

MEMORANDUM

January 2, 2009

Re: MATTER OF ELENOR J. PIEL, DOCKET NO. 2005-2935
AND
MATTER OF WILLIAM H. ROTH, DOCKET NO. 2005-2936

In the movie 1776, the character playing John Adams laments the failure of the members of the Continental Congress meeting in Philadelphia to pass a resolution on independence from Great Britain saying:

“GOOD GOD, SIR, WHAT ARE THEY WAITING FOR?”

I say the same to this Committee.

Mrs. Catherine E. Malarkey’s malpractice claim against Piel and Roth has been before the Committee for over three years and still there is no resolution. Why?

The question Mrs. Malarkey puts to this Committee is direct and narrow: Did her lawyers lie to the Court, to their adversaries and to her to impede discovery about the existence of taped conversations?

When Mrs. Malarkey truthfully stated in her March 1997 deposition that she had taped fellow Texaco employees, Texaco’s lawyers promptly went to Court demanding production. At that hearing, Respondents blamed Mrs. Malarkey for their failure to produce the tapes, leading the Court to fine her \$500. Respondents thought they could get away with what they had done when they (a) lied to the Court that they didn’t know Mrs. Malarkey had tapes and (b) lied to Mrs. Malarkey that there was no record of the hearing. They almost did get away with it.

The evidence that Respondents lied to Magistrate Fox in 1997 when they told him they did not know their client had tapes responsive to Texaco's demand is irrefutable and -- after three years of proceedings before this Committee -- convincingly documented by Respondents' written admissions; by the Roth documents Claimant has turned over to the Committee in prior submissions; and by the documents turned over to the Committee in December 2008 at its request.¹ It is far past time for this Committee to sanction Respondents for malpractice and to direct them to reimburse Mrs. Malarkey for the \$500 she paid to the Court because they lied.²

THE DOCUMENTARY EVIDENCE THAT PIEL AND ROTH LIED TO MAGISTRATE FOX AND ARE LYING STILL TO THIS COMMITTEE IS OVERWHELMING.

At the March 26, 1997 hearing before Magistrate Judge Fox,³ called after claimant truthfully testified in her March, 1997 deposition that she had taped fellow Texaco employees, Piel lied to the Judge when she told him the following:

¹ At the conclusion of Roth and Piel's representation of Mrs. Malarkey in her claim against Texaco, Roth turned over to Mrs. Malarkey various documents in his files. In November 2008, counsel for Roth and Piel asked to review these documents. These are the documents turned over to the Committee in December 2008.

² Malarkey's allegations of wrongdoing against Respondents are set forth in her letters to the Committee and in the accompanying exhibits: Letter of November 1, 2005 and attached Exhibits 1-7; Letter of December 5, 2005 and attached Exhibits 8 & 9; Letter of December 21, 2005; Letter of January 13, 2006 with attachments; and Letter of January 23, 2006.

In addition, the undersigned submitted memoranda of law and fact to the Committee on behalf of Mrs. Malarkey on May 18, 2006; June 1, 2007; February 18, 2008; March 11, 2008; and August 29, 2008.

³ A transcription of this hearing was annexed as Ex. 1 to claimant's November 1, 2005 submission to this Committee. A tape of the hearing was annexed as Ex. 11 to my August 29, 2008 submission to the Committee and a transcription of the tape is annexed as Exhibit 3 to that submission.

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First: “We never specifically spoke to her [Malarkey] about tapes with regard to the discovery request”;

Second: “I think the whole taping thing became significant with regard to Texaco when all this came out about the Lundwall case in another case”;
and

Third: “Now, in a sense you can blame us for not being more careful [a gross understatement] but at the time we discussed it with her [Malarkey] the whole Lundwall case had not developed and we didn’t go back to her and say now that there is this tape aspect of the Texaco case, do you have anything that would respond to the [Texaco] discovery order?”. Emphasis added.

