

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI`I

EQUAL EMPLOYMENT OPPORTUNITY )	CIVIL NO. 05-00479 SPK-LEK
COMMISSION, )	
Plaintiff, )	
vs. )	
LOCKHEED MARTIN, ETC., )	
Defendant. )	
_____ )	
CHARLES DANIELS, )	CIVIL NO. 05-00496 SPK-LEK
Plaintiff, )	
vs. )	
LOCKHEED MARTIN, ETC., )	
Defendant. )	
_____ )	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'  
MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND FOR SANCTIONS

Before the Court is Plaintiff Equal Employment Opportunity Commission's ("EEOC") and Plaintiff-Intervenor Charles Daniels' (collectively "Plaintiffs") Motion to Compel Production of Documents and for Sanctions ("Motion"), filed January 31, 2007. Defendant Lockheed Martin, doing business as Lockheed Martin Logistics Management, Inc. ("Defendant"), filed its memorandum in opposition to the Motion on February 5, 2007. This matter came on for hearing on February 23, 2007. Appearing on behalf of Plaintiffs were Raymond Cheung, Esq., for EEOC and Carl Varady, Esq., for Daniels. William Ota, Esq., and Kenneth

Robbins, Esq., appeared on behalf of Defendant. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is HEREBY GRANTED IN PART and DENIED IN PART for the reasons set forth below.

#### **BACKGROUND**

Daniels is an African-American male who was formerly employed as an avionics technician for Defendant. Beginning in 2000, Daniels was allegedly subjected to racially discriminatory comments and threats by his co-workers. He complained to a supervisor, Dick Mullen, and filed a complaint with Defendant's Human Resource and EEO office. Daniels alleges that the harassers found out about his complaint during the course of Defendant's investigation and threatened him. After completing the investigation, Defendant denied that the harassment existed and denied that it created a hostile work environment.

Around March 2001, Defendant transferred Daniels to Hawai'i and, shortly thereafter, it also transferred his alleged harassers to the same facility. Daniels was again subjected to harassment and threats. He complained to his supervisor, James Gutierrez, who threatened to fire him if he filed a complaint with the EEOC. After Daniels filed his EEOC complaint, Gutierrez threatened to transfer Daniels and his harassers to Maine, where one of the co-workers he had already complained

about would be his supervisor. Daniels also alleges that Gutierrez subjected him to racially discriminatory jokes and comments. When Daniels filed a complaint with Defendant's Human Resource Department in South Carolina, Defendant allegedly retaliated by selecting him for a layoff.

On August 1, 2005, EEOC filed a complaint against Defendant on Daniels' behalf. Daniels filed a separate, but related, action against Defendant on August 4, 2005. This Court permitted Daniels to intervene in the EEOC's case and the parties stipulated to consolidate the two actions.

On May 2, 2006, Daniels filed his First Motion to Continue Trial Date and All Open Deadlines ("Motion to Continue"). The Motion to Continue was prompted by Defendant's delay in responding to Plaintiffs' January 27, 2006 and February 28, 2006 requests for production of documents. One of the items in the January 27, 2006 request sought: "Documents that pertain, relate or refer to any complaints alleging racial discrimination, including without limitation, discrimination, hostile environment and retaliation, made against you or any of your officers or employees during the period 1999 to the present." [Exh. 2 to Motion.] This Court granted the continuance and ordered Defendant to produce documents responsive to the January 27, 2006 request by May 19, 2006 and to produce a privilege log for withheld documents by June 2, 2006.

Plaintiffs filed a Motion to Compel Production of Documents on July 29, 2006 ("2006 Motion to Compel"). It addressed the parties' disputes over two types of documents: 1) email communications regarding Defendant's internal investigation of Daniels' complaints; and 2) the personnel files of nineteen of Defendant's employees who may have information relevant to Plaintiffs' case.<sup>1</sup> In an order filed September 11, 2006 ("9/11/06 Order"), this Court granted the 2006 Motion to Compel in part and denied it in part. Defendant represented that it had reviewed the requested files and that the files contained no other discrimination or harassment complaints or investigations against those persons. This Court ordered Defendant to produce a declaration or affidavit to this effect by October 11, 2006 and ruled that Defendant had adequately responded to Plaintiffs' request for the personnel files.

