

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT - 2ND DIVISION
CIVIL ACTION NO. 01-CI-2882

MELINDA J. MASSARONE

PLAINTIFF

vs.

**MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY
OF LIABILITY JUDGMENT AGAINST DEFENDANT LARRY WALSH
FOR HIS UNTRUTHFUL DEPOSITION TESTIMONY AND BAD
FAITH ABUSE OF DISCOVERY**

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, et al DEFENDANTS

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A party has an obligation to answer deposition questions truthfully. Where a party answers deposition questions untruthfully and his conduct demonstrates a willful, intentional and bad faith attempt to conceal evidence or a gross and callous indifference to his discovery obligations, the Court is authorized pursuant to CR 37 and its "inherent power" enshrined by the Supreme Court in *Potter v. Eli Lilly, Ky.*, 926 S.W. 2d 449 (1996), to enter judgment against the party. Here, defendant Larry Walsh has given untruthful testimony on a number of material issues in intentional and willful disregard to his responsibility to answer deposition questions truthfully. Accordingly, Walsh's intentional and gross disregard for his discovery obligations provides the ground for this Court to enter judgment in plaintiff's favor as to Walsh's liability on her claims against him.

STATEMENT OF FACTS

Walsh has displayed a persistent and troubling disregard for the truth. In the face of documentary evidence to the contrary, he has testified untruthfully. He has denied making tape-recorded statements. He has directly and materially contradicted

the testimony of a number of police officers that continue to serve this community. He and co-defendant Devers have each acted to try and escape liability by shifting responsibility for Ms. Massarone's injuries to the other. Walsh's actions are in intentional and callous disregard for his obligations to be truthful in discovery.

Walsh's Untruthful Denial that He Did Not Grade Down Sgt. Arty Greene's Performance Appraisal Because Sgt. Greene Protested A Proposed Transfer Of African-American Officers On His Squad as Racially Discriminatory

Walsh fostered and perpetuated a discriminatory atmosphere in the police department. One of the ways he did this was by taking punitive action against officers who protested, as was their duty, employment practices that were discriminatory.

In June 1993 Sgt. Arty Greene authored a memorandum protesting as racially discriminatory the proposed transfer of four African-American officers on his squad. The day after Sgt. Greene authored his memo he was summoned to meet with Walsh and a number of other supervisors:

On June 28, 1993, I was called into Major Mitchell's office just after roll call and present there were Chief Walsh, Assistant Chiefs Kenny Watson and Robert Sewalls and Captain Greg Howard. Chief Walsh was very mad and demanded to know who had helped me prepare my June 27 memorandum. Chief Walsh's first comment to me, while waving my June 27th memo in the air, was "What is this?" I also recall that he then asked me "What does this mean?" and he asked something to the effect was I trying to charge him with the document. Two or three times during the meeting Chief Walsh, while holding my June 27 memo in his hand and waving it in the air, stated to me "I ought to fire your ass." I recall that Assistant Chief Watson stated that Chief Walsh didn't have to check with me about anything nor get my approval or authority to reassign whomever. I was allowed to point out in this meeting that it was against the law to use race as a basis for employment decisions. Chief Walsh became increasingly agitated and eventually marched out of the office. Shortly after that I left the office and I heard the others laughing, which led me to believe that they had orchestrated the entire affair.

(Arty Green Affidavit ¶ 6 at 2-3).¹

Sgt. Green was also issued a disciplinary reprimand because of the memorandum: his supposed offense was “insubordination.” (Arty Greene affidavit, exhibit A). Walsh received this memorandum and not only failed to revoke it but expanded on its punitive aspects for Sgt. Greene by grading down substantially the performance appraisal that Sgt. Greene received for the year in question. (Arty Greene affidavit, exhibit C). Walsh, of course, denies ever affecting any employee’s appraisal:

Q: Okay. Did you yourself ever reduce any employee’s rating because they had reported what they perceived to be a discriminatory practice?

A: No.

(Walsh deposition at 25).

