

June 20, 2014

HAND DELIVERED

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
Department of Civil Rights-Madison
210 Martin Luther King Jr. Blvd. Room #523
Madison, WI 53708

Re: *Natalee Cruse v. Nordic Consulting*
MEOC Case No. 20142065
EEOC Case No. 26B201400033

Dear Ms. Weatherby-Flowers:

Set forth below is Ms. Natalee Cruse's response to Nordic's Position Statement dated May 27, 2014. As part of our rebuttal we also incorporate by reference our previous position statement and original charge of discrimination.

A. A finding of probable cause is fully warranted on Ms. Cruse's claim of sexual harassment

Nordic's defense to Ms. Cruse claim of sexual harassment consists entirely of lies, half-truths and innocent remarks misleadingly taken out of context. Ms. Cruse at no time "welcomed, actively participated in, or . . . incited" Mr. Madden's behavior. (Nordic's Position Statement, p. 12) She absolutely did not text him "multiple inappropriate photographs" or make repeated comments about the "quality of sex life" or "other sexually tinged topics." (Id.) The so-called sexual "banter" was completely one-sided---it

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all came from Mr. Madden e. g. Ms. Cruse asks for time off to take an executive marketing class and he starts talking about "pole-dancing", she expresses concern about a company press release and he says "don't pee on your boobs", she tells him she is too ill to attend a work function and he asks "So morning sickness is off the table? . . . Have you ever considered dumping Brian and dating Dennis? He could really screw in your shelves!", out of nowhere he calls her into his office and starts talking about her bra color, remarking that the "guys are looking at her nipples", uninvited he tells her, out of all the women, she is his "one and only true favorite" and reminisces about what she was wearing when he first met her. He took an "upskirt photo" that showed her underwear and inner thigh, and although she vehemently objected at the time, he continued to interject the "upskirt" topic in emails and texts and a company document. She didn't "welcome" any of this; for months she tried to redirect to work-related topics and then finally fed up she did report it. She was then terminated in short order.

It is well settled that the inquiry into whether or not behavior was welcome will often turn on "credibility determinations committed to the trier of fact." *See, Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) Such is the case here. As indicated in our responses below and in our previous submissions, there are numerous factual disputes not only as to whether Madden's conduct was welcome, but also as to whether Madden engaged in certain conduct in the first instance, which Nordic now denies e.g. his telling Ms. Cruse that her breasts looked "very big----bigger than they normally do" at an out of town conference. Resolution of these disputes of fact will turn on credibility determinations that can only be made at a hearing on the merits. Accordingly, we respectfully request that the MEOC issue a finding of probable cause that sexual harassment occurred.¹

B. A finding of probable cause should also be issued on Ms. Cruse's retaliation claim

A finding of probable cause is also fully merited on Ms. Cruse's claim of retaliation. Contrary to Nordic's allegations Ms. Cruse's *alleged* performance deficiencies do *not* "predate" her complaint of sexual harassment. (Nordic's Position Statement, p. 14)

¹ Nordic argues that Ms. Cruse failed to meet the 300-day deadline for filing discrimination complaints with respect to events predating July 18, 2013. However, Ms. Cruse alleges a continuing violation with respect to her sexual harassment claim and, thus, the 300-day limit does not apply and *all* the events are timely. Moreover, assuming it did apply the cut-off date would be "events predating *June* 18, 2013" — not July 18, 2013 as Nordic claims.

Neither Mr. Madden nor Mr. Bakken met with Ms. Cruse on September 20th or "around this same time" to discuss "her performance deficiencies and need to improve" or "concerns with the marketing department." (Id. p. 7) These meetings never happened. The first time Mr. Bakken or Mr. Madden said anything to Ms. Cruse about any supposed performance deficiencies was after she complained about the sexual harassment and after Bakken had talked to Madden about the complaint on October 21st. On September 1st---just a few weeks before these performance meetings allegedly occurred---Mr. Madden gave Ms. Cruse an Incentive Stock Option Agreement (signed by Mr. Bakken) with an option to purchase 65,000 shares of stock, which he said was projected to be worth \$500,000-\$600,000. Surely, such a generous offer would never have been made if Ms. Cruse's performance were truly marginal as Nordic now claims.