On November 6, 2006, Defendant produced a declaration from counsel, William Ota, stating that there was no documentation of other discrimination or harassment complaints in

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<sup>1</sup> Plaintiffs state that the nineteen employees fall into four categories, although some fall in multiple categories. The categories are: *harassers* - David Ader, Roy Colledge, James Gutierrez, James Hansen, Robert McGee, and James Glenn; *supervisors/other managers* - Gutierrez, Hansen, Glenn, Dick Mullen, James Schwecke, Mike Sartor, and Larry Cochran; *coworkers/witnesses* - Eulogio Arizala, Walter Blackwell, Thomas Carey, John Collins, Vernon Gross, Jon Kicker, and Richard Wolford; and *other discrimination victims* - Winton Wallace and Thomas Carey.

the personnel files of the nineteen employees. [Decl. of William N. Ota, Exh. 6 to Motion ("Ota Decl.").] Plaintiffs requested another declaration because Mr. Ota was not an employee of Defendant. On November 13, 2006, Regina Flint, the paralegal to Defendant's Ethics Officer, submitted a declaration stating that she had transmitted the complete personnel files to Defendant's counsel and that there was no documentation of other discrimination or harassment complaints in them. [Decl. of Regina Flint, Exh. 7 to Motion ("R. Flint Decl.").] In the instant Motion, Plaintiffs allege that Defendant's representations in connection with the 2006 Motion to Compel, and in the Ota Declaration and the R. Flint Declaration, were false.

On January 11, 2007, the parties deposed Sam Flint, who Defendant identified as a Fed. R. Civ. P. 30(b)(6) witness. Sam Flint confirmed that there was another complaint of alleged racial harassment and discrimination against an African-American employee of Lockheed Martin Logistics Management, Inc., Steven Walker. Plaintiffs argue that Defendant should have disclosed information about the Walker case in response to the January 27, 2006 discovery request. Plaintiffs have now reviewed Walker's federal court complaint and the disciplinary committee report and they argue that Defendant's failure to disclose the Walker case in response to Plaintiffs' discovery requests or the orders issued by this Court constitutes discovery fraud.

Plaintiffs state that Eulogio Arizala, Daniels' former team member and one of the nineteen identified employees, was Walker's site supervisor and was involved in the investigation into Walker's claims. Plaintiffs allege that Regina Flint had email correspondence with Walker about his case and attended his deposition in his federal action. Plaintiffs also state that Stephanie Montgomery, Defendant's Ethics Officer, Regina Flint, and Angela Miller, Defendant's in-house counsel, knew of the Walker investigation. Further, Walker's claims arose shortly after the investigation into Daniels' complaint began and many of the same investigators were involved in both cases. Daniels also asserts that the alleged discriminatory and harassing conduct is similar in both cases. Defendant, however, has refused to produce discovery regarding the Walker case.

Plaintiffs argue that the Court should sanction Defendant by: entering default against it on the issue of liability; deeming the factual allegations in the complaints established as a matter of law; striking Defendant's affirmative defenses; or extending the discovery deadline at Defendant's expense. Plaintiffs also ask for their attorneys' fees and costs incurred in bringing the instant Motion.

Plaintiffs argue that further discovery regarding the Walker case is necessary and relevant. They claim that the discovery remedy should include, *inter alia*: further discovery

regarding Defendant's patterns, practices, and policies regarding racial discrimination and harassment, as well as those of Defendant's parent companies; deposing Ms. Miller to ascertain whether there are other discrimination and harassment cases against Lockheed Martin Aircraft Logistic Center subsidiaries, including Lockheed Martin Logistics Management, Inc., from 1999 to the present; and voiding the confidentiality agreement in Walker's federal action.

