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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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U.S. EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)
)
Plaintiff,)
)
v.)
REPUBLIC SERVICES, INC., et al.,)
Defendants.)

2:04-cv-1352-DAE-LRL

ORDER

Before the court is plaintiff EEOC’s Motion for Contempt and to Compel Responses to Discovery and Request for Sanctions (#136), defendants’ Opposition (#142), and the EEOC’s Reply (#143). The EEOC moves the court to compel answers to an interrogatory and the production of documents from defendants, which oppose the motion on a variety of grounds.

BACKGROUND

This is an employment discrimination action brought by United States Equal Employment Opportunity Commission (the “EEOC”) under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*, (the “ADEA”), to correct unlawful employment practices and to provide relief to persons terminated from employment with defendants Republic Services, Inc. (“RSI”) and/or Republic Silver State Disposal, Inc. (“RSSD”) (collectively “defendants”) and/or denied the opportunity to transfer on the basis of their age, forty (40) and above. (Amended Compl. (#2) at 1.)

In January 2005, the EEOC began propounding Requests for Production of documents and interrogatories to defendants. (Reply (#143) at 1.) In mid-2006, it filed two motions to compel complete responses to a variety of its document requests and interrogatories (##28,55). On September

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1 18, 2006, the court held a hearing on the motions and granted them eight days later, ordering:

2 1) Defendants shall, by October 19, 2006, answer Interrogatory 13 from the EEOC's
3 Second Interrogatories and produce raw data for each program identified therein in
4 response to Request for Production No. 1 from Document Request Set 4;

5 2) The relevant time period for discovery purposes is January 1, 2000 to the present;

6 3) In the event the parties are unable to stipulate to a proposed confidentiality order, the
7 parties shall, not later than October 5, 2006, each file a proposed protective order
8 regarding confidentiality, from which the court will fashion the governing confidentiality
9 order;

10 4) Defendants shall pay the EEOC \$2,280.00 as the reasonable attorney's fees and costs
11 incurred in making the Motion to Compel (#28).

12 (Exh. 1 to Mot. (#136) at 6; Order (#88)).

13 In the Order (#88), the court found that, "In regard to remaining discovery requests, defendants
14 report that they have produced all documents responsive to the EEOC's document requests, 'to the
15 extent they exist.'" (Order (#88) at 3.) As noted in the Order (#88), courts cannot compel production
16 of documents that do not exist. (*Id.*) However, the court recognized that, "The EEOC proffered
17 sufficient information . . . to call into question the accuracy of defendants' representation that certain
18 documents don't exist." (*Id.* at 3.) Accordingly, it permitted the EEOC to conduct discovery "into
19 whether defendants are adequately supplementing or otherwise responding to those requests to which
20 defendants have responded, 'to the extent that responsive documents exist and are located during
21 discovery, they will be produced.'" (*Id.* at 3-4.)

22 ANALYSIS

23 Although defendants produced budget-related documents in May 2007 and June 2007, the EEOC
24 now contends that they should have been produced much earlier and that the "delay" in producing them
25 violated the dictates of the Order (#88), *i.e.*, that "[t]he parties have a duty to provide true, explicit,
26 responsive, and complete and candid answers to discovery, and their attorneys have a continuing duty
to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures." (Exh.
1 to Mot. (#136) at 3; Order (#88) at 3 (quoting *Wagner v. Dryvitt Sys.*, 208 F.R.D. 606, 609-10 (D. Neb.
2001)).) The EEOC also states that defendants delayed in producing other categories of documents
responsive to its Document Request Set 1 for months after the September 18, 2006 hearing. (Mot.

1 (#136) at 2.) It notes that defendants did not produce job position data until late January 2007, and
2 produced incomplete foremen bonus information in June 2007. (*Id.*) Lastly, the EEOC claims that
3 defendants failed to produce other requested documents in accordance with the Order (#88). (*Id.*)

4 Defendants respond that they complied with the Order (#88) and timely provided supplemental
5 production of discovery. (Opp'n (#142) at 2.) They also point out that since the Order (#88) was
6 entered, the EEOC has propounded additional discovery requests (Sixth, Seventh and Eighth Sets of
7 Requests for Production). (*Id.*) According to defendants, the materials requested in these most recent
8 requests are not relevant or their relevancy is outweighed by the burden of disclosure. (*Id.*) As to the
9 contempt request, defendants contend it is without merit because the budget documents which the
10 EEOC claims were so delayed are not responsive to the previous document requests that were the
11 subject of the Order (#88). (*Id.* at 2-3.)