Importantly, Nordic has not produced a single documented verbal or written warning, disciplinary suspension or plan for corrective action as required by Nordic's Employee Handbook. (See, Exhibit A to Nordic's Position Statement at pp. 24 and 29) This is prima facie proof that Ms. Cruse's alleged performance issues were baseless and a pretext for a retaliatory discharge. See, *Giacolletto v. Amaz Zinc, Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (Discriminatory inference permitted where an employer failed, although required by policy, to counsel an employee about performance issues and develop a plan for improvement.) *Lockard v. Fidelity Information Services*, 722 F.Supp.2d 994, 1004 (N.D.Ill. 2010), citing *Lewis v. School District #70*, 523 F.3d 730, 744 n. 9 (7th Cir. 2008) (failure to follow personnel policy supported inference of pretext) Moreover, a hearing examiner is warranted in finding that Bakken admitted to Ms. Cruse that she was fired because of her sexual harassment complaint against Mr. Madden. (See, Complainant's Position Statement, 5/28/14, p. 13)

C. Ms. Cruse's response to misstatements of fact and misleading arguments by Nordic

Set out below is Ms. Cruse's response to some of the more egregious misstatements of fact and misleading arguments by Nordic. In addressing these specific assertions we do not in way concede there is merit to any allegations not specifically addressed.

Page 2, ¶ B

"Ms. Cruse and Mr. Madden often spent time socially together outside the office with Mr. Madden's wife and Ms. Cruse's significant other."

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 4

Not true. Ms. Cruse recalls only one time when she and Brian Matsuura (her significant other) had dinner with the Maddens---which she only did as part of her professional and business related effort to have dinner with each one of her coworkers and their significant other.

Ms. Cruse and Mr. Madden "exchanged joking banter that was at times sexual in nature."

Not true. The text and email histories submitted with our previous response show that Ms. Cruse never initiated or perpetuated any banter of this kind. The sexual content was all initiated by Mr. Madden.

Page 3, ¶ D

During a gathering at a conference in New Orleans Mr. Madden was tired and "As such, he asked the entire group that was present whose bed he could take a quick nap on, and Ms. Cruse in front of others offered hers."

Not true. Mr. Madden never asked the group whose bed he could sleep in or mentioned he was going to nap. It wasn't until later in the evening that someone noticed Mr. Madden wasn't present, and a search for him began. Once again, the truth and significance of this episode is for the hearing examiner to determine by, *inter alia*, assessing the credibility of the witnesses.

"Ms. Cruse then asked Mr. Madden to close his eyes while she changed, and then stated she would sleep at the foot of the bed Mr. Madden was in."

False. Nothing of the sort happened that evening or any other occasion.

Pages 3-4, ¶ E

"The photo was not an 'upskirt photo,' but rather, was taken at a normal angle, did not show Ms. Cruse's underwear, and if anything, revealed approximately six inches of Ms. Cruses' legs above the knee."

False. The photo showed Ms. Cruse's inner thigh and underwear and was clearly "upskirt" and *not* at a "normal angle." Madden was the one who repeatedly referred to the "upskirt" photo from that day forward, so the term was his from the beginning. Ms. Cruse was very upset and told Mr. Madden as much several times, on that evening and

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 5

in the subsequent days/weeks. She demanded he delete it. The upskirt was *not* funny. It was an outrageous violation of Ms. Cruse's right to privacy under state law and sufficient *by itself* to state a claim of sexual harassment. *See, Hoestettler v. Quality Dining*, 218 F.3d 798, 807 (7th Cir. 2000) ("There is no magic number of incidents required to establish a hostile environment . . . Even one act of harassment will suffice if it is egregious.") (citations omitted)

"Ms. Cruse never mentioned anything about the photo to Mr. Bakken nor did she act upset in any way."

Ms. Cruse did not tell Mr. Bakken about the photo because she was embarrassed about it. Madden was also Nordic's president and her supervisor, as well as Bakken's business partner, and she feared retaliation.

"Escalating the joke, Ms. Cruse next sent Mr. Madden a text picture of her dog in an aroused state with his legs open while lying on his back on her couch, and said that upskirt photos of dogs were 'totally' ok."

False. Once Ms. Cruse sent a picture of a dog sleeping on his back to Mr. Madden and several others because it was cute---never as a reference to the upskirt photo and certainly not because the dog was aroused. Ms Cruse is very involved with the Humane Society and loves animals. It was a very innocent, funny pic of a friend's dog---that's it. Madden interjected the comment about upskirt photos. It did not come from Ms. Cruse.

Pages 4-5, ¶ F

"At the time, the 'pole- dancing' reference applied to a Groupon for pole-dancing they had both seen and the 'cross your leg' applied to a Nordic marketing video they had both seen."