Defendant filed its memorandum in opposition to the Motion on February 5, 2007. Defendant argues that the Motion is frivolous and should be denied. Defendant contends that the 9/11/06 Order only applied to the personnel files that Plaintiffs requested and these files did not contain any material related to the Walker matter, or any other complaints of harassment and/or discrimination. Defendant stated during the hearing on the Motion that, because of the sensitive nature of harassment and discrimination complaints, these documents are not kept in an employee's personnel files.

Defendant also notes that, of the nineteen employees whose personnel files Plaintiffs requested, only one - Eulogio Arizala - interacted with Walker. Defendant states that Arizala's file does not contain any documents about the Walker matter, nor does it contain any other complaints of discrimination and/or harassment. Plaintiffs have not

articulated any basis for their belief that Arizala's file does contain such information. Further, neither Walker's case nor the instant case characterizes Arizala as one of the alleged harasser. Defendant asserts that the Ota Declaration and the R. Flint Declaration are fully accurate and the fact that Regina Flint emailed Walker and attended his deposition is consistent with her statement in her declaration that the requested personnel files did not contain documents regarding other discrimination or harassment complaints. Defendant never disclaimed knowledge of other discrimination or harassment complaints; it only stated that the requested files did not contain such information. Defendant therefore argues that it did not violate the 9/11/06 Order and that Plaintiffs are not entitled to discovery sanctions.

In addition, Defendant argues that Plaintiffs are not entitled to discovery regarding the Walker matter. Defendant previously objected to Plaintiffs' discovery request for documents concerning other discrimination and/or harassment complaints and Plaintiffs have never responded to Defendant's objection. Defendant argues that the Walker materials are not relevant to the instant case. Although there may be some general similarities between the cases, the Walker matter arose after the instant case and involved different alleged perpetrators, projects, and investigations. Defendant also argues that the



Walker materials are protected by attorney-client privilege and the work product doctrine. All of its internal documents prepared in anticipation of the Walker EEOC proceedings are attorney work product and Plaintiffs have not demonstrated a substantial need for these materials. Finally, Defendant argues that, if any Walker materials are relevant and not privileged, they are not discoverable because Plaintiffs can obtain them from other sources, such as the court records of Walker's federal action or the EEOC's investigation records.

## **DISCUSSION**

### **I. Motion to Compel**

Federal Rule of Civil Procedure 26(b) provides:

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . [or] reasonably calculated to lead to the discovery of admissible evidence." Id. Relevancy, for purposes of Rule 26(b), is a broad concept that is construed liberally.

"Discovery is not limited to the issues raised only in the pleadings, but rather it is designed to define and clarify the issues." Miller v. Pancucci, 141 F.R.D. 292, 296 (C.D. Cal. 1992) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

This Court has already ruled that "the occurrence of other incidents of discrimination is relevant to the issue of

notice and the sufficiency of Lockheed's preventative programs and measures." [9/11/06 Order at 18.] The Walker matter is relevant to the instant case, even though the alleged discrimination against Walker occurred at different work sites, after the alleged discrimination against Daniels, and involved different harassers and supervisors. First, both Daniels and Walker were allegedly discriminated against and harassed because they were African-American. Daniels and Walker were employed by the same division of Lockheed Martin and the alleged discrimination and harassment against them occurred within approximately two years of each other. Thus, both Daniels and Walker arguably worked under the same employment policies, which purported to prohibit discrimination based on race. They also had at least one supervisor in common. Under the liberal construction of relevancy for purposes of discovery, this Court finds that the Walker matter is relevant to the claims and defenses in the instant case.

Defendant also argues that it is not obligated to produce the Walker documents because Plaintiffs can obtain them from other sources. The fact that Plaintiffs can obtain some of the Walker materials from court records does not relieve Defendant from its duties of disclosure. Further, counsel for EEOC in the instant matter is not charged with knowledge of, or access to, the materials from EEOC's Walker investigation.

