

August 29, 2008

MEMORANDUM

RE: MATTER OF ELEANOR J. PIEL, DOCKET #2005.2935  
AND MATTER OF WILLIAM H. ROTH, DOCKET #2005.2936

This memorandum is submitted in further support of the complaint filed with the Grievance Committee by Catherine E. Malarkey against her former attorneys arising out of their representation of her discrimination case filed in the Southern District of New York against her employer, Texaco. Recently the Committee requested copies of certain recordings which were the subject of the March 26, 1997 hearing before Magistrate Judge Fox in the Texaco case. The requested tapes (the "Texaco Tapes") and, in some instances, partial transcripts of them are herewith submitted.<sup>1</sup>

Judge Fox ruled against and fined Mrs. Malarkey based on the testimony of her lawyers that she herself was solely responsible for their failure to produce the Texaco Tapes during discovery requested by Texaco. Her lawyers, the Respondents herein, remarkably told the Court they didn't know the tapes even existed. A transcript of that hearing is annexed as Exhibit 1 to Mrs. Malarkey's November 1, 2005 submission to the Committee.

At the March 26th hearing, Texaco's lawyers told Judge Fox why the Malarkey tapes were clearly responsive to Texaco's document demand, and the Court agreed. Here is what Texaco's counsel told the Court:

---

<sup>1</sup> Copies of the tapes submitted herewith were referred to in my February 18, 2008 memorandum to the Committee in footnote 6. The Committee has requested copies of these tapes.

(1) "Plaintiff's counsel has written to the court and has attempted to downplay the importance of the tapes. In fact the tapes are crucial evidence in this case." (Emphasis added)

(2) "Plaintiff alleges that her supervisor and others at Texaco have discriminated against her based on her age and her sex and that they retaliated against her for filing discrimination claims."

(3) "She [Mrs. Malarkey] alleges that her supervisor, Mr. McLeod, has said things to her that support her claims."<sup>2</sup> (Emphasis added)

(4) "She [Mrs. Malarkey] alleges that Ms. Palmieri, one of the people on these tapes, said things to her such as that Ms. Palmieri was told not to associate with plaintiff." (Emphasis added)<sup>3</sup>

(5) "She [Mrs. Malarkey] alleges that the other person [(Young)],<sup>4</sup> who we have now learned is on the tapes, refused to speak with plaintiff after receiving a threatening phone call. In fact, we believe the evidence will show that plaintiff was pestering this person, trying to get this person to say, 'Yes, I was discriminated against, too,' and what happened was this person disagreed with plaintiff and said, '[N]o, I haven't been discriminated against. I have been treated fairly.'" (Emphasis added)

---

<sup>2</sup> A transcription of this tape is annexed as Exhibit 3 and as discussed infra on pp 9 and 10.

<sup>3</sup> This tape is annexed as Exhibit 11.

<sup>4</sup> A portion of this tape is quoted on pp. 8 and 9, infra and a transcript annexed as Exhibit 1.

Ms. Piel, Mrs. Malarkey's counsel, responded to Texaco's counsel by stating that the non-production of these tapes was just an oversight and not her fault: "We never specifically spoke to her [Mrs. Malarkey] about tapes with regard to the discovery request."

"Your Honor, we may have failed in not going over the discovery request with her and talking to her specifically about each item, which we did not do." (Emphasis added; 3/26/97 Transcript p. 3)

Ms. Piel then threw her client to the wolves, identifying her as being solely responsible for the non-production of the tapes.

