UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTINE MILLS, *et al.*, Plaintiffs, v. **JAMES BILLINGTON**, Defendant.	Civil Action No. 04-2205 (HHK)(AK)

MEMORANDUM ORDER[1]

Pending before the Court are Defendant's Motion for Sanctions for Disobeying Discovery Order, or, in the Alternative, to Compel Additional Discovery Responses ("Def.'s Mot.") [68], Plaintiffs' Opposition ("Pl.'s Opp'n") [71], and Defendant's Reply [72].

I. Background

Plaintiffs are minority employees of the Library of Congress who brought suit on behalf of themselves and "as representatives of a class of all minority job applicants and all past, current and future minority employees of the Library of Congress," alleging that Defendant James Billington, the Librarian of Congress, "engaged in an ongoing pattern and practice of discrimination against its minority employees." (2d Am. Compl. [28] ¶¶ 1-2.) Plaintiffs allege discrimination in various areas, including compensation, promotions, wage classifications, job

[1] United States District Judge Henry H. Kennedy referred this matter to the undersigned Magistrate Judge for all discovery-related motions, pursuant to Local Civil Rule 72.2(a). (*See* Order of Referral to United States Magistrate Judge [39].)

assignments, and recruitment. (*Id*. ¶ 2(a)-(d).) Plaintiff further alleges that Defendant maintains a hostile work environment for minority employees and retaliates against minority employees who bring these discriminatory practices to the attention of management. (*Id*. ¶ 2(e)-(f).)

On May 4, 2007, after Plaintiffs filed their Second Amended Class Action Complaint, Defendant propounded a set of interrogatories titled "Defendant's First Set of Interrogatories Relating to the Second Amended Complaint to Plaintiffs." (Mem. Order [44], at 2.) Asserting that Plaintiffs' responses to these interrogatories were incomplete and that Plaintiffs' objections were inadequate, Defendant filed a Motion to Compel Discovery Responses. (*Id*. 1, 3, 5.) The Court granted Defendant's Motion to Compel on September 27, 2007. (*Id*. 6.) Specifically, the Court found that Plaintiffs' answers to Interrogatory Nos. 1-15 were incomplete because they referred to Plaintiffs' earlier discovery responses. (*Id*. 2-4.) Additionally, the Court found that Plaintiffs' objections to Interrogatory Nos. 16-38 constituted an improper general objection and concluded that Plaintiffs had waived their objections to those interrogatories. (*Id*. 5.) Accordingly, the Court ordered Plaintiffs to supplement their responses to Defendant's First Set of Interrogatories Relating to the Second Amended Complaint within ten days. (*Id*. 6.)

Plaintiffs served their Amended Responses to Defendant's Interrogatories on November 12, 2007. (*See* Ex. 1 to Def.'s Mot. [68-2].) Defendant now alleges that these supplemental answers contain "the same generic, non-responsive responses (including incorporating prior interrogatory answers by reference)" as Plaintiffs' original answers. (Def.'s Mot. 5.) Defendant further alleges that "Plaintiffs' amended responses violate the Federal Rules and assert legally untenable objections." (*Id*.) In light of these alleged deficiencies, Defendant asks this Court to sanction Plaintiff by striking the class action allegations from the Second Amended Complaint.

(*Id*. 18.) Defendant also asks this Court to compel Plaintiffs to further supplement their responses to Interrogatory Nos. 1-18 and 20-37.

II. Discussion

A. Plaintiffs' Amended Responses to Defendant's Interrogatories

Federal Rule of Civil Procedure 33(b)(3) provides: "[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." The responding party must state its "grounds for objecting to an interrogatory . . . with specificity," and "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." FED. R. CIV. P. 33(b)(4).

If a party to whom an interrogatory was propounded fails to answer, the Rules provide that "a party seeking discovery may move for an order compelling an answer . . . ." FED. R. CIV. P. 37(a)(3)(B). An "evasive or incomplete" answer is treated as a failure to answer when determining whether the discovering party is permitted to file a motion to compel. Fed. R. Civ. P. 37(a)(4). The party moving to compel discovery has the burden of proving that the opposing party's answers were incomplete. *Daiflon, Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 227 (10th Cir. 1976), *cited in U.S. ex rel. El-Amin v. George Washington Univ.*, No. 95-cv-2000, 2000 WL 1763679, at *1 (D.D.C. Nov. 27, 2000).

1. *Plaintiffs' objections to Interrogatory Nos. 1-8, 12-18, 20-25, and 27-36 are inappropriate*.

a. Interrogatory Nos. 1-8 are proper contention interrogatories.