Again, EEOC's investigation does not excuse Defendant from its discovery obligations.

This Court therefore GRANTS Plaintiffs' motion to compel production of documents and ORDERS Defendant to produce all non-privileged documents responsive Daniels' request for "[d]ocuments that pertain, relate or refer to any complaints alleging racial discrimination, including without limitation, discrimination, hostile environment and retaliation, made against [Defendant] or any of [Defendant's] officers or employees during the period 1999 to the present." Defendant shall produce these documents to Plaintiffs by March 19, 2007. If Defendant withholds any of these documents on the basis of attorney-client privilege or the work product doctrine, Defendant must describe the withheld documents in a privilege log. If, after reviewing the documents produced and the privilege log, Plaintiffs believe that any or all of the withheld documents should have been disclosed, they must file the appropriate motion at that time.

## **II. Discovery Sanctions**

Federal Rule of Civil Procedure 37 states, in pertinent part:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending

may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

Fed. R. Civ. P. 37(b)(2). This section allows courts to impose sanctions for failure to comply with the court's discovery orders. See Fed. R. Civ. P. 37(b)(2) advisory committee's note (1970 Amendment). Courts can apply Rule 37(b)(2) to enforce oral orders as well as minute orders. See Yourish v. Cal. Amplifier, 191 F.3d 983, 987 (9th Cir. 1999) (discussing Henry v. Sneiders, 490 F.2d 315 (9th Cir. 1974)). "Rule 37(b)(2) contains two standards--one general and one specific--that limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982).

Defendant argues that it did not violate the 9/11/06 Order because none of the requested personnel files contained

documents relating to the Walker matter, or any other complaints of discrimination or harassment. This is technically true. The 2006 Motion to Compel focused on personnel files because Plaintiffs apparently believed that, if such complaints existed, Defendant would include, or at least refer to, them in the employees' personnel files. At the time that Plaintiffs brought the 2006 Motion to Compel, they could not have known that Defendant does not include discrimination and harassment complaints in their employees' personnel files.

Daniels' first request for production of documents specifically requested: "Documents that pertain, relate or refer to any complaints alleging racial discrimination, including without limitation, discrimination, hostile environment and retaliation, made against [Defendant] or any of [Defendant's] officers or employees during the period 1999 to the present." [Exh. 2 to Motion.] Defendant objected to this request. The Court addressed Daniels' first request for production of documents at a discovery conference on May 16, 2006 and issued a minute order ("5/16/06 Order") requiring Defendant to produce documents responsive to Daniels' first request for production of documents. Defendant should have produced documents relating to the Walker matter in response to Daniels' first request for production of documents. Defendant's failure to disclose the existence of the Walker complaint, as well as Defendant's failure

to disclose documents relating thereto, violated this Court's 5/16/06 Order. This Court therefore finds that sanctions are warranted and now turns to the issue of what sanctions are appropriate.

Plaintiffs first argue that this Court should: enter default against Defendant on the issue of liability; deem the factual allegations in the complaints established as a matter of law; or strike Defendant's affirmative defenses. Default is a terminating sanction and the establishment of all factual allegations or the striking of Defendant's affirmative defenses would also effectively resolve the case in Plaintiffs' favor. This Court cannot impose such harsh sanctions as "mere penalties". See United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980) (quoting Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979)). A court's use of sanctions must be tempered by due process. See id. Thus, the harshest sanctions are inappropriate if the failure to comply was due to a party's inability to comply or to circumstances beyond the party's control. See id. In order to warrant terminating sanctions, the party's conduct must have been "due to willfulness, fault, or bad faith." See Computer Task Group, Inc. v. Broby, 364 F.3d 1112, 1115 (9th Cir. 2004) (citations and quotation marks omitted).

