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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

U.S. EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)
)
Plaintiff,)
)
ERIKA MORALES and ANONYMOUS)
PLAINTIFF’S ONE THROUGH EIGHT)
)
Plaintiff-Intervenors)
)
v.)
)
ABM INDUSTRIES INCORPORATED,)
et al.)
)
Defendants.)

1:07-cv-01428 LJO JLT

ORDER GRANTING IN PART AND DENYING IN PART EEOC’S MOTION TO COMPEL DEFENDANT ABM JANITORIAL SERVICES NORTHERN CALIFORNIA TO RESPOND AND PRODUCE RESPONSIVE DOCUMENTS [DOC 149]

Plaintiff United States Equal Employment Opportunity Commission (“EEOC”) seeks an order compelling defendant ABM Janitorial Services Northern California (“ABMNC”) to produce documents in response to EEOC’s Request for Production of Documents, set number one, numbers 1 and 3. As required by Local Rule 232, the parties met, conferred and filed a joint statement regarding their discovery dispute. [Doc 149] On February 1, 2010, the Court heard argument regarding this motion. The Court has read and considered the pleadings and arguments of counsel and makes the following ruling.

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1 **Factual and Procedural Background**

2 On September 28, 2007, the EEOC initiated this action against Defendants ABM Industries, Inc.
3 and ABM Janitorial Services, Inc. (Doc. 1.) ABMNC was added as a defendant through the First
4 Amended Complaint filed on July 17, 2009. (Doc. 118.) The EEOC’s amended complaint alleges
5 unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended,
6 and Title I of the Civil Rights Act of 1991. (Id.) In particular, the amended complaint charges that
7 ABMNC engaged in a pattern and practice of subjecting Erika Morales and a class of others similarly
8 situated to her to a sexually harassing, hostile work environment and quid pro quo sexual harassment
9 by ABMNC supervisors and other employees at various ABMNC work sites. (Id.) The complaint alleges
10 further that ABMNC failed to exercise reasonable care to prevent and correct the sexually harassing
11 behavior promptly. (Id.) Also, Erika Morales alleges that she and others similarly situated were
12 constructively discharged for complaining about or rebuking the sexual harassment. (Id.)

13 On October 1, 2009, the EEOC served “Request for Production of Documents to Defendant
14 ABM Janitorial Northern California.” Request number 1 seeks records related to complaints of sexual
15 harassment made against any employee of ABMNC no matter where the incident occurred from 2000
16 to the current time. Request number 3 seeks all such documents that were created as a result of
17 complaints to ABMNC’s harassment hotline.

18 On November 6, 2009, ABMNC filed timely objections to the requests. Along with a myriad
19 of other objections, ABMNC noted that on December 22, 2008, the Court ruled on a similar motion to
20 compel in which the EEOC served the “nearly identical” request to obtain the same information from
21 defendant ABM Janitorial Services, Inc. (“ABM Janitorial”). [Doc 67]

22 In the joint statement, the EEOC does not deny that the substance of the requests are nearly the
23 same as one that was subject to the December 22, 2008 order. However, the EEOC asserts that due to
24 ongoing discovery, evidence has revealed that harassment has occurred by non-supervisors at locations
25 other than in the 11 counties outlined by the December 22, 2008 order. Therefore, the EEOC contends
26 that it should no longer be bound by the Court’s previous order. Alternatively, it argues that it is not
27 bound by the order as to ABMNC because this defendant was not a party to the action at the time the
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1 order was issued.

2 Analysis

3 **A. Discovery overview**

4 The purpose of discovery is to make trial “less a game of blind man’s bluff and more a fair
5 contest with the basic issues and facts disclosed to the fullest practicable extent,” United States v.
6 Proctor & Gamble Co., 356 U.S. 677, 683 (1958), and to narrow and clarify the issues in dispute.
7 Hickman v. Taylor, 329 U.S. 495, 501 (1947).

8 Fed.R.Civ.P. 26(b) establishes the scope of discovery and states in pertinent part:

9 Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
10 party’s claim or defense - including the existence, description, nature, custody, condition,
11 and location of any documents or other tangible things and the identity and location of
12 persons who know any discoverable matter. For good cause, the court may order
discovery of any matter relevant to the subject matter involved in the action. Relevant
information need not be admissible at trial if the discovery appears reasonably calculated
to lead to the discovery of admissible evidence.