Exhibit C to Sgt. Greene’s affidavit clearly and unequivocally indicates that Walsh’s testimony is untruthful. Walsh’s testimony is in gross disregard for his obligation to be truthful in discovery.

Walsh’s Untruthful Testimony About His Racist statements Regarding a Young African-American Man Tragically Shot by Police Officers

Walsh has testified untruthfully and denied making the following statement to Sergeant Phil Vogel in reference to an incident in which some police officers, including an officer Garrison, had been compelled to shoot fatally a young African-American man:

¹ A copy of Sgt. Greene’s affidavit is attached hereto and marked Exhibit 1 to this memorandum.

Well, you can go back to the Garrison thing, and you're an experienced commander, you ought to be able to look at the Garrison shooting, and realize that if they had their sticks on, they'd never had to kill that nigger.

If they'd had their sticks on, if, if they'd hope to get to that stick, just like when they get out on a disorder call, if they both just had their sticks and had been able to resort to those sticks, I bet you they wouldn't have had to kill him.

I don't give a fuck that they had to kill him, but, but, let's just be... being honest about it.

Walsh, while not quarreling with the transcription above, states that he doesn't remember these comments and then, after thinking that may not be quite enough, decides that it is best to just do a complete denial. This is untruthful and in intentional disregard for his discovery obligations.

Walsh's Untruthful Testimony About the "Captain's List" that Ms. Massarone Was Promoted From

Another issue that Walsh has testified untruthfully about in his deposition was denying that he expressed any dissatisfaction with a "Captain's List" that came out in 1996 and identified three persons, Steve Stanley, plaintiff Melinda Massarone, and Michael Bosse at the head of the list. Walsh testified untruthfully in pertinent part as to this list as follows:

Q: Did you ever express any dissatisfaction with the way this Captain's List had turned out, the way the rankings had turned out?

A: No, I don't know of any dissatisfaction.

Q: Do you recall ever making any statements that you thought that the people at the bottom of the list should have been at the top?

A: No, I don't remember anything like that.

Q: Do you recall making any statements that you thought the Captain's List was upside down?

A: No.

Q: Do you recall making any statements to the effect that the people at the top of the list were assholes?

A: No, I don't.

Q: Didn't say any of that?

A: Don't recall anything of that nature.

Q: When you say you don't recall, do you mean you may have said it, but you can't remember saying it today, or do you mean you never said it, period?

A: I can't recall any conversation of any sort about lists inverted, people being assholes. I don't know of that conversation ever occurring.

(Walsh deposition at 60-61).

Contrary to Walsh's evasive and untruthful testimony, Major Mike Bosse, who has been for many years and is presently in charge of the internal affairs bureau of the Division of Police, has only recently testified as follows and in direct contradiction to Walsh:

Q: Just one thing I want to follow-up on, Major Bosse. You have described how you initially heard a rumor that Walsh had made the statement "wasn't going to promote those three assholes at the top of the Captain's List." Did he - did he, Chief Walsh, ever confirm to you directly that he had in fact made those statements?

A: Yes.

Q: Did he do that during your Captain's interview?

A: No, it was - and I don't - again, I don't know the time frame, but I was at the grand jury, outside the grand jury at the old circuit court

building, and he was there for whatever reason, and it was just he and I in the hallway, and he turned to me and said something to the effect that I know that you heard, you know, that I had made the statement about the Captain's on the - that statement, the assholes on the Captain's List, and he says, "you know I was just" - in some odd sense - "evaluating you to see how you would take that," basically was the jest of the conversation. "I wanted to see how you would respond to that kind of thing." And I was like OK. I mean, to me it was very odd.

(Bosse deposition at 42-43).

