred at approximately the same time[11] and they all concerned the same issue. Moreover, I cannot precisely apportion fault for the misrepresentations and omissions on the present record. Under these circumstances, it is appropriate to divide liability for the fees equally among the three culpable individuals.[12]

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[11] DiLuglio's misrepresentation occurred on or about August 13, 1993, when he sent his letter to the court. ARusso's responses to Legault's requests for admissions were made on or about September 3, 1993. Zambarano's and aRusso's interrogatory answers were made on or about September 7, 1993, and DiLuglio's response to Legault's document request was made on or about September 24, 1997.

[12] I also determined that DiLuglio should be sanctioned for failing to produce other documents in response to Legault's document request and for failing to file a final pretrial

## IV. CONCLUSION

For the reasons stated herein, the motions to reconsider (documents nos. 141, 144, 145) are denied.

SO ORDERED.

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Paul Barbadoro, United States
District Judge for the
District of New Hampshire
(Sitting by Designation)

March 29, 1996

cc: Ina P. Schiff, Esq.
Henry F. Spaloss, Esq.
Thomas A. DiLuglio, Esq.
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statement. However, these issues are of much less importance to the case and, by themselves, would not support an award of significant monetary sanctions.