13 In Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (U.S. 1978), the Court evaluated the strictures
14 posed by Rule 26 and held,

15 The key phrase in this definition -- "relevant to the subject matter involved in the pending
16 action" -- has been construed broadly to encompass any matter that bears on, or that
17 reasonably could lead to other matter that could bear on, any issue that is or may be in
18 the case. See Hickman v. Taylor, 329 U.S. 495, 501 (1947). [Footnote] Consistently with
19 the notice-pleading system established by the Rules, discovery is not limited to issues
raised by the pleadings, for discovery itself is designed to help define and clarify the
issues. Id., at 500-501. Nor is discovery limited to the merits of a case, for a variety of
fact-oriented issues may arise during litigation that are not related to the merits.
[Footnote]

20 (Footnotes omitted.) Furthermore, “[t]he party who resists discovery has the burden to show that
21 discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its
22 objections.” Oakes v. Halvorsen Marine Ltd., 179 F.R.D. 281, 283 (C.D. Cal. 1998); Nestle Foods Corp.
23 v. Aetna Casualty and Surety Co., 135 F.R.D. 101, 104 (D. N.J. 1990).

24 **B. Requests for Production of Documents**

25 Fed.R.Civ.P. 34(b)(2)(B) requires a written response to a request for production to “state that
26 inspection and related activities will be permitted as requested or state an objection to the request,
27 including the reasons.” The request is sufficient if the documents or things to be produced are described
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1 by item or category with “reasonable particularity” in the request. Fed.R.Civ.P. 34(b)(1)(A). A
2 responding party is obligated to produce all designated and nonprivileged documents, tangible things,
3 or electronically stored information which are in its “possession, custody or control.” Fed.R.Civ.P.
4 34(a). The propounding party may seek an order compelling production or inspection if a party “fails
5 to respond that inspection will be permitted - or fails to permit inspection - as requested under Rule 34.”
6 Fed.R.Civ.P. 37(a)(3)(B)(iv). Failure to object to discovery requests in a timely fashion constitutes a
7 waiver of any objection. See Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th
8 Cir. 1992).

9 According to the joint statement submitted by the parties (Doc. 149), the dispute involves two
10 requests for production. Request Number 1 of the document production request reads,

11 IDENTIFY and produce all DOCUMENTS that reflect, describe or relate to complaints
12 of sexual assault and/or other forms of sexual harassment occurring at YOUR
13 workplaces, during the period from January 1, 2000 to the present made by any of YOUR
14 janitorial employees against any of YOUR employees, including, but not limited to, all
15 DOCUMENTS pertaining to verbal or written complaints, interview notes, affidavits,
witness statements, final and draft recommendations pertaining to the complaint(s) or
investigation(s), any DOCUMENT that YOU contend reflects on the credibility of all
complainants and/or witnesses, and/or any discipline issued to any accused harasser
and/or his or her supervisor(s).

16 Request Number 3 of this same document production reads,

17 IDENTIFY and produce all DOCUMENTS that reflect, describe or relate to any
18 complaints made to YOUR 1-800 Harassment Hotline, including, but not limited to, the
19 1-800-97-STOP IT number or 1-800-977-8674, regarding any incidents occurring at
20 YOUR workplaces, during the period from January 1, 2000 to the present, including, but
21 not limited to, all DOCUMENTS pertaining to call logs, verbal or written complaints,
22 interview notes, affidavits, witness statements, final and draft findings and/or reports for
any investigations conducted by YOU or on YOUR behalf, final or draft
recommendations pertaining to complaint(s) or investigation(s), any DOCUMENT that
YOU contend reflects on the credibility of all complainants and/or witnesses, and/or any
discipline issued to any accused harasser and/or his or her supervisor(s).

23 ABMNC objected to these requests on the basis that they were overbroad, not reasonably calculated to
24 lead to admissible evidence, invaded the privacy of third parties, invaded the attorney-client and attorney
25 work product privilege and, based upon the December 22, 2008 order, they were harassing. ABMNC
26 has not refused to respond to these requests, but has instead, limited its response to complaints related
27 to supervisory conduct and for locations within the Eastern District of California. Given this and how
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1 the issues are framed by the joint statement, therefore, the parties seek a determination here of whether
2 the EEOC may obtain information regarding all other incidents of unlawful sexual conduct that occurred
3 other than in the Eastern District and other than where the alleged "harasser" was a supervisor.

4 **C. Reconsideration of the December 22, 2008 order**

5 On December 22, 2008, the Court decided issues that were very similar to those raised here. At
6 the time, the EEOC sought records from defendant ABM Janitorial. Request number 161 of the
7 "Plaintiff EEOC's Second Request for Production of Documents to Defendant ABM Janitorial Services,
8 Inc." read,

9 Identify and produce all documents that reflect, describe or relate to complaints of sexual
10 harassment made against you, since January 1, 2000, through the present, including, but
11 not limited to, all documents pertaining to verbal or written complaints, interview notes,
12 affidavits, witness statements, final and draft findings and/or reports for any
13 investigations conducted by you or on your behalf, final or draft recommendations
14 pertaining to the complaint(s) or investigation(s), and documents that you contend
15 reflects on the credibility of all complainants and/or witnesses, and/or any discipline
16 issued to any accused harasser and/or his or her supervisor(s).