Ms. Cruse has no idea what respondent's talking about here. She has never even seen a Groupon, much less one for pole dancing. She is unaware of the reference to the marketing video.

"Ms. Cruse expressed reservations because the goat's long hair would have to be trimmed. Another Nordic employee joked that instead of sheering the goat, she could wax the goat."

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 6

There was no "inside joke." Ms. Cruse never considered the length of a goat's hair in any context. When Madden made the comment "wax your goat" it was purely sexual and unwelcome.

"I may have forgotten to tell you: I had my period last week."

This was a single, blunt statement Ms. Cruse made in response to Madden's personal questions about morning sickness/whether she was pregnant. It was not "friendly banter" but was said in the hope of putting an end to his comments.

"Ms. Cruse often made comments to Mr. Madden regarding the status of her sex life, mentioning to him on more than one occasion that her busy schedule impacted the quality of her sex life."

Completely untrue. Ms. Cruse never made a single such comment to Mr. Madden, ever. The emoticon message Madden sent, which he characterized as, "if Brian hits the sweet spot (twice) you will turn your cell phone off and be okay with not walking as long as you can write down what turns you on and makes your triangle go through the roof" was unsolicited and *not* part of a "game."

Pages 5-6, ¶ G

"At no point during the conference was Mr. Madden intoxicated, nor did he make any comments regarding Ms. Cruse's physical attributes."

Mr. Madden was belligerently drunk and did, in fact, make the comments that her breasts "look very big-bigger than they normally do." He also asked if she was pregnant.

Ms. Cruse recalls a similar scenario around the same time when Mark Bakken asked one of the young women at Nordic whether or not she was pregnant because her "breasts looked like it". Mr. Bakken said this to Meghan, who relayed the story to Ms. Cruse. This became a supposedly 'funny' Bakken story that circulated the office for weeks.

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 7

Page 6, ¶ H

"On July 1, 2013, Nordic promoted Ms. Cruse to Vice President of Marketing."

Ms. Cruse was actually promoted June 1, 2013. It wasn't until July 11th that Mr. Madden got around to drafting the new compensation agreement, which also puts the effective date as June 1st. (Exhibit 3 to Complainant's Position Statement, 5/28/14) Respondent appears to be intentionally misleading with the promotion date. They claim it was "soon after" Ms. Cruse's promotion---supposedly July 1st---that they discovered she was "struggling" to meet performance expectations of her new position. (See, page 7, ¶ K) However, she had actually been VP of Marketing since June 1st, which gave Nordic plenty of time to provide her with feedback and document any *alleged* performance deficiencies as provided in their Employee Handbook. (Exhibit A to Nordic's Position Statement, pp. 24 and 29) Nordic did none of this, not because there wasn't time, but because there were no deficiencies. The *alleged* deficiencies were all fabricated in response to Ms. Cruse's complaint of sexual harassment. Nothing was said to her before then.

Page 6, ¶ I

"At the close of the meeting Mr. Madden commented to Ms. Cruse that a nude bra should be worn with a white shirt . . . In response to Mr. Madden's comments, Ms. Cruse laughed and said, "wow . . . I guess you know more about this stuff than I do."

Ms. Cruse did not find this incident funny. Respondent also omits the part where Mr. Madden commented how the "guys were able to look at her nipples that day." The comment was disgusting.

Page 7, ¶ K

"Soon after Ms. Cruse's promotion to Vice President Marketing, it became increasingly obvious to those working with her, and even to Ms. Cruse personally, that she was struggling to meet the performance expectations of her new position."

Completely false. Ms. Cruse was not struggling to meet performance expectations. The Marketing department had a heavy workload given available staff. (See, text, e.g. "with KE going back to school") That is all Ms. Cruse was commenting on in her text to Mr.

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 8

Madden. The text was about the quantity of work her department was responsible for---it was not about the quality of her performance, which was always excellent. It is very telling that the *only* documentation Nordic has of Ms. Cruse's alleged performance deficiencies is a message she wrote. There are no documented verbal or written warnings, disciplinary suspensions or plans for corrective action as required by Nordic's Employee Handbook. This is prima facie proof that Ms. Cruse's alleged performance issues were baseless and a pretext for a retaliatory discharge.

"Consequently, on September 20, 2013, Mr. Madden met with Ms. Cruse to discuss her performance deficiencies and the need to improve."