"And I am terribly sorry this has happened and I would hope that your Honor would regard it as an incident where a client does not understand when she reads this that it meant she was supposed to come up with the tapes." (Emphasis added; 3/26/97 Transcript p. 3)

After hearing Piel and Texaco's lawyer, the Court ruled that the tapes, which Malarkey had turned over to Texaco after her deposition, were clearly responsive to Texaco's document demand. Because her lawyers had put the blame on her, Mrs. Malarkey was fined \$500 for the failure to produce them. The Court found:

"Let me say first of all I find your [Piel's] client's position untenable. The [Texaco] document request dated August 12, 1996, which specifies the information clearly in the definitions, under definitions and instructions under 'D' includes tapes, computer tapes, diskettes, audio tapes, audio cartridges, cassettes and electronic recording of any kind. I have to tell you that your client's conduct [not producing the tapes timely] comes perilously close to the same type of conduct that former Texaco officials have now been indicted for, for obstruction of justice." (3/26/97 Transcript p. 4)

In reaching this decision, Judge Fox rejected Roth's claim, as set forth in a letter to the Court two days prior, that he had listened to Mrs. Malarkey's tapes and "The tape re-



cordings do not appear to record conversations regarding items requested by Texaco in its Rule 34 request.” (Ex. 5 to Roth’s submission to the Committee dated February 14, 2008) Roth’s contention had no validity then, and has none now. The tapes were relevant, Piel and Roth knew about them, and they should have produced them.

Quite simply, Respondents lied when they told Judge Fox that they did not know about the Texaco Tapes. The uncontroverted evidence, including Respondents’ own contemporaneous writings on this point, was summarized and documented in Mrs. Malarkey’s May 18, 2006 submission to the Committee, including Roth’s letter to Piel on November 11, 1996 in which he states:

“The only fact that bothers me in the last category of documents [requested by Texaco] is that Catherine [Malarkey] taped conversations on the job. Do you know if she has the tapes?” (Emphasis added; Exhibit 3 to Mrs. Malarkey’s letter of November 1, 2005 to the Committee)

This admission puts the lie to Respondents’ position before this Committee. But there is more: indeed Respondents’ own privilege log lists a document dated November 19, 1995 from Mrs. Malarkey. The November 19, 1995 document Respondents withheld from production was a taped conversation Mrs. Malarkey had with a fellow Texaco employee and is identified by Roth

on his privilege log as follows:

“Catherine Malarkey (CEM) to Richard W. Mcirowitz (RWN)/  
November 19, 1995 — 3 pages)”<sup>5</sup>

Next to this description Roth wrote “privileged” and “redact”; he did not produce the document.

As a result of this hard evidence, Respondents cannot now walk away from their clear contemporaneous acknowledgment that Claimant had responsive tapes, that they discussed the existence of these tapes and then they suppressed them.

It is well settled that “counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched,” *Zubulake v. UBS Warburg LLC*, 2297 RD 422 (SDNY 2004). Furthermore, “counsel must oversee compliance [with discovery demands] monitoring the party’s efforts to retain and produce relevant documents” (at 432). In this matter, Piel and Roth failed in their duty to their adversary, the Court and their client, whom they indeed abandoned.

Respondents’ willful withholding of responsive documents is also manifested with another contemporaneous document, this one in Roth’s own handwriting (Exhibit 2 to Mrs. Malarkey’s June 1, 2007 Memorandum to the Committee). In Document #41 on page 4 of

---

<sup>5</sup> Mrs. Malarkey’s memo of November 19, 1995 also states in part:

“I [Malarkey] got a tape recorder and hope it picks up more than the one I had before.”  
(Exs. 5 and 6 to Mrs. Malarkey’s letter of November 1, 2005)

Roth's list of documents he is evaluating for production, Roth references a taped conversation:

"Dec. 6, 1995. See tape of conversations. Moylett [a Texaco employee] said he would not testify for CM [Catherine Malarkey]."

This transcript of this tape is produced with this memorandum as Exhibit 8 and is clearly responsive to Texaco's demand: Roth withheld it from production.

Not only did Respondents have actual knowledge of specific responsive documents which they chose to withhold. They had general knowledge of the critical importance of taped conversations to employment discrimination claims — involving Texaco. At the March 26, 1997 hearing, Piel told Judge Fox that she was aware of the significance of Texaco employee tapes in another discrimination case against that company. Piel was referring to the *Lundwall* case reported in *The New York Times* and *The Wall Street Journal* in 1996 and 1997 in articles previously submitted to the Committee. These stories detailed how a Texaco employee had taped conversations with fellow employees in which they reported on Texaco's discrimination. Respondents knew that these tapes led to a \$176 million dollar settlement in that case.

And still Respondents did nothing to secure, review and produce Mrs. Malarkey's tapes, and they would have gotten away with their actions, but Mrs. Malarkey truthfully answered Texaco's questions regarding tapes.

Well aware that recorded conversations can be critical to discrimination claims, and well aware that their client possessed such tapes, Respondents nevertheless failed to produce



them. That failure was both a profound lapse in zealous advocacy and a breach of ethical rules Respondents were bound by. Now facing the threat of sanctions from this Committee, Respondents, having abandoned their client before Judge Fox, have no qualms about advancing this predictable two-step denial: (1) We didn't know about the tapes; and, when that didn't work, (2) Well, even if we did know, the tapes are not responsive. Another falsehood.

Mrs. Malarkey wisely taped fellow employees, as was done by another Texaco employee in the *Lundwall* case with devastating results for Texaco, to capture evidence that Texaco continued to discriminate against her in compensation, promotion and evaluation. Texaco's document demand covered each of these subjects in Items 1, 2 and 5:

“1. All documents that are relevant to the facts and claims alleged in the Complaint in this action.

2. All documents concerning plaintiff's job duties at Texaco, including all documents concerning plaintiff's performance of those job duties and any reviews of and complaints or criticisms of plaintiff's performance.

5. All documents concerning any communication between plaintiff and any other person, including the defendant or any of its employees, concerning the allegations and claims in the Complaint in this action.” (See Ex. 1 to Roth's Ans.)

THE TAPES RESPONDENTS WITHHELD CONTAINED EVIDENCE  
RELATING DIRECTLY TO THE ISSUES IN MALARKEY'S  
DISCRIMINATION CASE AGAINST TEXACO

---

I. THE YOUNG TAPE, JANUARY 1995

By way of example, in January 1995 Malarkey taped a conversation she had with another Texaco employee, Carole Young, who had received a telephone call threatening her if she in any way supported Malarkey's discrimination claim against Texaco. This is the taped conversation Texaco's counsel referred to at the hearing before Judge Fox (supra item 5 on page 2 of this memorandum). A transcript of this tape is annexed as Exhibit 1.<sup>6</sup>

Prior to this conversation Young had told Malarkey that she had received a call threatening her if she in any way supported Mrs. Malarkey's case against Texaco.

MALARKEY: "I will probably be going back to court on a violation.

YOUNG: Really.

MALARKEY: And I probably will call you.

YOUNG: What do I have to do with that?

MALARKEY: That threatening phone call that you had. (emphasis added)

YOUNG: But I don't have to go to court, do I?

MALARKEY: I would like you to be a witness.

---

<sup>6</sup> The transcriptions submitted herewith were prepared by Mrs. Malarkey at the request of the undersigned, her pro bono counsel, and are not produced to this Committee as a professional transcript of the tapes.

The transcript and related documents are annexed hereto as Exhibits 1 through 9. The tapes themselves are submitted separately and bear the same Exhibit numbers.



YOUNG: But do I have to?

MALARKEY: Do you have to? I would like to have that be on the record. You are not the only person they have done that to. So I would like to have that be on the record.

YOUNG: I am going to be very frank with you. I really (garbled) . . . stress. If they call me, I just might not even go.

MALARKEY: Carol, I think you would be subpoenaed.

YOUNG: And if I don't go, what then? Jail?

MALARKEY: You could be fined and, yes, I guess you could be jailed. I wouldn't want to see that. I don't think you would want to see that either, Carol.