14 As recited above, the current request number 1 and the substance of request number 3, are markedly
15 similar.

16 Notably, the Court issued its December 22, 2008 order on the EEOC's motion to compel ABM
17 Janitorial to produce documents, not ABMNC. Here, the EEOC does not seek an order requiring ABM
18 Janitorial to produce anything. Clearly, the December 22, 2008 order bound those who were party to
19 it and, presumably, the parties complied with it.

20 Although ABMNC and the other ABM defendants are related, the defendants have maintained,
21 and it was further clarified at argument on this motion, that ABMNC is a distinct legal entity from ABM
22 Janitorial.¹ Moreover, there is no showing that the parties intended that any later added defendant would
23 be bound by the December 22, 2008. To the contrary, the EEOC seems to indicate that it did not believe
24 that the order would be binding on ABMNC. Therefore, the law of the case doctrine does not control.

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26 ¹In defending against the motion that resulted in the December 22, 2008 order, the defendants in that motion argued
27 that they should not be ordered to produce the documents because they were not the employer of the claimants at issue. The
28 current position urging application of the law of the case doctrine, therefore, seems contrary to the earlier position taken by
the other defendants that they are distinct entities from ABMNC.

1 Disimone v. Browner, 121 F.3d 1262, 1267 citing Zdanok v. Glidden Co., Durkee Famous Foods Div.,
2 327 F.2d 944, 953 (2nd Cir. 1964) (Doctrine applies where it was “clear that everyone expected [the new
3 plaintiffs] rights to be governed by the court's interpretation of the contract.”).

4 In addition, the confines of the December 22, 2008 order was based in large part to the fact that
5 the parties were in the midst of Rule 23 discovery, which has since ended. Likewise, since the December
6 22, 2008 order, the EEOC amended its complaint to allege that the harassment was perpetrated by
7 “Defendants’ supervisors *and employees*.” According to the joint statement and as admitted by
8 ABMNC, the EEOC has since identified claimants who allege that they suffered sexual harassment by
9 non-supervisor employees as well. Therefore, ABMNC’s objection to the current discovery, based upon
10 the preclusive effect of the December 22, 2008 order, is overruled.

11 **D. Overbreadth**

12 **i. Geographic Scope**

13 In its request for discovery, the EEOC appears to seek documents related to complaints of sexual
14 harassment no matter the location of the job site where the alleged harassment occurred. While seeming
15 to request discovery on a statewide basis, the EEOC provides little support for this request. For
16 example, as in its original complaint, the EEOC asserts in its amended complaint that the harassment
17 occurred “within the Eastern District of California.” The Intervenor Complaint alleges similarly that
18 “the employment practices that PLAINTIFF INTERVENORS allege to be unlawful were and [are] now
19 being committed in California within the jurisdiction of the United States District Court for the Eastern
20 District of California.”

21 Nevertheless, at argument on this motion, without citation to any authority, the EEOC took the
22 position that its entitlement to all of ABMNC’s records, no matter the locale where they originate, was
23 based upon the fact that ABMNC operated in areas outside of the Eastern District of California.
24 However, exactly where ABMNC operates was not explained by the EEOC. Most importantly, the
25 EEOC failed to explain how this position was supported by their First Amended complaint that alleged
26 that the acts *only* occurred within the Eastern District of California.

27 Federal Rules of Civil Procedure 26 (b)(1) reads,
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1 **Unless otherwise limited by court order, the scope of discovery is as follows: Parties**
2 **may obtain discovery regarding any nonprivileged matter that is relevant to any**
3 **party's claim or defense--**including the existence, description, nature, custody,
4 condition, and location of any documents or other tangible things and the identity and
5 location of persons who know of any discoverable matter. For good cause, the court may
order discovery of any matter relevant to the subject matter involved in the action.
Relevant information need not be admissible at the trial if the discovery appears
reasonably calculated to lead to the discovery of admissible evidence. All discovery is
subject to the limitations imposed by Rule 26(b)(2)(C).

6 (Emphasis added.) Subdivision (b)(2)(C)(iii) permits the Court to limit the extent of discovery where
7 “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of
8 the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the
9 action, and the importance of the discovery in resolving the issues.”