Walsh's evasive and untruthful testimony regarding Massarone's transfer request

The pension board (and the government's examining physicians agreed) that the conduct of defendants Walsh and Devers caused Ms. Massarone's psychiatric disability and the end of her distinguished career in the police department. In an attempt to evade responsibility for his conduct, Walsh has given evasive and untruthful testimony regarding his actions relative to Ms. Massarone's repeated efforts to be transferred. Walsh denied any responsibility for the denial of Ms. Massarone's transfer request. He denied knowing of any transfer requests prior to April or May 2000:

Q. When - had you at anytime prior to that heard that Ms. Massarone wanted to transfer out of Communications?

A: No, I hadn't.

Q: Had you ever discussed that with Chief Devers?

A: No.

(Walsh deposition at 77).

Walsh explained that he had final authority on transfer requests but that Devers had not consulted him regarding Massarone's request:

Q: ...who had the say so over - in 1999 and 2000 or whether a transfer request by [Ms. Massarone] would be granted?

A: Well, her bureau commander would obviously have some input, and I would be the final authority if it became a conflict.

Q: The bureau commander in this case would be Chief Devers?

A: Yes.

Q: Would she be expected to consult with you regarding a transfer request by Ms. Massarone?

A: It depends on how it would - if she says I want out, I want a transfer, yeah, she should consult.

Q: Do you know if Ms. Massarone ever did that before April or May 2000?

A: The only time that I know of that she did it was when Chief Devers told me in a morning staff meeting that she wanted - Melinda wanted out of Communications, and at some point after that, immediately after that, I received a copy of the memo that she had sent Chief Devers. Subsequently, I called her and talked to her. That's the only point that I know she requested a transfer.

(Walsh deposition at 78-79).

Contrary to Walsh's untruthful claims that he did not know about the transfer request by Ms. Massarone prior to April/May 2000 and his assertions that defendant Devers had not discussed these transfer requests with him, , contrary to policy. Devers has testified in such manner as to put the onus and responsibility directly on Walsh. Devers claims that she discussed all of Ms. Massarone's prior transfer requests with Walsh:

Q: In 1999, do you remember if Captain Massarone requested a transfer?

A: It would have been in – when, I don't know the specifics. But, yes, in 1999.

Q: On one or more occasions in 1999?

A: Two, that I can recall.

Q: Now, Chief Walsh testified that Department policy was that for that type of transfer request, department policy required you to consult with him. Did you in fact do that?

A: Yes.

Q: And I understand from what you have testified to earlier, that a bureau to bureau transfer would be Chief Walsh's call basically?

A: Yes. ...

Q: I want to be clear. Did you tell Walsh that Massarone had requested a transfer, correct?

A: Yes.

Q: Well, he testified that you didn't.

A: I did.

Q: So he was incorrect in his statement?

[objection by defense counsel]

A: I don't know what he said.

Q: But you are confident that you did tell him?

A: Yes.

(Devers deposition at 61-64).

Walsh's untruthful testimony about his threats to Sgt. Arty Greene to have Sgt. Greene fired because Sgt. Greene protested a discriminatory transfer of a number of African-American police officers

Walsh has also testified untruthfully with regard to threats he made to Sgt. Arty Greene that Sgt. Greene should be fired because he had protested a proposed racially discriminatory transfer of several African-American officers in his squad. Even while acknowledging that telling an employee that they should be fired for reporting discrimination would be unlawful, Walsh denies making any statement to Sgt. Greene of any kind that he wanted him fired or wanted to see his employment terminated.

Q: Did you ever tell any employee that, "I ought to fire your ass," because that officer had reported what they perceived to be a discriminatory practice?

A: No.

Q: Did you remember making that statement, "I ought to fire your ass," to a Sergeant named Arty Greene?

A: No, I do not. I can't fire anybody.

Q: Did you - do you remember, if you didn't exactly make that statement, do you make some similar statement or statement to the effect to Mr. Greene that you wanted to fire him or wanted to see his employment terminated?

A: No. Arty Greene and me were friends. We've know each other a long time. We got along very well. I never said anything like that to him. He was a good man and served a good purpose in the police department. No, I never said anything like that to him.

Q: ...Did you tell [Sgt. Greene] with regard to his memorandum that you thought he ought to be fired?

A: No, I did not.