12 The court has broad discretion in controlling discovery. *Little v. City of Seattle*, 863 F.2d 681,
13 685 (9th Cir. 1988). Relevance within the meaning of Fed. R. Civ. P. 26(b)(1) is considerably broader
14 than relevance for trial purposes. For discovery purposes, relevance means only that the materials
15 sought are reasonably calculated to lead to the discovery of admissible evidence. *See Oppenheimer*
16 *Fund v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted); *see also* Fed. R. Civ. P. 26(b)(1).
17 However, a court may limit discovery if it determines, among other things, that the discovery is
18 unreasonably cumulative or duplicative, obtainable from another source that is more convenient, less
19 burdensome, or less expensive, or the burden or expense of the proposed discovery outweighs its likely
20 benefit. Fed. R. Civ. P. 26(b)(2).

21 **I. Document Request Nos. 74 and 75 of Set 1 and Document Request No. 20 of Set 3 (Budget-**
22 **Related Documents)**

23 The EEOC first claims that defendants failed to supplement responses to Requests 74 and 75
24 of Set 1 as well as Request 20 of Set 3 for nine months after the Order (#88). As noted above, parties
25 have a continuing responsibility to provide responsive answers to discovery. *Wagner*, 208 F.R.D. at
26 609-10.

1 Requests 74 and 75 of Set 1, issued on January 21, 2005, sought evidence of “documents” and
2 “communications” regarding the “anticipated” financial gains and losses, respectively, from each of
3 defendants’ decisions resulting in the terminations of eight class members and any other salaried
4 employees ages forty (40) and above. (Mot. (#136) at 3.) Request 20 of Set 3, issued January 27, 2006,
5 similarly asked defendants to identify all documents supporting defendants’ saved costs as a result of
6 consolidation of shifts from January 2000 through present. (*Id.* at 3; Reply (#143) at 1.) Although these
7 requests did not specifically provide that budget-related documents would be responsive, there is
8 evidence that defendants’ general managers deposed by the EEOC in early 2006 testified that such
9 documents would reflect cost savings or advantages of operational decisions resulting in various
10 terminations of the EEOC’s class members. (Exh. 3 to Mot. (#136) at 27:4-14.) Yet RSI and RSSD
11 responded that no responsive documentation existed or ever existed. (Mot. (#136) at 3.)

12 On September 18, 2006, during the hearing on the EEOC’s two motions to compel (##28,55),
13 counsel for the EEOC implied that budget documents would in fact be responsive to the requests. (Exh.
14 3 to Mot. (#136) at 27:4-14.) Almost four months later, on January 11 and 17, 2007, counsel for the
15 EEOC sent counsel for defendants letters asking for budget documents and indicated that they were
16 identified at the September 18, 2006 hearing. (Exh. 5 to Mot. (#136) at 11.) Counsel for defendants
17 responded that neither RSI nor RSSD retained copies of such documents. (*Id.* at 25.)

18 On April 19, 2007, the EEOC issued its sixth set of document requests, Request One of which
19 specifically asked defendants to produce budget documents exchanged between RSI and RSSD from
20 August 1997, when RSI purchased RSSD, through the present. (Mot. (#136) at 4.) RSI and RSSD
21 objected, stating that the requested time frame was too broad and the requested information irrelevant.
22 (*Id.*) RSI also stated that, to the extent the request sought current year (2007) budget data, such data was
23 proprietary in nature and therefore would not be released absent a protective order. (*Id.*) Despite
24 counsel for defendants’ earlier claim that no budget-related documents were retained by defendants,
25 defendants produced same documents on May 29, 2007 and, soon after a meet and confer letter was sent
26 by counsel to EEOC in early June, produced additional budget documents on June 11, 2007, *i.e.*, the