10 Because the information sought as to incidents that occurred outside of the Eastern District *does*
11 *not* bear on the issues raised in the First Amended Complaint, ABMNC’s objection on this point is well-
12 taken. Therefore, the motion to compel the discovery of records related to incidents that occurred
13 outside of the Eastern District of California is DENIED.

14 **iii. Discovery as to non-supervisory alleged “harassers”**

15 ABMNC objects to the production of the documents sought by request numbers 1 and 3 because
16 they seek information related to non-supervisors. ABMNC asserts that the only reason for this discovery
17 is for the EEOC to attempt to locate additional claimants that allege unlawful actions that were outside
18 of the scope of the EEOC’s investigation and the conciliation process. The Court notes that when the
19 EEOC sues in its own name, the litigation is limited by the scope of the EEOC’s charge and its
20 investigation. EEOC v. Farmer Bros. Co., 31 F.3d 891, 899 (9th Cir. 1994). The litigation need not
21 exactly mirror the charge but may include claims that “*can be reasonably expected* to grow out of the
22 charge of discrimination.” Id. Here, the Court has no occasion to determine whether the EEOC has
23 properly satisfied the prerequisites to litigation regarding the allegations of sexual harassment by non-
24 supervisors. Instead, the Court’s order relates only to whether discovery will be permitted related to
25 these claims.

26 As to this issue, the Court notes that the First Amended Complaint filed in July 2009, while
27 somewhat vague, indicates that sexual harassment was perpetrated by “supervisors *and employees*” of
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1 the defendants. This amendment was notable given the few other changes made to the pleading from
2 that contained in the original complaint. Counsel for ABMNC indicated, at the argument on the motion,
3 that he believed that the reference to “supervisors *and employees*” referred to Jose Vasquez who,
4 purportedly, committed the alleged act of rape while he was a non-supervisory level employee.² Given
5 the minimal requirements of Rule 8, the Court has no explanation why ABMNC did not conduct
6 discovery to confirm its understanding of the EEOC’s meaning of the phrase “supervisors *and*
7 *employees.*” In any event, ABMNC admits that it was aware that additional claimants alleged
8 harassment by non-supervisory coworkers. This awareness occurred as early as May 2009 when the new
9 claimants were identified by the EEOC but no later than September 2009 when their depositions were
10 taken. When coupled with the filing of the First Amended Complaint, the Court is persuaded that
11 discovery that inquires into the acts of sexual harassment of non-supervisors should be allowed to a
12 certain extent.

13 On the other hand, the Court is not persuaded that full discovery of all sexual harassment
14 complaints against every non-supervisor of ABMNC is warranted at this juncture of the case. At
15 argument on the motion, the EEOC’s counsel indicated that this discovery would be used to locate
16 additional claimants and to support its “pattern and practice” case. Given the extensive efforts by the
17 EEOC to identify additional claimants, including sending letters to 4,000 of defendants’
18 employees/former employees, continuing this type of discovery on the eve of the close of discovery is
19 inappropriate and subjects the defendants to unfair prejudice. Therefore, the Court does not find this
20 explanation to be sufficient to justify the discovery. The Court does find, however, that the evidence
21 would be relevant to the “pattern and practice” allegations of the litigation.

22 Therefore, the Court GRANTS the motion to produce documents responsive to requests number
23 1 and 3 as to non-supervisor employees of ABMNC, consistent with the other terms imposed by this
24 order. However, the Court sees no justification to expose private details about these complaints given
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26 ²Rather than militate against the production request, this statement of counsel seems to justify the additional
27 discovery given that, clearly, ABMNC was aware of the allegation that sexual harassment by Jose Vasquez occurred *before*
28 he became a supervisor.

1 that no additional claimants will be permitted from this production.³ Thus, consistent with the
2 geographical limitation set forth above, ABMNC is required to produce all complaints of sexual
3 harassment, including those asserting that the unlawful acts that were committed by non-supervisory
4 personnel.

5 On the documents produced, ABMNC is ordered to redact the names of the complainants and
6 the harassers and other personal identifiers, so that only the first initials of the first and last name are
7 shown. However, ABMNC may not redact the name of the complainant if the complainant is also a
8 claimant in this current action. Likewise, ABMNC may not redact the documents as to the name of the
9 alleged harasser if the alleged harasser has been identified as a harasser in this current litigation.
10 Moreover, the parties are ordered to prepare a joint, stipulated protective order to ensure that any other
11 personal information, not discussed here, is maintained confidential. ABMNC must produce a privilege
12 log as to any document not produced that it contends is subject to the attorney-client privilege or work
13 product privilege.

