

Professional Liability: Punishing Effect of Rule 11 in *Keister v. PPL Corp.*

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Federal courts correct bad litigation behavior, eventually.

People take being sued personally, and lawsuits can take an emotional toll on defendants, whether as an individual or as a representative of an employer. Anger and frustration always lead to the same questions: Can we sanction them for lying? Can I get my fees (or my insurance deductible) back? Won't the court do something?

Federal courts can and do sanction attorneys for lying, failing to investigate claims and “posturing” a case to get a settlement. But sanctions are reserved for the worst offenders, and it often takes multiple violations before attorneys’ fees, costs or other monetary fines are imposed.

A Case in Point

In *Keister v. PPL Corp.*, U.S. District Court Judge Matthew W. Brann of the Middle District of Pennsylvania directed Attorney X to pay opposing counsel’s fees and costs in excess of \$103,000.

What did Attorney X, a solo practitioner in a rural Pennsylvania county, do to potentially warrant more than \$100,000 in sanctions? In a 55-page Opinion (which supplemented a 48-page summary judgment opinion), the court explained that Attorney X:

- Engaged in “litigious necromancy” by “conjuring” facts to support the age discrimination claim of his client, Ernest Keister, a 34-year employee of PPL and a union member, who worked in a unique position (*i.e.*, his job could not be compared with others) and who was neither fired nor replaced by a younger worker.
- Proceeded with the claim, in the absence of any evidence that Keister’s age was a factor in (1) his employer’s 2011 denial of a request to reevaluate his job title, duties, salary and management role or (2) the union’s decision not to support moving Keister’s position from the collective bargaining unit.
- Alleged that Keister faced “ongoing” discrimination in order to avoid dismissal of his client’s lawsuit, despite the complete absence of evidence that anyone insulted or otherwise

mistreated Keister.

- Intentionally asserted claims that were directly contradicted by Keister's testimony, failed to comply with local motion practice by failing to admit undisputed facts, and submitted documents that were "calculated" to confuse the court and opposing counsel.
- Failed to investigate the facts and observe procedural requirements, including following the union's grievance process and filing the federal action within the applicable limitations period (as established by the EEOC's denial of a claim filed by Attorney X).
- Amended the complaint for the sole purpose of forcing a mediation to settle a valueless case.
- Engaged in this conduct after receiving two (non-monetary) Rule 11 sanctions in other cases as well as a public reprimand by the Pennsylvania Disciplinary Board.

Judge Brann repeatedly stated that Rule 11 sanctions are not a "general fee-shifting device" and are not available merely because one side was successful. Sanctions were imposed because Attorney X "is simply not getting the message," despite prior federal court and state bar disciplinary reprimands. The court held that the "least severe sanctions adequate to serve the purpose" of punishing Attorney X's conduct and deterring it in the future was to award all costs and fees to the defendants.

Summary

The *Keister* ruling suggests that a Rule 11 motion should only be filed when it can be proven that opposing counsel did not have the facts to back up a client's claims and made an effort to hide the absence of a factual dispute. However, even when such proof can be found, federal courts will first award non-monetary sanctions for an attorney's first and even second offense, as happened here with Attorney X.

When facing a litigation opponent who lies to the court, it is best to prove the lie, document it, and then decide the most appropriate way to bring it to the attention of opposing counsel and, if appropriate, the court or disciplinary authorities. The work might not yield monetary sanctions in the first instance, but the federal courts may not act to stop abusive litigators until presented with multiple examples of bad conduct.

In the short run, it may seem more cost-effective to ignore an opponent's abusive actions because a judicial reprimand does not return money to the client. But in the long run, the federal courts will not protect a client from future bad acts or additional lawsuits until an attorney's repeated pattern of deception is established.

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