Defendant's failure to disclose the Walker matter, and any other complaints of discrimination or harassment that may exist, does suggest an amount of gamesmanship on Defendant's part. There is, however, no proof in the record that the failure was willful or in bad faith. This Court therefore finds that terminating sanctions are not appropriate in this case. Plaintiffs' request for default, establishment of the complaints' factual allegations, or striking of Defendant's affirmative defenses is therefore DENIED.

Plaintiffs also ask the Court to extend the discovery deadline at Defendant's expense. The Court acknowledges that further discovery may be necessary to explore the Walker matter, and any other cases of discrimination or harassment that Defendant may disclose pursuant to this order, but Plaintiffs' request to extend the discovery deadline is premature because Plaintiffs already have until April 6, 2007 to conduct discovery. Once Plaintiffs have reviewed Defendant's production, they will have a better idea of what further discovery they need to conduct and how long such additional discovery will take. Plaintiffs' request to extend the discovery deadline is therefore DENIED WITHOUT PREJUDICE.

Finally, Plaintiffs seek their attorneys' fees and costs incurred in bringing the instant Motion. In lieu of, or in addition to, any of the sanctions listed in Rule 37(b)(2),

the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2). Defendant's failure to comply with the 5/16/06 Order was not substantially justified and there are no circumstances that would make an award of attorney's fees and costs unjust. This Court therefore GRANTS Plaintiffs' request for attorneys' fees and costs and ORDERS Defendant to pay Plaintiffs' reasonable expenses incurred in connection with the instant Motion, as well as the 2006 Motion to Compel.

Defendant's failure to produce documents regarding other discrimination and harassment complaints, as required by the 5/16/06 Order, caused Plaintiffs to file both the instant Motion and the 2006 Motion to Compel. The fact that the 2006 Motion to Compel focused upon personnel files is irrelevant because, as noted above, Plaintiffs reasonably believed that a record of such complaints would be reflected in the personnel files. Thus, the sanction of paying Plaintiffs' expenses for the two motions is specifically related to Defendant's failure to disclose other cases of alleged racial discrimination and/or harassment.

Plaintiffs shall file declarations with supporting documents establishing their attorney's fees and costs incurred in connection with the instant Motion and the 2006 Motion to



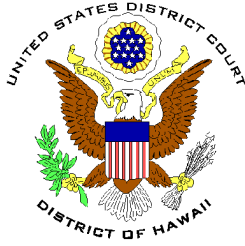
Compel by March 23, 2007. Plaintiffs may include attorney's fees and costs incurred in drafting the motions and reply memoranda, if any, and in appearing at the hearings on the motions. Plaintiffs' submissions should contain the information required by Local Rule LR54.3(d) and (e). Defendant may file a memorandum addressing the reasonableness of the requested amount of attorney's fees and costs by March 30, 2007. The Court will issue a ruling thereafter.

### **CONCLUSION**

On the basis of the foregoing, Plaintiffs' Motion to Compel Production of Documents and for Sanctions, filed January 31, 2007, is HEREBY GRANTED IN PART and DENIED IN PART. This Court GRANTS Plaintiffs' request to compel the production of documents. Defendant shall produce the documents described in this order by March 19, 2007. This Court DENIES Plaintiffs' request for default, establishment of the complaints' factual allegations, and striking of Defendant's affirmative defenses. Plaintiffs' request for an extension of the discovery deadline is DENIED WITHOUT PREJUDICE. Finally, this Court GRANTS Plaintiffs' request for attorney's fees and costs associated with the instant Motion and with the 2006 Motion to Compel. Plaintiffs shall file documentation of the fees and costs incurred by March 23, 2007. Defendants shall file any memorandum contesting the amount of the award by March 30, 2007.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAI`I, March 1, 2007.



/S/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States Magistrate Judge

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. LOCKHEED MARTIN,  
ETC; CIVIL NO. 05-00479 SPK-LEK; CHARLES DANIELS V. LOCKHEED  
MARTIN, ETC.; CIVIL NO. 05-00496 SPK-LEK**