14 **iii. Time**

15 Both of the production requests seek documents from January 1, 2000 through the present. At
16 issue, then, is information that spans ten years. Although ABMNC notes an objection based upon time,
17 it has failed to outline the nature of its objection in the joint statement. "The party who resists discovery
18 has the burden to show that discovery should not be allowed, and has the burden of clarifying,
19 explaining, and supporting its objections." Oakes v. Halvorsen Marine Ltd., 179 F.R.D 281, 283 (C.D.
20 Cal. 1998). The Court refuses to speculate as to ABMNC's concern. Therefore, the Court deems the
21 objection waived. McLeod, Alexander, Powel & Appfel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir.
22 1990) (Conclusory, boilerplate objections without explanation of the underlying basis for the objection
23 is insufficient.)

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26 ³See the Court's order filed herewith on the defendants' motion for protective order or alternative relief in which
27 the Court is setting a cut-off date for the EEOC to identify additional claimants to a date that is *before* the disclosure date
28 here.

1 **E. Not Reasonably Calculated to Lead to Admissible Evidence**

2 **1. Request for Production of Documents #3 - Sexual Harassment Complaints**

3 ABMNC objects to the request on the grounds that it fails to limit itself to complaints made to
4 its Hotline to those alleging sexual harassment. This objection is proper and the motion to compel
5 documents that are unrelated to claims of sexual harassment is DENIED.

6 **F. Privacy of 3rd parties**

7 Based upon the limitations placed on the production request recited above and the Court's order
8 that the parties stipulate to a protective order governing the documents, the Court finds that the privacy
9 of third parties to be sufficiently preserved. The objection is overruled.

10 **ORDER**

11 Based on the foregoing, the Motion to Compel Responses to Plaintiff's Requests for Production
12 of Documents (Doc. 149) is GRANTED IN PART and DENIED IN PART as follows:

- 13 1. The Motion to Compel Responses to Request for Production numbers 1 and 3 - Set One,
14 is GRANTED, subject to the limitations set forth below, as to complaints that occurred
15 on ABMNC work sites located in Eastern District of California. As to complaints that
16 arose in locations other than in the Eastern District, the motion is DENIED.
- 17 2. As to Request number 1, ABMNC is ordered to produce documents responsive to the
18 request without regard for whether the alleged harasser was a supervisor at the time of
19 the alleged act. Records to be produced include, documentation of verbal or written
20 complaints of sexual assault or sexual harassment at ABMNC work sites within the
21 Eastern District made since January 1, 2000, interview notes, affidavits, witness
22 statements, final and draft recommendations pertaining to the complaints or any resulting
23 investigation, and any records relating to documentation of any resulting discipline issued
24 to any accused harasser or to the accused harasser's supervisors.
- 25 3. As to Request number 3, ABMNC is ordered to produce documents responsive to the
26 request without regard for whether the alleged harasser was a supervisor at the time of
27 the alleged act. Records to be produced include, documentation of the Hotline
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1 complaints of sexual assault or sexual harassment at ABMNC's work sites within the
2 Eastern District made since January 1, 2000, all records related to call logs, interview
3 notes, affidavits, witness statements, final and draft findings, any reports of any resulting
4 investigations, any final or draft recommendations resulting from the complaints or any
5 related investigations, and any records relating to documentation of any resulting
6 discipline issued to any accused harasser or to the accused harasser's supervisors.

7 4. As to either production, ABMNC must produce a privilege log as to the documents that
8 are subject to the attorney-client privilege or the attorney work product privilege.

9 5. In producing the documents described above, the names of the complainants are to be
10 redacted so that only the first initials of the first and last names appear unless the
11 complainant is a claimant in this current litigation. All other personal identifiers of the
12 non-claimant, complainants including, but not limited to, social security numbers, drivers
13 license numbers, addresses, phone numbers and the like are to be redacted in full.

14 6. In producing the documents described above, the names of the alleged harassers are to
15 be redacted so that only the first initials of the first and last name appear unless the
16 harasser alleged in the documents to be produced is also alleged to be a harasser in this
17 current litigation. As to those alleged harassers who are not identified in this current
18 litigation, all of their other personal identifiers including, but not limited to, social
19 security numbers, drivers license numbers, addresses, phone numbers and the like are to
20 be redacted in full.

21 7. The motion is DENIED in all other respects.

22 8. Not later than ten (10) days from the date of service of this Order, the parties shall submit
23 a stipulated form of protective order for the Court's consideration as to any
24 complainant/claimant or alleged harasser whose name appears in full.

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9. Not later than twenty (20) days from the date of service of this Order, Defendants shall identify and produce all documents as provided in this Order.

IT IS SO ORDERED.

Dated: February 4, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE