IN THE MATTER OF AN ATTORNEY

NO. BD-2012-043

S.J.C. Order (Dismissing Petition for Discipline) entered by Justice Spina August 6, 2012. [1]

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[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2012-043

IN RE: THE MATTER OF THE DISCIPLINE OF AN ATTORNEY

MEMORANDUM OF DECISION

On April 9, 2012, the Board of Bar Overseers (board) voted to dismiss a petition for discipline filed by Bar Counsel with regard to the respondent. In doing so, the board rejected the recommendation of a hearing committee that the respondent be reprimanded publicly for violation of Mass. R. Prof. C. 8.4 (h). Bar Counsel objected to dismissal of the matter, and pursuant to S.J.C. Rule 4:01, § 8 (6), the board on May 23, 2012, filed an information with this court. The question presented is whether the respondent committed conduct that adversely reflected on her fitness to practice law when, while employed at a major Boston law firm, she searched the "public" section of the firm's document management system for documents to support her claims of sex discrimination and retaliatory discharge against the firm.

The material facts are not in dispute. In April, 2004, the respondent was hired as an associate in the Boston office of a national law firm. The respondent was assigned to the employment, labor, and benefits (ELB) section of the firm. Several lawyers were partners in the ELB section, and had supervisory authority over the respondent. Shortly after beginning work, the respondent came to believe that those partners were engaged in sex discrimination against her. She also believed that one had behaved toward her in a sexually inappropriate way. In December, 2007, while still employed at the firm, the respondent filed a complaint against the firm with the Massachusetts Commission Against Discrimination.

During the respondent's tenure at the firm software called DeskSite was used to store

firm documents. When creating a document on DeskSite, a user was given the option of either (1) designating the document as private, in which case it could only be accessed by individuals with a password; or (2) "leaving [the document] available to all users by not making such a denomination." Employees at the firm often looked at documents in the "public" section of DeskSite to assist them in their work. New hires, including the respondent, were trained in use of DeskSite and its public-private distinction.

The respondent testified that she did not have enough work to keep her occupied at the firm, and she eventually came to believe that she would be laid off. Approximately six times between May, 2007, and November, 2008, she used DeskSite to search for "public" documents that might support her pending and possible future claims against the firm. The respondent was particularly curious about information related to the case of a prior employee at the firm who had sued the firm for sex discrimination and retaliatory discharge. The respondent "scrupulously tried to avoid examining or copying documents regarding her own case or that she believed were privileged." She made no effort to hide her activities, as she did not believe they were wrong. Indeed, the respondent was aware that the firm could track all of her DeskSite activities. When the respondent found a document she believed to be helpful, she either copied it or emailed it to her personal email account.

In November, 2008, the respondent found on DeskSite a transcription of a voicemail from the managing partner at one of the law firm's offices outside Massachusetts to the chairman of the Boston office. In the voicemail, the out-of-State partner expressed concern that one attorney named as a defendant in the respondent's complaint was "extremely defensive" about employment complaints, did not take such complaints seriously, and that his actions did "not reflect someone capable of exercising judgment, separating himself from his own personal involvement and possibly his own personal feelings on such matters." The respondent considered this voicemail to be a "smoking gun" in her claims against the firm.

Later that month, the respondent was informed that she was going to be laid off for economic reasons. Thereafter, on November 21, 2008, she brought the "smoking gun" voicemail transcription to the attention of a partner who had been advising the firm with

respect to her claims. The respondent was laid off a few days later, "on grounds that she had violated privacy rights and breached her duty of loyalty to the firm by accessing and copying firm documents for her own purposes."

On August 12, 2010, Bar Counsel filed a petition for discipline with the board, alleging violations of Mass. R. Prof. C. 8.4 (b) (criminal act reflecting adversely on honesty, trustworthiness, or fitness as a lawyer), (c) (dishonesty, fraud, deceit, or misrepresentation), and (h) (other conduct adversely reflecting on fitness to practice law). A hearing was held. The hearing committee found no grounds to support violations of rules 8.4 (b) or (c), but did find a violation of rule 8.4 (h). The hearing committee took the position that the respondent's "snooping into the litigation materials of an adversary," circumventing the discovery process, and viewing materials not intended for her eyes amounted to conduct adversely reflecting on her fitness to practice law. The hearing committee recommended that the respondent receive a public reprimand.

On review, the board declined to find any violation of the rules by the respondent, and dismissed the petition. According to the board, "[a]ny experienced plaintiff's lawyer would have advised [the respondent] to copy everything she could get her hands on that was freely available and pertinent to her claim."

The board's findings and recommendations are entitled to great weight, though they are not binding on this court. *In re Murray*, 455 Mass. 872, 879 (2010). As in bar discipline matters reported to the full court, I "review the board's findings and reach [my] own conclusion." See *In re Hrones*, 457 Mass. 844, 849 (2010), quoting *Matter of Fordham*, 423 Mass. 481, 487 (1996), cert. denied, 519 U.S. 1149 (1997). Here, the findings of the board are not disputed – it is the board's ultimate conclusion that is contested.

I agree with both the hearing committee and the board that the respondent cannot be thought to have violated Mass. R. Crim. P. 8.4 (b) or (c). Regarding rule 8.4 (b), the only suggestion that the respondent violated any criminal prohibitions by her actions was in Bar Counsel's own petition for discipline; no other authority has charged the respondent with a crime. Regarding rule 8.4 (c), from the beginning the respondent has been perfectly

forthright about her use of DeskSite to search for "public" documents at the firm in support of her claims. The respondent did not attempt to cover her tracks or to lie about her use of DeskSite. In short, there was no "dishonesty, fraud, deceit, or misrepresentation."

As the board notes, rule 8.4 (h) is a general catch-all provision. I am thus reluctant to find a violation of rule 8.4 (h) unless the respondent can be fairly said to have been on notice that her conduct was wrong. See *Matter of Crossen*, 450 Mass. 533, 568-569 (2008). In this regard, it is useful to consider what the respondent did not do in this case. First, the respondent did not invade anyone's privacy to obtain the documents at issue. She did not sneak into a partner's office after hours, or peek into an opposing counsel's briefcase. Compare *O'Day* v. *McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 758 (9th Cir. 1996) ("rummaging" through supervisor's desk); *Matter of Ebitz*, 8 Mass. Att'y Disc. R. 77, 78 (reciprocal discipline case from Maine) (removal of opposing counsel's file from opposing counsel's table in courtroom). Rather, she took the documents from a place that she was encouraged, and even required, to be. Second, as discussed above, the respondent did not act surreptitiously. She knew the firm monitored her activities, and made no effort to conceal them. Compare *Matter of Ebitz, supra.* Third, the board found that the respondent avoided viewing privileged or confidential information, and did not violate any consistently enforced firm policy. There is substantial evidence for such a finding. These distinctions are dispositive of the issue, as they move the respondent's conduct from a clear violation of the rules to, at the very least, a grey area, which cannot form a basis for punishment under rule 8.4 (h).

Nor can the fact that the respondent "circumvented" discovery provide a basis for punishment under rule 8.4(h). Our court has not decided a case involving the use of so-called "self-help discovery," and the practice has met with varying results in other jurisdictions. See *Pillsbury, Madison & Sutro* v. Schectman, 64 Cal. Rptr. 2d 698 (Ct. App. 1997) (surveying cases) (defining "self-help discovery" as "evidence gathering by employees for use in contemplated litigation against their soon-to-be-former employers"). See also 42 U.S.C. 2000e-3(a) (participation in investigation of discrimination as protected activity).

Where the conduct engaged in by an attorney is not clearly prohibited under our law, or even under the law of outside jurisdictions, there can be no basis for imposing an ethical sanction on an attorney who engages in it.

The facts of this case resemble those at issue in *Kempcke* v. *Monstanto Co.*, 132 F.3d 442 (8th Cir. 1998). In that case, an employee who believed he was being discriminated against due to his age was assigned a personal computer previously used by a high-ranking human resources official at the company. *Id.* at 444. In the process of deleting the prior user's files, the employee found documents helpful to his claims of age discrimination. *Id.* The court found that the documents were "innocently acquired," and that the employee's retaining them could be considered protected activity under the Federal Age Discrimination in Employment Act. *Id.* at 446, 447 (reversing grant of summary judgment to defendant employer).

As with the personal computer in *Kempcke*, the respondent here was given full access to the public space on DeskSite, including any documents her employer may have left there. That the respondent viewed the documents and found non-privileged, non-confidential information to support her claims may have been frustrating to her employer, but it does not make her an unethical attorney.

Accordingly, it is ORDERED that the petition for discipline against the respondent be, and hereby is, DISMISSED. It is further ORDERED that the entire record in this case shall be sealed, conformably with S.J.C. Rule 4:01, § 20(3)(d), and § 3.22(c)(4) of the Rules of the Board of Bar Overseers, except for this memorandum of decision and the resulting judgment, both of which are to be open for public inspection and distribution.

By the Court,

Francis X. Spina
Associate Justice

ENTERED: August 6, 2012