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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

RIVIERA OPERATING CORP.,

Defendant.

2:04-cv-01257-RLH-LRL

ORDER

Before the court is plaintiff’s Motion to Compel (# 39), defendant’s Opposition (# 44), and plaintiff’s Reply (# 49). This action, which is brought under Title VII and the ADEA, alleges that certain individuals and a class of people similarly situated were unlawfully retaliated against for having participated as witnesses in the EEOC’s enforcement efforts against defendant. The EEOC asks the court to compel defendant to identify all former employees rehired from January 2003, produce all documents prepared by Riviera’s video surveillance operators, and produce the source tapes that were used to make a compilation tape of the charging parties’ alleged misdeeds. Defendant responds that the Motion is untimely and does not comply with Local Rules. Additionally, defendant argues the requests are irrelevant, burdensome, oppressive, and overly broad.

I. Procedural Arguments

Defendant argues that the instant motion is untimely because a considerable amount of time elapsed between the date the responses were produced and the initial meet and confer. Defendant also claims untimeliness because the instant motion was filed after the discovery cut-off date and the dispositive motion deadline. The court in *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999), held that if a delay results in “substantial prejudice” to the party to whom the motion was

1 directed, then a court may hold that the requesting party has waived the right to compel response and
2 disclosure. In *Gault* the court had already made a ruling on a summary judgment motion, and the
3 request was filed on the eve of trial. Hence there was prejudice to the responding party. Here, while
4 a summary judgment motion has been filed, the court has not yet made a ruling. Additionally, no trial
5 date has yet been set. Consequently, there is no prejudice to the responding party. Further, the EEOC
6 provided the court with acceptable reasons for the delays.

7 Defendant also argues that the EEOC's motion does not satisfy the requirements of Fed. R. Civ.
8 P. 37(a)(2)(B) and Local Rule 26-7. Local Rule 26-7(a) requires that all discovery motions set forth
9 the full text of the discovery sought. The text, however, may be attached as an exhibit; it need not be
10 reproduced in the body of the motion. The EEOC attached the text of their requests in Exhibits I, J, and
11 K. Thus, the requirement has been met.

12 Defendant objects to the sufficiency of counsel's certification that a good faith effort to meet
13 and confer took place. Specifically, defendant points to the fact that not all of the parties'
14 communications were attached to the instant motion, and argues that the certification does not
15 adequately demonstrate "performance." Defendant further contends that the communications, the
16 inadequate certification, along with defense counsel's own declaration, show that the EEOC did not
17 engage in meaningful discussions. The EEOC claims that its counsel's declaration and accompanying
18 exhibits set forth all the details of "who, what, where, and when." Reply (# 49) at 5. A meaningful
19 meet and confer does not require that the parties agree, only that they attempt, in good faith, to resolve
20 their discovery issues without court intervention. After a reading of the parties' communications the
21 court finds such a good faith effort was made.

22 **II. Interrogatory No. 1**

23 Interrogatory No. 1 seeks the identity of each and every employee who was rehired by defendant
24 Riviera from January, 2003 to the present. The EEOC maintains that this information is relevant to the
25 determination of whether there were other employees who were terminated, but who were later rehired
26 by the Riviera. This information, according to the EEOC, will serve as data for "comparators" and

1 reveal any inconsistent treatment of the witnesses in the related action.

2 Riviera originally objected to the question, then answered that “none of the former employees
3 of the Riviera listed as witnesses on *Plaintiff EEOC’s Initial Disclosures Pursuant to Federal Rules of*
4 *Civil Procedure 26(a)(1)* in the Jean Sylvia litigation, re-applied to be re-hired to their former positions
5 between January 2003 and the present.” Mot. (# 39) Ex. K at 3. Thus, there is nothing to which to
6 compare the information. Additionally, the court is not convinced that this information would be
7 relevant even if there were witnesses who had reapplied. The events surrounding an employee leaving
8 and then applying for rehire are very fact-based. There could be any number of factors for which
9 Riviera may wish to rehire one employee and not rehire another. Consequently, such statistical analysis
10 is not reasonably calculated to lead to the discovery of admissible evidence. For these reasons, Rivera
11 will not be compelled to supplement their answer to Interrogatory No. 1.

12 **III. Requests for Production 48 and 49**

13 The EEOC asks for copies of the source tapes used to make a compilation tape of certain Riviera
14 employees. The compilation tape allegedly shows Hill and Harris stealing cigarettes. Riviera raises
15 multiple objections to the production. The Riviera avers that when the compilation tape was first
16 produced it indicated that the EEOC could view the source tapes. Simply making the tapes available
17 for viewing is not enough when the evidence is relevant and reasonably calculated to lead to the
18 discovery of admissible evidence. Riviera states that under Fed. R. Civ. P. 34 making documents
19 available for inspection and copying is permissible. This is true. The “copying” portion of the rule
20 seems to have been overlooked, however, by the defendant. It is not overly burdensome to send the 43
21 identified source tapes to an outside vendor for duplication. The EEOC will bear the expense of the
22 copying.

23 The EEOC also seeks an order compelling any documents pertaining to surveillance, or special
24 surveillance, prepared by Riviera’s surveillance operators in January and February 2003. The Riviera
25 declares that it has disclosed all written reports in connection with the its surveillance investigation, that
26 lead to the terminations of Harris, Hill, Pratt, and Harrington. The request for any documents related

1 to any surveillance by Riviera's operators is overly broad. The production already completed by Riviera
2 is appropriate.

3 Accordingly, and for good cause shown,

4 IT IS ORDERED that Plaintiff EEOC's Motion to Compel (# 39) is GRANTED to the following
5 extent:

6 1) Defendant Riviera will send the 43 source tapes to an outside vendor for copying.

7 2) Riviera will send the copies to the EEOC, at which time the EEOC will reimburse Riviera
8 for the cost of copying. Riviera will provide to the EEOC an itemized accounting of the costs so
9 incurred.

10 3) All other requests are denied.

11 DATED this 13th day of September, 2006.

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14 **LAWRENCE R. LEAVITT**
15 **UNITED STATES MAGISTRATE JUDGE**