YOUNG: It's too stressful for me.

\* \* \*

MALARKEY: No, it would probably be a hearing before a judge. And you would say your piece that you got that threatening phone call, that you were very shaken by it. I remember you touched me and you said, 'My hands are still ice cold.' You were inconsolable. You were inconsolable.

YOUNG: (Garbled) . . . I have been here all this time. No one has ever done that (garbled) and I really was . . . I was frightened. I think I am mature enough to take care of myself. Nevertheless, I don't appreciate it when (garbled) . . . I have never done that before."

---

After the Fox hearing, and the production of this tape, Ms. Young had her deposition taken. In her April 21, 1997 deposition Ms. Young testified that she had received a telephone call at night from a man telling her not to associate with Malarkey and that "it wouldn't be good for me." Ms. Young also testified that her telephone number was unlisted and that she was very upset by the call. (Young Dep. pp. 8, 9 and 10, Exhibit 2).

## II. THE MCLEOD TAPE, APRIL 6, 1993

On April 6, 1993, Malarkey taped a conversation she had with Bill Mcleod, Manager of Texaco Quality Resource Center to which Malarkey had recently been assigned.

On this tape, the transcript of which is annexed as Exhibit 3, Malarkey expresses her concern that as a result of her initial discrimination suit against Texaco, which was settled in her favor, she has been given a job requiring substantial computer skills she didn't possess that would make it almost impossible for her to obtain a satisfactory proficiency rating (Exhibit 3, pp. 4, 5) and that Texaco has deliberately placed her in a dead end job where her pay scale can't be increased and she in effect is in a dead end position — allegations not refuted by Mcleod.

### III. THE DICKINSON TAPE, APRIL 5, 1993

On April 5, 1993 Malarkey discussed her new Texaco job assignment with Texaco's Senior Vice President Richard Dickinson. The transcript of this tape is annexed as Exhibit 4. She explained to him that as she did not have adequate training for her new assignment, that she was doomed to failure as a result and that he had placed her in a job with no possibility of promotion. Mr. Dickinson was noncommittal. (Exhibit 4, pp. 4, 5)

On May 13, 1997, less than two months after the March 26th Fox hearing and the production of the Texaco tapes, Roth wrote to Piel: "It looks like Dickinson was responsible for appointing CEM to her quality analysis job", and as all Texaco witnesses to date have denied placing her in this dead end job:

"That leaves Dickinson. I'm a bit embarrassed to say, I think we should make an application to depose him.

A copy of Roth's memorandum is annexed as Exhibit 5.

Had Roth timely listened to the Dickinson tape submitted as part of Exhibit 4, he would have learned of Dickinson's direct involvement in the operation of this unit, and Malar-

key's objections to being placed in this dead end job, and he would therefore have placed this Texaco senior officer on his witness list. Dickinson's knowledge of Malarkey's being placed in a clearly unsuitable job was obviously relevant to her discrimination claims. Respondents' argument that the Dickinson tape (Exhibit 4) is irrelevant can't be justified.

#### IV. THE METZGER TAPE, JUNE 15, 1995

On June 15, 1995, Malarkey taped a conversation she had with Texaco's Vice President James Metzger after she had received a death threat in her Texaco interoffice mail which said: "You or someone close to you will soon Die." (Emphasis added)

A copy of the death threat is annexed as Exhibit 6. Metzger knew of this death threat.

Malarkey also reports to Metzger on this tape that Texaco's Vice President and Corporate Secretary Carl Davidson has told at least one Texaco employee not to talk to Malarkey (Exhibit 7, p. 3) and Malarkey's request following the death threat for a film of Texaco's annual meeting at which a man was very abusive of women in attendance is denied (Exhibit 7, p. 2).