Q: Did you make any statement to him threatening his employment?

A: No, I did not.

(Walsh deposition at 28-29).

Walsh's untruthful testimony about his unlawful retaliation and attempts to intimidate Mark Barnard and others who participated in an investigation.

Walsh's attempts to intimidate officers who opposed the discriminatory practices in his police department were not limited merely to those directed at Sgt. Greene. In 1998, a number of police officers participated in an investigation conducted by now Police Chief Anthony Beatty regarding racially discriminatory practices originated with Capt. William Fockele in the homicide department of the homicide bureau of the police department. Walsh and Fockele subsequently identified Mark Barnard as the principal bad actor that caused this investigation. Walsh testified untruthfully as follows:

Q: Okay. During the time you were Chief of Police, did you ever accuse an officer of having participated in a coup by their reporting discriminatory actions by another office.

A: No.

Q: Do you remember making that statement to a Mark Barnard?

A: No.

Q: Are you sure you didn't make that statement?

A: I don't remember.

Q: Okay. You say you don't remember it. Does that mean it could have happened and you don't remember making it today, or it never happened?

A: I don't know of any conversation of that sort that ever took place. I can't - I have no idea about where that could come from.

(Walsh deposition at 25-26).

Lt. Mark Barnard has been employed by the Division of Police for sixteen years.

Contrary to Walsh's untruthful testimony, Lt. Barnard has testified as follows:

Q: Did you ever discuss Fockele's conduct or statements or this matter in general with Larry Walsh?

A: Yes, sir.

Q: When was that?

A: When I went in for my Lieutenant's meeting, it's a Rule 5 that they take the next five people for promotion, Chief Walsh brought me into his office and asked me what a leader was, ask me to give a definition of a leader, and then stated that I wasn't a leader, that leaders don't pull coups against their supervisors, and continued to talk about the coup that I attempted to pull against Lt. Fockele. Lt. Fockele had done wonders in that unit, had made the clearance rate higher, and that we were pulling a coup against him to usurp his supervision.

Q: Did he use that - Did Walsh use that specific word, coup?

A: Yes, sir, several times.

Q: Did he indicate - Did Walsh indicate to you in any way that he felt you had participated in a coup against Fockele?

[Objection by defense counsel]

A: Yes, he said I pulled a coup, had pulled or orchestrated, I can't remember the exact words, a coup against Lt. Fockele.

Q: Did Walsh indicate to you or state something to the effect that you all - that you and perhaps other officers as well had set Fockele up?

A: Yes, sir.

Q: You specifically remember that?

A: Yes, sir.

Q: ... has there ever been other than at this Lieutenant's meeting, have you ever discussed this matter with Walsh on any other occasion?

A: Well, the coup portion of it came up again in a meeting, I think Commissioner Gardner, I think Captain Cecil was my Captain, Captain Sutton, I believe Assistant Chief Hall, and I can't exactly remember who all was in the room, during an inquiry of the Penny homicide investigation after Detective Lyons and Sorrell's lawsuit, it came up in that meeting where he ask me to come in, set down, shut up, I don't have anything to hear from you, this all goes back to the coup - the Fockele coup, I believe is the words. Somehow, and I don't know the exact wording, but it came up in that meeting again, that he advised me not to make any statements, he didn't want to hear from me. He just told me what was going to be happening.

(Barnard deposition at 16-17).

ARGUMENT

Point 1

Walsh Has a Duty to Testify Truthfully In Discovery Proceedings

A party has a duty to disclose pertinent information in discovery and this includes testifying truthfully in deposition. *Reed v. Furr's Supermarket*, 11 P.3d 639, 643 (N.M. App. 2000); *Dotson v. Bravo*, 202 F.R.D. 559, 570 (N.D. Ill. 2001); *Amway Corp. Shapiro Express Co.*, 102 F.R.D. 564, 570 (S.D.N.Y. 1984).