1 discovery cut-off date. (*Id.*)

2 As the above suggests, defendants should have been aware that budget-related documents were
3 responsive to the Set 1 and Set 3 requests once the general managers deposed by the EEOC stated that
4 those documents would reflect cost savings resulting from the termination of EEOC class members.
5 (*See* Exh. 3 to Mot. (#136) at 27:4-14.) If this was insufficient notice, defendants were reminded of the
6 responsiveness of the budget-related documents during the September 18, 2006 hearing on the EEOC's
7 two motions to compel (##28,55), and were again reminded in January 2007. (*Id.*) Therefore, although
8 defendants might not have retained budget-related documents and had to produce them from scratch,
9 it seems unlikely that this process would take a year-and-a-half (from the depositions), nine months
10 (from the September 2006 hearing), or even five months (from the January 2007 letters). This,
11 particularly when RSI and RSSD shared an accounting system (*i.e.*, Larson) and RSI apparently had
12 accounting back-up data available to it. (9/18/06 Hearing Transcript at 25-7.)

13 As the budget documents were produced before the discovery cut-off date, however, the court
14 will not impose evidentiary and/or terminating sanctions on defendants. Instead, defendants will be
15 required to pay the reasonable expenses, including attorney's fees and costs, caused by their failure to
16 comply with the Order (#88). *See* Fed. R. Civ. P. 37(b)(2). The EEOC will have ten (10) days from
17 the date of this order to file an affidavit of such fees and costs. The court will deny the EEOC's
18 contempt request. The Order (#88), referred to in the request, did not specifically mention budget-
19 related documents.¹

20 **II. Document Request No. 2 of Set 6 (Three-Man Trucks)**

21 The EEOC next argues that RSI improperly withheld responsive documents to Request 2 of Set
22 6, which asked defendants to produce all documents reflecting financial losses attributable to the use

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24 ¹ The EEOC also claims that defendants abused the discovery process and violated the
25 court's Order (#88) by refusing to provide current year (2007) budget-related documents. (Reply
26 (#143) at 5.) However, the Order (#88) stated that the relevant time period for discovery purposes
was "January 1, 2000 to the present." Because the Order was issued on September 26, 2006, the
relevant time period for budget-related documents ended September 26, 2006.

1 of three-man trucks at RSI's residential department from 1999 to present. (Mot. (#136) at 8-10.) It
2 claims that these documents are relevant to whether EEOC class member Jimmy Hilton ("Hilton") was
3 fired because the routing department, in which Hilton worked, was responsible for the failure of the
4 three-man truck experiment. (*Id.* at 9.) Defendants respond that these documents are not relevant
5 because there is no evidence that Hilton had supervisory authority over, or had any input into, the
6 staffing of trucks for the residential department. (Opp'n (#142) at 9.)

7 Defendants are required to provide documents responsive to any request "unless it is clear that
8 the information sought can have no possible bearing on the subject of the subject matter of the action."
9 *Snowden v. Connaught*, 137 F.R.D. 325, 329 (D. Kan. 1991); *see also Jackson v. Montgomery Ward*
10 *& Co.*, 173 F.R.D. 524, 528 (D. Nev. 1997) ("Under the Federal Rules, the scope of discovery should
11 be allowed unless the information has no conceivable bearing on the case."). Here, RSSD General
12 Manager Joe Knobluck ("Knobluck") testified that another RSSD employee, Charles Holloway
13 ("Holloway"), was fired due to routing mistakes in the three-man truck experiment. (Exh. 9 to Mot.
14 (#136) at 203:11-13.) Knobluck said that defendants lost \$1.5 million because of the routing
15 department run by Hilton and Holloway, and that Holloway was fired because of that loss. (Exh. 9 to
16 Mot. (#136) at 204:6-17.) This information is sufficient to demonstrate that the requested documents
17 may have some bearing on the case. While neither Knobluck nor Holloway testified that Hilton was
18 fired due to the routing mistakes, it follows from the above testimony that Hilton, like Holloway, may
19 have been fired because of them.