#### V. THE MOYLETT TAPE, NOVEMBER 21, 1995

On this tape of November 21, 1995, John Moylett, Texaco's Human Resources Manager, tells Malarkey that he knows of cases involving discrimination claims by Texaco employees being "stacked against the employee" and that the investigation of the death threat she received is going nowhere (Exhibit 8, p. 7).



VI. THE SECOND MOYLETT TAPE, DECEMBER 6, 1995

On this tape recorded on December 6, 1995 (Exhibit 8), John Moylett, Texaco's Human Resources Manager, tells Malarkey that even though Malarkey was successful in her first discrimination claim against Texaco, the company hasn't changed and "they're not going to change" (Exhibit 9, p. 1).

When Malarkey tells Moylett that her work isn't being properly evaluated and that her discrimination continues, he replied:

- "Yeah. That's what is going to happen. Those are the consequences when you take them on. They'll [Texaco] do everything and anything to humiliate you." (Exhibit 9, p.2);
- That Texaco had blocked and blacklisted Malarkey (Exhibit 9, p. 3);
- "But clearly, from what I know, you had them on discrimination (Exhibit 9, p. 4);
- That Texaco had discriminated against Malarkey:

"You're not going to hit them. You're only going to get a few dollars in a monetary award and then you are going to be back to square one because they [Texaco] aren't going to change (Exhibit 9, p. 6);

- "We have some bad apples. We have some people that do unethical practices"" (Exhibit 9, p. 10).

VII. TAPES OF RUSTY RICHARDS, LAURA PALMIERI, COOKIE IHRIG AND OTHER TEXACO EMPLOYEES

In addition to the Texaco tapes referred to above, there are additional tapes we are producing to the Committee. Here is a brief description of the subjects covered in these tapes.

A. Exhibit 10: There are multiple tapes of Malarkey's conversations with Rusty Richards, Texaco's manager of Corporate Planning. In these tapes (four in March

1995, three in March 1996 and two in October 1996), Malarkey complains to Richards about (a) the difficulty she is having obtaining information from Texaco's Human Resources Department without which she can't do her job; and (b) the arbitrariness of her job description and pay grade. These arbitrary restrictions limited Malarkey's ability to advance within Texaco and were critical to her discrimination case against Texaco.

One of Richards's tapes was referred to in Malarkey's memorandum to Piel dated November 19, 1996, where she told Piel, "I recorded this short meeting [of complaint]."

B. Exhibit 11: November 20, 1995. Laura Palmieri tells Malarkey that her boss, Ronald Boilla, Director of Texaco's Human Resources Department and EEOC compliance, has told her to stay away from Malarkey (a troublemaker), but she knows Malarkey is fighting for what she thinks is right in her case against Texaco.

C. Exhibit 12: November 1995. Records Malarkey's conversation with Cookie Ihrig of Texaco regarding disability payments due to Malarkey for her work-related illness.

D. Exhibit 13: November 20, 1995. Malarkey talking to various Texaco employees after she returned to work following the June 1995 death threat.

The Texaco tapes summarized above demonstrate that Respondents' argument that they are not responsive to Texaco's demand is just preposterous. At a minimum, they identify Texaco employees Malarkey was likely to call at trial having conferred and confirmed with them Texaco's ongoing discrimination against her.

## CONCLUSION

As is clear from Texaco's argument to Judge Fox and the examples of what is on the tapes set forth in this memorandum, the Texaco Tapes identified employees who had knowledge of Texaco's acts of discrimination against Mrs. Malarkey. In any event, in addition to offering potential affirmative support to Mrs. Malarkey's case in chief, the tapes identify potential witnesses to be called at trial by either side.

The Respondents' argument that the Texaco tapes are irrelevant to the issues before this Committee is as frivolous now as it was on March 26, 1997. Appealing Judge Fox's ruling, which Respondents now argue was in error, would have exposed the very misconduct they hope to bury. With the plain truth now before this Committee, that cannot be allowed to occur.

Respectfully submitted,

---

Thomas F. Curnin

August 29, 2008