The Lundwall case Piel referred to was a class action lawsuit brought against Texaco by African-American Texaco employees alleging discrimination based on race. It settled in 1996 for over \$100 million after much publicity about embarrassing tapes of conversations in which Texaco officers disparaged their African-American employees.

Roth agreed with Piel’s representation to Judge Fox that the significance and usefulness of tapes to prove Malarkey’s discrimination case against Texaco “had not developed” at

Footnote continued from previous page.

The accuracy of the tape and transcription presented to the Committee have not been challenged.

the time she and Roth discussed their obligations as lawyers to comply with Texaco's discovery. But this was a lie and, fortunately for Mrs. Malarkey, she can prove it.

Texaco's document demand, dated August 12, 1996, was submitted to the Committee as Appendix A to my memorandum dated February 18, 2008. At the March 26, 1997 hearing, Judge Fox held that the Malarkey tapes were clearly responsive to Texaco's demand and he fined her \$500 for her failure to produce them.

The impact of the Lundwall case on Texaco as reported in the press in 1996, many months before the March 1997 Fox hearing, can't be overstated. Disclosure of embarrassing taped comments by senior Texaco officers denigrating African-American Texaco employees forced the \$100 million plus settlement.

All this was known to Piel and Roth and was being carefully monitored by them in 1996. Here are some examples of the newspaper stories Roth kept in his files in 1996, which we produced to the Committee in December 2008. Copies are annexed as Exhibit 1.

1. 11.20.96 Newsweek

This article reports on the case of Roberts v. Texaco and the \$115 million settlement in this case that alleged that Texaco had engaged in racial discrimination against African-Americans as disclosed in conversations of senior Texaco executives taped by a Texaco employee [Lundwall] and how devastating the tapes were to Texaco and how central to establishing plaintiffs' claims.

This article (p. 49) refers to Malarkey's earlier suit against Texaco where the jury awarded her damages for Texaco's willful discrimination against her. This article reports on an earlier article on the Texaco tapes as reported in The New York Times.

2. "Law Section" from an undated Wall Street Journal

This article reports on a grand jury investigation into allegations that Texaco executives tried to obstruct justice by allegedly planning to destroy

tapes the plaintiffs were seeking in their racial discrimination case against the company. The case was settled for \$115 million.

The article reports that Richard Lundwall (who worked in the same building as Mrs. Malarkey) had received a subpoena for the tapes he made of various meetings of Texaco executives. The heading for the article reads "Tape Sparks probe of Texaco Aides' Talks."

3. 11.12.96 Barron's

Reports pension fund managers are divesting Texaco's stock because of the discriminatory remarks made at the highest levels of Texaco.

4. 12.9.96 Fortune

Article on alleged racist remarks, taped, by Texaco executives.

5. 11.25.96 Newsweek

Article on the \$115 million Texaco will pay in racial reparations following embarrassing disclosure of racist remarks by Texaco executives caught on tape.

6. 11.14.96 Cable News Network

Reports Texaco agrees to pay \$100 million and spend \$30 million on programs to improve the racial situation at Texaco. The settlements followed plaintiffs' lawyers release of secretly made tapes of Texaco executives making racial remarks and planning to destroy documents.

7. 11.9.96 Detroit News

Reports that Texaco admits corporate discrimination against African Americans and that action will be taken against high ranking corporate officials connected with a meeting [discussion racial comments] caught on tape.

8. 12.2.96 BusinessWeek

Refers to Lundwell ex-Texaco employee and the embarrassing Texaco tape and The New York Times story of November 4, 1996.

9. 11.26.96 Wall Street Journal

Article discussed Texaco tapes in the Lundwall case that led to \$176 million settlement against Texaco.

All of these articles were in Roth's files. They all date before the hearing. Piel's claim that the importance of the tapes disputed here "had not developed" by the time of the hearing is false.

It is also indisputable that in 1996 Piel and Roth discussed among themselves that Malarkey had taped fellow Texaco employees. What did they do: they told her they weren't interested and not to produce them. And when caught, they lied.