20 Defendants shall therefore provide documents from January 1, 1999 through December 31, 2006
21 (Holloway was fired in 2000, when residential trucks went back to two-man shifts (Exh. 10 to Mot.
22 (#136) at 45:12-16.), which reflect or refer to financial losses attributable to three-man trucks at RSI's
23 residential department, even if they do not specifically mention the routing department.

24 **III. Document Request No. 22 of Set 6 (Declining Balance Budget Sheets)**

25 The EEOC claims that defendants improperly objected to its request for "declining balance
26 budget sheets" for each foreman at each of defendants' facilities from August 1997 to present. (Mot.

1 (#136) at 11-12.) It contends that these documents are necessary to determine whether foremen were
2 terminated because of difficulty using company computer software. (*Id.* at 11.) Defendants aver that
3 this evidence is not relevant as foremen were not terminated for the reason cited by the EEOC. (Opp'n
4 (#142) at 10-11.)

5 Since there is no evidence defendants fired foremen due to their lack of computer skills,
6 compelling defendants to disclose copies of declining balance budget sheets in discovery is not justified
7 based on computer-related performance issues. However, to the extent that these forms contain other
8 performance information, which it appears they do, they may help explain why foremen class members
9 were fired. As such, defendants shall provide the requested information for January 1, 2000 through
10 December 31, 2006. *See Snowden*, 137 F.R.D. at 329 (“[U]nless it is clear that the information sought
11 can have no possible bearing on the subject of the subject matter of the action.”).

12 **IV. Document Request No. 23 of Set 6 (Worker’s Compensation Administration)**

13 In this request, the EEOC asked for all documents reflecting communications between
14 defendants and their third-party worker’s compensation administrator pertaining to Louis Buster
15 Thomas (“Thomas”), Michael Barnes (“Barnes”), and any other employee who defendants contend
16 stopped working for them after going through the worker’s compensation process. (Mot. (#136) at 12.)
17 The EEOC claims that defendants improperly objected to these requests, arguing that the documents
18 (1) were relied on by defendants’ deposition witnesses in preparing for their deposition testimony and
19 (2) may demonstrate that, even though some employees accepted training, the decision to fire them was
20 allegedly made beforehand, the training being forced upon them as opposed to a return to work. (*Id.* at
21 12-14;Exh. 11 to Mot. (#136) at 13:18-14:25.)

22 Defendants maintain that the requested documents are not relevant, are difficult to obtain and
23 are too broad in scope because no time frame was given by the EEOC. (Opp’n (#142) at 12-13.)
24 However, the relevant time frame determined by the court in its Order (#88) should guide defendants
25 in their response to this request. Furthermore, relevancy has been established. The EEOC provided
26 documentation that defendants’ worker’s compensation manager authorized the third-party

1 administrator to “get rid” of EEOC class member Barnes: “Jeff Romeo has given authority up too [sic]
2 \$15k to get rid of this guy. Please do your best for the buyout. I want his file shut down.” (Exh. 4 to
3 Exh. 11 to Mot. (#136).) Lastly, defendants have shown that the requested communications are not
4 overly difficult to obtain. Defendants’ worker’s compensation manager, Romeo L. Vellutini III, was
5 able to obtain documents from the third-party administrator’s website within fifteen minutes of being
6 asked during deposition. (Exh. 3 to Reply (#143) at 13:18-14:20.)

7 Nevertheless, defendants have identified only seventy-five (75) employees (including Barnes
8 and Thomas) whose employment ended as a result of worker’s compensation injury/vocational
9 rehabilitation. (Opp’n (#143) at 13.) Accordingly, defendants shall provide the requested information
10 for those seventy-five (75) employees. *See* Fed. R. Civ. P. 26(b)(2)(B), ©) (a court may limit discovery
11 if it determines, among other things, that the discovery is unreasonably cumulative or duplicative,
12 obtainable from another source that is more convenient, less burdensome, or less expensive, or the
13 burden or expense of the proposed discovery outweighs its likely benefit).