This never happened. September 20th was the Friday after Epic's User Group Meeting and the end of a very long week for Nordic's marketing department (and the company as a whole). Ms. Cruse believes that Madden was in the office for a total of two hours that day, and her time in the office was abbreviated as well. If they did meet, it was an impromptu meeting and consisted of nothing but praise for a very successful week of client events. Just three weeks earlier on September 1st Mr. Madden gave Ms. Cruse an Incentive Stock Option Agreement (signed by Mr. Bakken) with an option to purchase 65,000 shares of stock, which he said was projected to be worth \$500,000-\$600,000. Surely, such a generous offer would never have been made if Ms. Cruse's performance were truly marginal as Nordic now claims.

"Likewise, around this same time, Mr. Bakken also had a conversation with Ms. Cruse wherein they discussed some of his on-going issues and concerns with the marketing department which Ms. Cruse headed."

False. The first time Mr. Bakken brought up any concerns with Ms. Cruse about marketing was after her sexual harassment complaint and the conversations between him and Madden, and Madden and Ms. Cruse. Never before.

"Mr. Bakken suggested that Ms. Cruse would make a good CEO of a much smaller start-up company."

Not true. Mr. Bakken and Ms. Cruse were talking about succession planning at Nordic specifically. He was talking about wanting to retire, and asked if she thought any of the existing C-suite would be a good CEO of Nordic. He also said he'd like someone from the "next generation" of leadership to take over when he retired---someone like Ms. Cruse, he said.

Pages 7-8, ¶ L

"For the first time [September 25th] Ms. Cruse commented to someone at Nordic about the alleged Bra Incident that happened approximately two months prior . . . Ms. Cruse did not make any complaints or express any other concerns regarding Mr. Madden's interactions with her."

Misleading. Ms. Cruse also mentioned the inappropriate remarks Mr. Madden had made during their meeting that day---that he had been commenting about "his favorites" in the office (all women) but that Ms. Cruse would always be his one and only "true favorite" and that he would never forget when he first met her, that he could remember the details of what she was wearing etc. It was this incident that prompted Ms. Cruse's complaint to Peggy Bakken on the 25th. She also mentioned some of his prior behavior (the bra incident).

Page 8, ¶ M

"Mr. Bakken never mentioned the existence of situations in which he observed Mr. Madden acting inappropriately with other women."

False. Mr. Bakken mentioned Eliza Block specifically and intimated there were others as well during his conversation with Ms. Cruse on September 27, 2013.

"Ms. Cruse candidly acknowledged that she was not accomplishing as much as she had hoped, and expressed concern about going way over the marketing budget for the new sales collateral and Nordic website."

False. Mr. Bakken and Ms. Cruse did not discuss performance during this conversation. The entire meeting was focused on Mr. Madden and the things he'd said to her. And Mr. Bakken was the last person to be interested in budgets---they never had that discussion.

Pages 8-9, ¶ N

On October 21, 2013, when they were both traveling together for work, Mr. Bakken spoke to Mr. Madden about the alleged Bra Incident."

Nordic's sexual harassment policy states, "there will be a prompt and careful investigation." (Exhibit A at p. 17) October 21st was almost a whole month after Ms.

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 10

Cruse reported Mr. Madden's inappropriate sexual remarks. This is hardly 'prompt.' Casually talking to Madden about the bra incident is hardly an investigation. Nordic essentially did nothing to follow-up or investigate Ms. Cruse's allegations.

"Ms. Cruse 'swore on Hudson's [her oldest dog's] life' that she was not offended, and insisted that her comments regarding Mr. Madden's conduct during the alleged Bra Incident had been blown out of proportion by Ms. Bakken."

This is not something Ms. Cruse would say and she didn't say it. She did send Mr. Madden a text message in an attempt to repair the situation. She had complained about his inappropriate behavior and it had not gone well. He had threatened her saying "he wasn't going to protect her any longer" and he was very angry with her. Still, she sent him a nice message thanking him for meeting with her in an attempt to mend their *work* relationship. This hardly means she welcomed his sexual harassment.

Pages 9-10, ¶ O

"Mr. Sampson responded by encouraging her to stay and to resolve the performance issues she was having within the marketing department."

Eric Sampson encouraged Ms. Cruse to stay---but made no mention of any performance issues. In fact, he commented on how much he'd looked forward to working with her, how talented she was, how fortunate Nordic was to have her, etc.