On November 11, 1996, at a time Roth was actively collecting news stories on the Lundwall tapes, he writes to Piel on the subject of document production to Texaco and says:

"The only fact that bothers me is in the last category of documents (#11 in Texaco's demand; Appendix A to my 7/18/08 submission to the Committee)⁴ is that Catherine taped conversations on the job. Do you know if she has the tapes" (Ex. 3 to Claimant's submission of November 1, 2005). (Emphasis added.)

In the March 26, 1997 hearing, Judge Fox found that the Malarkey tapes were clearly responsive to Texaco's demand. (Ex. 7 to Claimant's submission of November 1, 2005).

"All right, let me say first of all, I find your client's position untenable. The [Texaco] document request, dated August 17, 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 recordings of any kind."

⁴ Texaco's demand # 11: All documents on which plaintiffs intend to rely at the trial of this action.

The November 11, 1996 letter from Roth to Piel is also interesting because on the second page Roth says:

“I left a lengthy tape message on Kurt Eichenwald’s phone at the Times on Saturday, leaving both office and home number.”

Eichenwald wrote a lengthy article about Lundwall and the devastating effect of the Texaco tapes in The New York Times on November 4, 1996.⁵

Here are two more examples of Malarkey telling Roth and Piel that she had taped fellow Texaco employees:

1. Malarkey May 4, 1995 memo to Roth captioned “Violations of Injunction against Further Retaliation”. On page 2 Malarkey reports: “I recorded the conversation” of fellow Texaco employee Carole Young. (Annexed hereto as Exhibit 2)
2. Malarkey July 25, 1996 memo to Roth captioned “Malarkey Texaco July 1996 People We May Want to Depose”. Under the heading Carole Young on the 2nd page Malarkey tells Roth “I taped a subsequent conversation where she said she did not want to get involved but she would do what is right.” (Annexed hereto as Exhibit 3)

Roth sent this July 25, 1996 memorandum from Malarkey disclosing continued taping to Piel in an undated memorandum, annexed as Exhibit 4. See Roth’s entry #4: “Early CM note: on who we want to depose”.

⁵ This article is in Appendix B to our memorandum of February 18, 2008.

PIEL LIED TO MALARKEY WHEN SHE TOLD HER THERE
WAS NO TRANSCRIPT/RECORD OF THE MARCH 26, 1997
FOX HEARING.

To conceal from Malarkey that they lied to Judge Fox when they told him they knew nothing about their client's Texaco tapes, Piel told Malarkey that the hearing was not taped or otherwise recorded. This is uncontroverted by respondents. We know this was a lie because Malarkey was able to obtain a tape of the hearing from the Court in December 1999. (See Submission of February 18, 2008, pp. 12 & 13.)

Both Piel and Roth knew there was a tape of the hearing, but they couldn't let Malarkey hear their lies. In Roth's file is a copy of the Appearance Sheet for the March 26, 1997 hearing before Judge Fox. As is customary, it notes that the hearing is recorded and who is in charge of the recording. See Exhibit 5 annexed hereto.

The evidence is clear and uncontrovertible that Piel and Roth knew, as early as 1995 and throughout 1996, that Malarkey had tapes of conversation with various other Texaco employees -- and that the taping was ongoing. They also had to realize that because of the impact the Lundwall tapes had on the outcome of the African-American discrimination case against Texaco, Malarkey's tapes were potentially exceedingly important. They have done whatever they can in this proceeding to conceal this clear truth.

In her submission dated November 1, 2005, Ms. Malarkey attached the following exhibits proving Piel and Roth knew of the existence of tapes in 1995, 1996 and 1997.

Exhibit 2: This is a four page undated document in Roth's handwriting entitled "Memo to Counsel: Documents Produced". Item # 41 reads as follows:

December 6, 1995 See tape of conversation Moylett [a Texaco employee] said he would not testify for CM.

Exhibit 3: Roth's 11/11/96 Letter to Piel (noted earlier in this memo at p. 6) in which he states:

The only fact that bothers me is the last category of documents [in Texaco's request] is that Catherine taped conversation on the job [at Texaco]. Do we know if she has the tapes?