14 **V. Document Request No. 24 of Set 6 (Foremen Incentive Program)**

15 The EEOC next argues that defendants violated discovery rules by failing to provide
16 documentation in response to a request for documents pertaining to the Foremen Incentive Program
17 from August 1997 through present. (Mot. (#136) at 14-16.) Defendants allege that RSSD “has
18 produced relevant documents” in response to this request and that the motion “does not identify a basis
19 for claiming that is [sic] has not received all relevant and existing documents.” (Opp’n (#142) at 14.)

20 The EEOC acknowledges that defendants have produced some of the requested documents,
21 namely those from years 2002 and 2005 in its May 30, 2007 amended response to the request, as well
22 as five more documents pertaining to 2004 as part of its June 11, 2007 supplemental response. (Mot.
23 (#136) at 15; Reply (#143) at 11.) However, as the EEOC points out, defendants offer no argument
24 regarding their failure to produce a complete set of documents for 2002 and 2004-2005, or any
25 documents for the years 2000-2001, 2003, or 2006. (Reply (#143) at 11.) Foremen Incentive Program
26 documentation is relevant insofar as it allows the EEOC to compare the performance of class members

1 with employees who were not terminated. Therefore, the court compels production of the requested
2 documents from January 1, 2000 through December 31, 2006.

3 **VI. Document Request No. 1 of Set 7 (Attendance History)**

4 The EEOC contends that defendants improperly objected to its request for the “attendance
5 history” of each mechanic who worked at the Henderson Transfer Station (“HTS”) for the period
6 January 1, 2000 to present. (Mot. (#136) at 16-18.) The request was made because class member Albert
7 Lee Vassar (“Vassar”) was terminated, in part, for accumulating overtime and claims that his supervisor
8 authorized younger employees to work more overtime than him or did not discipline younger employees
9 for working overtime. (*Id.*; Reply (#143) at 12; Exh. 4 to Opp’n (#142).) Defendants maintain that
10 attendance histories are not relevant because they do not indicate on their face whether overtime worked
11 by other HTS mechanics was “unnecessary” or was considered to be an example of “poor performance,”
12 as was indicated on Vassar’s termination letter. (Opp’n (#142) at 14-15, Exh. 4.)

13 All parties are entitled to reasonable access to “all evidence bearing on the controversy between
14 them, including that in the control of adverse parties.” *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 91 F.R.D.
15 574, 576 (S.D.N.Y. 1981). Here, the requested documents may demonstrate whether other mechanics
16 worked significantly more overtime hours than Vassar yet were not disciplined. A comparison of total
17 number of overtime hours worked would be significant because Vassar was fired partly due to an extra
18 half-hour of work on one occasion just prior to his termination. Accordingly, the court orders
19 defendants produce the requested documents from January 1, 2000 through December 31, 2006.

20 **VII. Document Requests Nos. 2-8 of Set 8 (Personnel Files)**

21 The EEOC issued its eighth set of requests by mail on May 8, 2007, making responses due on
22 June 11, 2007, the last day of discovery. (Reply (#143) at 15.) In these requests, it sought production
23 of personnel files for employees disciplined or fired for poor performance and for those who received
24 traffic tickets or were involved in traffic accidents while on duty. (Mot. (#136) at 18-23.) Defendants
25 object on grounds these requests would amount to well over 1,000 documents. (Opp’n (#142) at 15-22.)
26 However, the documents are relevant and federal courts have ordered similar-sized productions in other

1 cases. *See, e.g., EEOC v. Citicorp Diners Club*, 985 F.2d 1036, 1040 (10th Cir. 1993) (ordering the
2 production of employee information of about 1,100 people despite the potential need to look at
3 employee files, interview past or present employees and hire two employees for six months, because
4 the non-moving party failed to show that production would unduly disrupt and seriously hinder normal
5 operations of business and failed to provide the court with specific cost estimates). Therefore, the court
6 will order defendants to produce the requested documents from January 1, 2000 through December 31,
7 2006.