Plaintiffs object to these interrogatories because they relate to the merits of their claims against Defendants. (*See, e.g.*, Ex. 1 to Def.'s Mot. 1.) Interrogatories that seek to uncover the basis for a plaintiff's claims are called "contention interrogatories." *See Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 3 (D.D.C. 1995) ("Contention interrogatories 'ask a party: to state what it contends, . . . [or] to state all the facts upon which it bases a contention.) (citing *B. Braun Med. Inc. v. Abbott Labs.*, 155F.R.D. 525, 527 (E.D. Pa. 1994)). Rule 33(a)(2) recognizes that "the propriety of a 'contention interrogatory' may depend upon the point in the proceedings at which it is served." *Id.* at 3-4. Therefore "the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." FED. R. CIV. P. 33(a)(2).

Because discovery in this case has been ongoing for more than a year, the Court finds that it is appropriate for Plaintiffs to respond to inquiries about the basis for their claims. Therefore the Court will overrule Plaintiffs' objection that Interrogatory Nos. 1-8 relate to the merits of their claims.

b. Plaintiffs' objections to Interrogatory Nos. 16-18, 20-25, and 27-36 have been waived pursuant to this Court's September 27, 2008 Order.

In its September 27, 2008 Memorandum Order, the Court held that Plaintiffs had waived their objections to Interrogatory Nos. 16-38. (Mem. Order 5.) In direct contravention of this

order, Plaintiffs interposed new objections in response to many of these interrogatories when they submitted their amended responses.[2] Because the Court previously held that Plaintiffs had waived their objections to these interrogatories, the Court will once again order Plaintiffs to supplement their responses.

c. Plaintiffs' objections to Interrogatory Nos. 1, 2, 4, 7, 8, and 12-15 are waived as untimely.

Plaintiffs, in their Amended Responses to Defendant's Interrogatories, raise objections to Interrogatory Nos. 1, 2, 4, 7, 8 and 12-15 that they did not raise in their original responses. As stated above, any ground for objection "not stated in a timely objection is waived unless the court, for good cause, excuses the failure." FED. R. CIV. P. 33(b)(4). Not only are the objections to these interrogatories untimely, but Plaintiffs failed to demonstrate good cause for their failure to raise these objections in their original responses. Therefore the Court finds that Plaintiffs waived their objections and will order Plaintiffs to supplement their answers.

d. Plaintiff may not object to otherwise proper interrogatories on the grounds that Defendant is already aware of the answer.

Plaintiffs respond to Interrogatory Nos. 1-8 by stating that they may only be answered from documents that are in the exclusive possession of Defendant. (*See, e.g.*, Ex. 1 to Def.'s

[2] Even if the Court had not previously held that Plaintiffs waived their right to object to these interrogatories, the Court would now find that they have waived their objections on account of their failure to timely raise them. *See* FED. R. CIV. P. 33(b)(4). Moreover, the specific objections that Plaintiffs raised in their amended responses to Interrogatory Nos. 16-18, 20-25, and 27-36 are the types of objections that this Court has rejected elsewhere in this Memorandum Order. For example, Plaintiffs object to Interrogatory Nos. 21-24 and 30 on the ground that they seek information that is within the exclusive knowledge of Defendant and they object to Interrogatory Nos. 25, 28, 29, and 33-35 on the ground that Defendant is already aware of the answer. The impropriety of such objections is discussed below.

Mot. 5-6 (stating that a portion of Interrogatory No. 5 "can only be specifically answered from documents that are within the exclusive province of Defendant").) Similarly, Plaintiffs respond to Interrogatory Nos. 4 and 14 by stating that Defendant already has knowledge of the information sought, "thus making Defendant's request in part oppressive, redundant, and/or cumulative." (*Id*. 5.) While it is axiomatic that a party cannot provide information that it does not possess, a party may not relieve itself of its obligation to fully and completely respond to an interrogatory by stating that the information sought is already in the requester's possession. Moreover, each party has a duty to supplement its prior discovery responses as it becomes aware of new information. FED. R. CIV. P. 26(e)[3]. To the extent that Plaintiffs have the requisite knowledge to respond to these interrogatories, they must now do so. If Plaintiffs are still unable to respond to one or more of these interrogatories, they shall so state under oath and supplement their responses as additional information becomes available.

e. Plaintiff's Privacy Act objections are misplaced.

Plaintiffs object to Interrogatory Nos. 7, 8, 16, 28, and 29 on the basis of the Privacy Act.[4] Plaintiffs' reliance on this statute is misplaced, because the Privacy Act only applies to agencies,

[3] Rule 26(e) provides, in relevant part: "A party who . . . has responded to an interrogatory . . . -- must supplement or correct its . . . response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." FED. R. CIV. P. 26(e)(1)(A).