Page 10, ¶ P

"While Mr. Bakken offered his assistance in resolving the identified issues and concerns, Ms. Cruse inexplicably rejected Mr. Bakken's offer."

There was no offer of help. Mr. Bakken threatened Ms. Cruse by saying she "had to fix things with Madden" immediately. His comments about the marketing department were almost offhanded, and very vague. The vast majority of this conversation focused on what Mr. Bakken said was a deteriorating relationship between him and Mr. Madden and one for which he claimed she was at fault.

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 11

Pages 10-11, ¶ R

"Failure to respond to emails from Mr. Swaminathan regarding KLAS scores---similar to a Consumer Reports for healthcare IT products and critical to Nordic's business and planning---for nearly a month;"

This was not mentioned in the termination meeting. Nor does Ms. Cruse know what it means---the allegation is conflating several different issues. Nordic appears to be making this up.

"Failure to respond for approximately sixty (60) days to Nick Daar, Senior Consultant regarding his request to sponsor a Chicago area user group meeting for Nordic's customers. When questioned about her failure to respond in a timely manner to Mr. Swaminathan, Ms. Cruse acknowledged that she would have fired herself for such conduct;"

Misleading. This situation was resolved several weeks prior to the termination meeting. Nick Daar also made a special trip to Nordic-Madison to meet Ms. Cruse in person and thank her for being so helpful.

"Failure to draft marketing documents for Shine within a reasonable time frame and up to the level of quality expected."

Not true. Nordic had an ad agency working with marketing, there was no need for Ms. Cruse to draft 'marketing documents'.

"Failure to send out nominations for the HISTalk's HISSies awards despite assurances to Mr. Swaminathan that she would handle."

Misleading. This was not mentioned during the termination meeting. More important, Ms. Cruse did the nominations.

"Failure to demonstrate progress on Nordic's new website"

Not true. Ms. Cruse provided updates in the weekly status report every single week. In mid-December, she showed the C-suite wireframes for the website with the actual design and layout.

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 12

"Failure to attend Nordic's annual leadership meeting, despite being in town."

Misleading. Ms. Cruse was on vacation and supposed to be Montana, but her dog was very sick so she decided to stay in town but still take the week off. Her vacation was approved time off.

"Failure to attend scheduled meeting with Adam Dial, Vice-President of Client Relations, during regular business hours, and instead attended Humane Society meeting."

Not true. The only meetings Ms. Cruse ever had at the Humane Society were after hours, not during the work day.

"Mismanagement of selection and purchase of new backpacks for consultants"

Not true. Madden/Bakken came up with an ill-advised scheme to buy backpacks on the black market and then illicitly embroider them with Nordic's logo. (The brand label backpack company they initially wanted to buy from would not agree to embroider the Nordic logo.) Ms. Cruse tried to talk them out of this scheme, but they went ahead and bought the backpacks anyways and the project (never completed as *they* had planned) was a big waste of money.

"Hi Peggy. I talked to Mark. While I was surprised to hear what they'd decided, I want you to know I'm okay. And that I certainly don't blame you in any way. This is for the best- not for the reasons they've cited, but in the end it's the right outcome. And in a little bit of time, everything will be alright- for me, for the marketing team, for Nordic. Don't forget how wonderful I think you are!"

This is the text Ms. Cruse sent Peggy, Mr. Bakken's wife, after he fired her. Mr. Bakken had told Ms. Cruse that Peggy was "devastated" to learn of her termination, and because Ms. Cruse knew Peggy would be worried about her, she reached out to her afterwards to let her know she was okay. This was Ms. Cruse being selfless and bigger than the situation---she was not admitting guilt or condoning what had happened. Not at all.

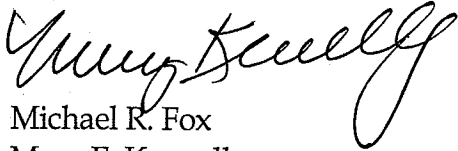
For the reasons set forth above, and the record herein, we respectfully request that the MEOC issue findings of probable cause on both Ms. Cruse's retaliation and

Ms. Annie Weatherby-Flowers
Investigator/Conciliator
June 20, 2014
Page 13

discrimination claim and this complaint be advanced to the hearing stage so that the hearing examiner can resolve all issues of material disputed by the parties.

Cordially,

FOX & FOX, S.C.



Michael R. Fox
Mary E. Kennelly

CC: Ms. Katherine E. Kenny
Ms. Lisa Stephanian Burton
Ms. Natalee Cruse