8 **VIII. Interrogatory No. 7 (Relationship between RSI and RSSD)**

9 Lastly, the EEOC claims that defendants' responses to Interrogatory No. 7, which asked
10 defendants to describe in detail the degree to which RSI and RSSD have financial control over each
11 other, should be supplemented. (Mot. (#136) at 25.) Defendants argue that the responses were
12 adequate because the EEOC already had the opportunity in depositions to explore with RSSD's former
13 President, Steve Kalish, and RSSD's Controller, Robert Kneesel, the nature of the financial relationship
14 between the parties. (Opp'n (#142) at 22.)

15 Unless excused by court order, a requested party must provide relevant discovery regardless of
16 whether it is already available to the requesting party. *See Fed. Deposit Ins. Corp. v. Renda*, 126 F.R.D.
17 70, 72 (D. Kan. 1989) (defendant's refusal to produce documents improper, as plaintiffs are entitled to
18 review those documents which are in defendant's control regardless of whether plaintiffs are in
19 possession of certain documents which they requested from defendants); *see also Westhemeco v. New*
20 *Hampshire Ins. Co.*, 82 F.R.D. 702, 710 (S.D.N.Y. 1979) (plaintiff's possession of requested documents
21 does not preclude plaintiff's request that defendant identify them, absent a showing of bad faith or harassment).

22 In this case, although the EEOC has already deposed RSSD's President and Controller,
23 defendants provided nearly identical and very limited responses to Interrogatory No. 7, only stating that
24 RSSD was a wholly-owned subsidiary of RSI and that the entities maintain separate payrolls, are
25 identified with discrete federal tax identification numbers and maintain separate bank accounts. (Mot.
26 (#136) at 25.) This minimal response does not provide sufficient detail regarding the degree to which

1 the parties overlap or otherwise exercise financial control over one another. The court therefore will
2 order defendants to supplement their answers to Interrogatory No. 7.

3 Accordingly, and for good cause shown,

4 IT IS ORDERED that Plaintiff's Motion for Contempt and to Compel Responses to Discovery
5 and Request for Sanctions (#136) is GRANTED to the following extent:

6 1. Defendants shall pay the reasonable expenses, including attorney's fees and costs, incurred
7 by the EEOC due to defendants' failure to provide the EEOC with budget-related documents pursuant
8 to the Order (#88). The EEOC will have ten (10) days from the date of this order to file an affidavit of
9 fees and costs.

10 2. Defendants shall, not later than **September 26, 2007**, provide to the EEOC documents which
11 reflect or refer to financial losses attributable to three-man trucks at RSI's residential department, for
12 the period January 1, 1999 through December 31, 2006.

13 3. Defendants shall, not later than **September 26, 2007**, provide to the EEOC "declining
14 balance budget sheets" for each foreman at each of defendants' facilities, for the period January 1, 2000
15 through December 31, 2006.

16 4. Defendants shall, not later than **September 26, 2007**, provide to the EEOC all documents
17 reflecting communications between defendants and their third-party worker's compensation
18 administrator pertaining to the seventy-five (75) employees (including Barnes and Thomas) whose
19 employment ended as a result of worker's compensation injury/vocational rehabilitation.

20 5. Defendants shall, not later than **September 26, 2007**, provide to the EEOC all Foremen
21 Incentive Program documentation, for the period January 1, 2000 through December 31, 2006.

22 6. Defendants shall, not later than **September 26, 2007**, provide to the EEOC the "attendance
23 history" of each mechanic who worked at the Henderson Transfer Station ("HTS"), for the period
24 January 1, 2000 through December 31, 2006.

25 7. Defendants shall, not later than **September 26, 2007**, provide to the EEOC the personnel files
26 of employees disciplined or fired for poor performance and for those who received traffic tickets or were

1 involved in traffic accidents while on duty, for the period January 31, 2000 through December 31, 2006.

2 8. Defendants shall supplement their answers to Interrogatory No. 7 not later than **September**
3 **26, 2007.**

4 IT IS FURTHER ORDERED that in all other respects the Motion (#136) is denied.

5 DATED this 13th day of September, 2007.

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LAWRENCE R. LEAVITT
UNITED STATES MAGISTRATE JUDGE

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