[4] Plaintiff did not assert its Privacy Act objections in their original interrogatory responses. However, the Court recognizes that a party does not waive its claims of privilege under the Privacy Act by failing to timely raise them. *Byrd v. Reno*, No. 96-cv-2375, 1998 WL 429676, at *5 (D.D.C. Feb. 12, 1998). Therefore the Court must address whether these objections have merit.

as that term is defined in the Freedom of Information Act[5], and therefore would not affect a private citizen's obligation to provide information during discovery. *See* 5 U.S.C. § 552a(b) (discussing the circumstances under which an agency may disclose records). Additionally, Judge Kennedy approved a consent protective order on December 6, 2007 to protect confidential information, including information that would be subject to the Privacy Act. (Consent Protective Order [52].) Therefore Plaintiffs may not use the Privacy Act as a basis for not responding to these interrogatories.

2. *Plaintiffs failed to separately and fully respond to Interrogatory Nos. 1-3, 5-16, 21-24, 26-28, and 30-36.*

As stated above, Rule 33(b)(3) states that "[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Responses to interrogatories "must be responsive, full, complete and unevasive. Insofar as practical they should be complete within themselves. Materials outside the answers and their addendum ordinarily should not be incorporated by reference." *Pilling v. General Motors Corp.*, 45 F.R.D. 366, 369 (D. Utah 1968).

Plaintiffs' supplemental responses to Interrogatory Nos. 1-3, 5-16, 21-24, 27, 28 and 30-36 are not full and complete because they refer Defendant to documents and other interrogatory answers. For example, in response to Interrogatory No. 2, Plaintiffs assert an objection and then state "[n]otwithstanding this objection, please refer to Response #1." (Ex. 1 to Def.'s Mot. 4.)

[5] Under the Freedom of Information Act, the term "agency . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1).

Similarly, the answer to Interrogatory No. 5 refers Defendant "to Responses #1, 3, 4, 17, 19, 21-27, 31." (*Id*. 6.) In their responses to Interrogatory Nos. 22 and 23, "Plaintiffs refer Defendant to response #21, and to Plaintiffs' individual EEO complaints. (*Id*. 12.) This pattern of references to documents and other interrogatory answers is repeated throughout Plaintiffs' Amended Responses to Defendant's Interrogatories.

Such non-specific references to documents and other discovery responses do not further the central aim of discovery, which is to narrow the factual issues in a case in preparation for dispositive motions and trial. More fundamentally, these responses do not comply with Rule 33(b)(3)'s requirement that the responding party answer each interrogatory "separately and fully." Accordingly the Court will order Plaintiffs to supplement their responses to these interrogatories.

3. *Plaintiffs' substantive answers to Interrogatory Nos. 1, 4, and 37 are incomplete.*

a. Interrogatory No. 1

Interrogatory No. 1 asks Plaintiffs to provide details about the "common operating procedures [that] discriminate against minority employees." (Ex. 1 to Def.'s Mot. 1.) Specifically, Defendants sought "the name or title of each practice and procedure, the date when each practice or procedure became effective; the person(s) who implemented each practice and procedure, and all facts showing that each named Plaintiff was adversely affected by each practice or procedure." (*Id*.) In response, Plaintiffs state that "[s]ince January 1, 2003, Defendant has engaged in a common operating policy, practice, or procedure that denies

Plaintiffs" career advancement and promotion opportunities, that promoted racially disparate treatment and a racially hostile work environment, and that reflects a toleration for disparate disciplinary treatment. (*Id*. 1-3.) Although their response is lengthy, it is incomplete in that it groups all of the named Plaintiffs together and therefore fails to set forth "all facts showing that each named Plaintiff was adversely affected by each policy and procedure." For example, the response does not specify the circumstances under which each individual named Plaintiff was subjected to a racially hostile work environment or whether all (as opposed to only some) of the Plaintiffs were subjected to disparate disciplinary treatment. Defendant is entitled to this level of detail so that he may adequately respond to Plaintiffs' class action allegations. Therefore Plaintiffs must supplement their response to Interrogatory No. 1.

b. Interrogatory No. 4

Interrogatory No. 4 asks Plaintiffs to identify and provide details about "Defendant's 'policy or practice' that 'pays minority employees less than Caucasian employees for the same work.'" (*Id*. 4-5.) In response, Plaintiffs identify a Caucasian employee who was allowed to perform certain duties and receive training opportunities that were not given to Plaintiffs. (*Id*. 5.) Plaintiffs also point to their allegation that "Defendant uses recruitment methods that target only persons outside of Plaintiffs protected class." (*Id*.) These answers are not responsive to Interrogatory No. 4, which specifically asks about disparities in pay between minority and Caucasian employees. Plaintiffs do "contend that Defendant has allowed a disparate plan or scheme that encourages reward and/or extra compensation to employees outside of Plaintiff's protected class" (*Id*.), but they do not supply the level of detail that Defendants seek.

Accordingly Plaintiffs must supplement their answer.

c. Interrogatory No. 37

Interrogatory No. 37 asks Plaintiffs to "[i]dentify all documents, data, data compilation(s), information or the like that Plaintiffs intend to use, considered, and/rely upon in support of their request for class certification." (*Id.* 17.) Plaintiffs respond that they "intend to use all documentation turned over in discovery related to class certification; documentation obtained from all similar federal litigation related to African American employees of the Library filed against James H. Billington, Librarian, since January 1, 2003." (*Id.*) They further respond that they "intend to use evidence obtained from cases such as *Cook v. Billington*, *supra*, and the *Howard R.L. Cook & Tommy Shaw Foundation for Ethnic Employees of the Library Foundation v. Billington*, 07cv1734-HHK." (*Id.*)

Plaintiffs' identification of "documentation from all similar federal litigation" is problematic for two reasons. First, aside from the two cases enumerated in their response, Plaintiffs do not identify the "similar federal litigation" to which they refer. This leaves Defendant to speculate which federal cases include documents that Plaintiffs intend to use in this litigation. Second, while Plaintiffs state they "intend to use *all* documentation" produced in the instant case, they only state that they intend to use "documentation" from the other cases. (Ex. 1 to Def.'s Mot. 17 (emphasis added)). Therefore Plaintiffs have failed to put Defendants on notice which specific documents from the other federal cases they intend to use. Plaintiffs' vague response to this interrogatory creates the type of guessing game that the discovery process is designed to prevent. Accordingly, Plaintiff must supply additional detail in response to

Interrogatory No. 37.

B. Defendant's Request for Sanctions

Defendant seeks sanctions pursuant to Federal Rule of Civil Procedure 37(b)(2)(A), which provides that a court may sanction a party who "fails to obey an order to provide or permit discovery." The rule provides a non-exhaustive list of sanctions, including "striking pleadings in whole or in part." FED. R. CIV. P. 37(b)(2)(A)(iii). In addition to or instead of the sanctions listed in Rule 37(b)(2), "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(b)(2)(C). When imposing sanctions, the court must ensure that the sanctions award is "proportional to the underlying offense." *Caldwell v. Ctr. for Correctional Health & Policy*, 228 F.R.D. 40, 42 (D.D.C. 2005). *See also Bonds v. D.C.*, 93 F.3d 801, 808 (D.C. Cir. 1996)("The choice of sanction should be guided by the 'concept of proportionality' between offense and sanction.")

As a sanction for Plaintiffs' failure to comply with this Court's September 27, 2007 Order, Defendant asks this Court to "strike Plaintiff's class allegations from their Second Amended Complaint." (Def.'s Mot. 15.) Although the Court has already found that Plaintiffs violated this Order by failing to adequately supplement their interrogatory responses, the Court does not believe that the sanction sought by Defendant is "proportional to the underlying offense." The Court will, however, order Plaintiffs to reimburse Defendant for the fees and costs he incurred in preparing and filing the instant motion because the Court does not believe that

Plaintiffs' failure to comply with the September 27, 2007 Order was substantially justified or that an award of fees would be unjust. The Court also cautions Plaintiffs that further violations of this Court's order and further failures to comply with their discovery obligations under the Federal Rules may result in more severe sanctions in the future.

III. Conclusion

For the foregoing reasons, it is this 28th day of July, 2008, hereby

ORDERED that Defendant's Motion for Sanctions for Disobeying Discovery Order, or, in the Alternative, to Compel Additional Discovery Responses [68] is **granted**; and it is further

ORDERED that Plaintiffs supplement their responses to Interrogatories Nos. 1-18 and 20-37 within ten days of this Memorandum Order; and it is further

ORDERED that Plaintiffs reimburse Defendant for the fees and costs he incurred on account of Plaintiffs' noncompliance with the Court's September 27, 2007 Order. Within five days of this Memorandum Order, Defendants shall submit to the Court via electronic filing a statement of the fees and costs incurred in connection with their Motion for Sanctions for Disobeying Discovery Order, or, in the Alternative, to Compel Additional Discovery Responses.

/s/
ALAN KAY
UNITED STATES MAGISTRATE JUDGE