Exhibit 4: Malarkey writes Roth on November 20, 1996 that she taped a meeting with a Texaco executive regarding her employment: "I recorded this short meeting."

Exhibit 5: On January 6, 1997 Roth sent a privileged log to Texaco's counsel and identified as document #1 on that log Malarkey's memo to R.W. Meierowitz of 11/19/95. Having listed this memo in his privilege log, we can assume Roth read this memo -- Ex. 6 below.

Exhibit 6: Malarkey's 11/19/95 memo to Meierowitz states in the first line that Malarkey has in the past and is currently taping Texaco employees "I got a tape recorder today and hope it will pick up more that the

old one I had before.” Next to this entry Roth has written “Redacted and Privileged”

Exhibit 7: This is a Malarkey memorandum with entries from December 5, 1995 to December 22, 1995. This is the Sixth document listed on Roth’s January 6, 1997 privilege log (Exhibit 5 above). The document lists and reports on a number of conversations Malarkey had with fellow Texaco employees.

The entry for December 6, 1995 reports on a conversation Malarkey had with Moylett (a Texaco employee) and she tells Roth “See tape of Conversation” and then Malarkey quotes what Moylett said.

The documents summarized above (Ex. 2-7) prove that Piel willingly lied when she told Judge Fox on March 26, 1997 “we never spoke to her [Malarkey] about topics with regard to the [Texaco’s] discovery request.” A blatant lie in which Roth joined.

Although these documents alone belie Roth and Piel’s current story, I refer the Committee to Roth’s April 10, 2007 submission, which Piel has adopted. There Roth acknowledges (p. 3):

“My letter to Ms. Piel on November 11, 1996 (quoted supra p. 6) xxx confirms my recollection that I had been advised [during discovery and prior to Malarkey’s deposition] that Mrs. Malarkey had taped some conversations [with Texaco employees] and that we made some inquiry of her about her taping, but she had not provided any tapes to Mrs. Piel or myself. (emphasis added)

Contrast that statement with Piel's representations to Judge Fox on March 26, 1997, (supra page 3):

“We never specifically spoke to her [Malarkey] about tapes with respect to the discovery request.”

Roth was present when Piel made this representation to the Court which he knew was false.

This raises an interesting question: Were Respondents lying then or are they lying now? The answer is they lied on both occasions. They discussed Texaco tapes with Malarkey and her memoranda to them identified which employees were taped and the subjects; and yet Roth and Piel never asked for the tapes and then lied to the Court about their knowledge of the tapes.

On this last point, I direct the committee to Roth's April 10, 2007 admission that he totally failed in his responsibilities as an attorney-at-law to his client, his adversary and the Court by his own admission: knowing that tapes existed he elected, as did Piel, to pretend they didn't exist.

“As I recall Mrs. Malarkey was vague about whether the tape recordings [of Texaco employees] she made yielded anything audible and she certainly did not bring any tapes to Mrs. Piel or me to review, evaluate or produce” (Roth submission p. 3).

In other words, Respondents ask for a free pass because -- although they knew about the tapes, they never bothered to find out what was on them! They compounded this failure by then attempting to cover their tracks.

Roth argues that he and Piel should not be sanctioned for lying to Judge Fox, their client and their adversary because the Malarkey tapes were not that useful as evidence of Tex-

aco's discrimination against her. That argument was summarily and correctly rejected by Judge Fox's March 26, 1997 finding that the Malarkey tapes were clearly called for and there was absolutely no excuse for not producing them to Texaco's Counsel (supra p. 6).

Moreover, as summarized in my August 29, 2008 submission (pages 8 to 13), the contents of the Malarkey tapes identified both potential trial witnesses and evidence of Texaco's job discrimination against her.

CONCLUSION

Respondents' defense here is not merely paper thin but transparently untrue.

The time has come for this Committee to act.

Respectfully submitted,



Thomas F. Curnin