Point 2

This Court has Authority Pursuant to CR 37 and Inherent Power, in accordance with the Supreme Court's decision in *Potter v. Eli Lilly Co.* to impose Punitive Sanctions against Walsh for his Untruthful Deposition Testimony and Discovery Abuse.

This Court has the power to impose the punitive sanctions against defendant Walsh that this motion seeks. The Supreme Court recognized in *Potter v. Eli Lilly Co.*, Ky., 926 S.W. 2d 449, 454 (1996), that a trial court possesses inherent power extending

beyond “actual fraud” to reach “bad faith conduct, abuse of judicial process, any deception of the court and lack of candor to the court.” While the *Potter* case arose in a slightly different procedural posture than that at hand, the general principle it stated applies here.

Numerous courts have recognized that both a trial court’s inherent power to police proceedings before it and that granted to police discovery abuses authorizes the imposition of punitive sanctions for untruthful deposition testimony. First and fundamentally, a party has an obligation to testify truthfully in deposition. *Reed, supra; Dotson v. Bravo, supra; Amway Corp. supra.* False deposition testimony constitutes an assault and a callous disregard for the integrity of judicial proceedings. *Id.* As the Supreme Court observed in *Potter*, “[e]ven the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the process.” 926 S.W.2d at 454.

Courts have consistently recognized that a party’s untruthful deposition testimony is an act taken in bad faith and with callous disregard for their discovery obligations. *Reed, supra; Dotson v. Bravo, supra; Amway Corp. supra.* In such circumstances where the integrity of judicial proceedings is imminently and directly threatened, courts have imposed the most punitive sanctions, including entry of judgment against the party who has violated their discovery obligations. *Id.*

Point 3

Walsh has testified untruthfully and in bad faith with callous disregard for his discovery obligations.

Larry Walsh has testified untruthfully in his deposition, in an attempt to evade liability. His untruthful testimony has been done in bad faith and with callous disregard for his obligations to testify truthfully in discovery.

The most obvious example of Walsh's untruthful testimony is with regard to the punitive actions he took against Sgt. Arty Greene for protesting as racially discriminatory a proposed transfer of four African-American officers on his squad. Any one reading Sergeant Green's memo would conclude that he is protesting what he perceives to be a racially discriminatory employment practice. Not even Walsh disputes this. Second, it is equally obvious that Walsh took punitive action against Sgt. Greene and graded down Sgt. Greene's performance appraisal in retaliation for Sgt. Greene's protest about the racially discriminatory transfer. The documents speak for themselves and they demonstrate that Walsh's deposition testimony is untruthful.

The second most obvious example is the very disturbing racial slurs that Walsh used in his taped conversation with Philip Vogel. Walsh's denial of the statements is untruthful.

The remainder of the items are no less disturbing. For instance, with regard to Major Bosse, one is left with assessing whether Bosse, a newly promoted major who has spearheaded the Internal Affairs Bureau of the Division of Police for quite a number of years, is lying about Walsh's acknowledgement to him that Walsh had disparaged Bosse, Ms. Massarone and Captain Stanley when they were on the Captain's List or if Walsh, a proven and demonstrated liar, as set forth above, with incentive to avoid liability, is not telling the truth in his deposition testimony. Lt. Barnard presents a

similar conundrum. Is he, a Lieutenant of many years service to this community including the present, committing perjury or is Walsh disregarding his obligation to tell the truth in a shameful attempt to evade responsibility for his misconduct and abuse of power?

Finally, one comes to the directly contradictory testimony of defendant Devers and Walsh. Here one encounters the evasive untruthfulness of two persons knowing they are responsible for great damage and injury to Ms. Massarone pointing the finger at the other.

Walsh's untruthful deposition testimony intentionally and callously disregards his discovery obligations. His misconduct warrants imposition of severe sanction. Accordingly, the Court should enter judgment against Walsh on Massarone's claims against him.

CONCLUSION

For all the foregoing reasons, the Court should SUSTAIN plaintiff's motion and enter judgment against Walsh on Massarone's claims against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed, postage prepaid, this ____ day of February, 2003, to the following:

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