UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANGELA COMPTON,
Plaintiff,

vs.

MICHAEL B. DONLEY,
SECRETARY OF THE AIR FORCE,
Defendant.

Case No. 1:12-cv-954

Litkovitz, M.J. (consent)

ORDER

Plaintiff Angela Compton brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., and the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*., alleging that defendant Michael B. Donley, Secretary of the Air Force (the Secretary), unlawfully discriminated against her on the basis of her disability, failed to accommodate her disability, and unlawfully retaliated against her for seeking disability accommodations and pursuing previously raised claims of gender discrimination. (Doc. 11). This matter is before the Court on plaintiff's motion to compel discovery responses (Doc. 29); the Secretary's motion to strike plaintiff's motion or, alternatively, his response in opposition (Doc. 35); plaintiff's reply memorandum (Doc. 36); plaintiff's response in opposition to the Secretary's motion to strike (Doc. 41); and the Secretary's reply. (Doc. 43). Also pending before the Court is plaintiff's motion to substitute the name of a defendant (Doc. 30) to which the Secretary has not responded.

I. Motion to Substitute Name of Defendant (Doc. 30)

Plaintiff seeks leave to substitute the name of Eric K. Fanning in place of Michael B. Donley pursuant to information and belief that Mr. Fanning was appointed Acting Secretary of the Air Force on or about June 21, 2013. In the absence of any opposition by the Secretary,

plaintiff's motion is **GRANTED**. The Clerk of Court is hereby **DIRECTED** to substitute Eric K. Fanning, Acting Secretary of the Air Force as the defendant in this matter.

II. Motion to Compel (Doc. 29) and Motion to Strike (Doc. 41)

On May 21, 2013, this Court adopted the Initial Discovery Protocols for Employment cases; the following day, a Standing Order was entered detailing the protocols. (Docs. 22, 23). This Standing Order outlines the production obligations of parties in employment discrimination cases, such as the instant matter. Plaintiff asserts that the Secretary has failed to timely produce documents which he was obliged to tender pursuant to the Standing Order. (Doc. 29). Specifically, plaintiff states the Secretary failed to timely produce a January 2010 performance appraisal and failed to explain why counsel for the Secretary represented that this document did not exist. *Id.* Plaintiff seeks a Court Order: (1) requiring the Secretary to produce documents currently being withheld in discovery; (2) mandating counsel for the Secretary to explain the late disclosure of the performance appraisal and why counsel represented that the appraisal did not exist; (3) and compelling the Secretary to state how and why the performance appraisal was removed from the paper and electronic files in the Secretary's custody and control. *Id.*

The Secretary responds that plaintiff's motion to compel should be stricken for failure to exhaust extrajudicial remedies prior to seeking Court intervention. The Secretary alternatively argues that plaintiff's motion should be denied because the information plaintiff seeks has already been produced, will be produced shortly, or is not in possession of the Secretary, or that plaintiff can glean the information sought from relevant witnesses during depositions. For the following reasons, plaintiff's motion to compel is granted and defendant's motion to strike is denied.

Fed. R. Civ. P. 37 provides that "[a] party seeking discovery may move for an order

compelling an answer, designation, production or inspection" if a party fails to provide discovery responses. Fed. R. Civ. P. 37(a)(3). Rule 37 also provides, "If a party or a party's officer . . . fails to obey an order to provide or permit discovery, . . . the court where the action is pending may issue further just orders," including "staying further proceedings until the order is obeyed." Fed. R. Civ. P. 37(b)(2)(A)(iv). Before making a motion to compel disclosure or discovery, though, the moving party must "in good faith confer[ ] or attempt [ ] to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a). Thus, before moving to compel discovery, a party must first show that it sought discovery from its opponent but was unable to resolve the dispute. *McDermott v. Continental Airlines, Inc.*, 339 F. App'x 552, 560 (6th Cir. 2009) (citing *Petrucelli v. Bohringer & Ratzinger,* 46 F.3d 1298, 1310 (3d Cir. 1995)).

At the outset, the Court finds that plaintiff has complied with both the Local[1] and Federal Rules regarding her duty to attempt to secure the sought after discovery prior to seeking Court intervention. Plaintiff's motion references and includes as exhibits several emails between plaintiff's attorney and defense counsel regarding the discovery at issue. *See* Doc. 29, Ex. 4. These emails demonstrate that on four occasions - June 29, July 2, July 8, and July 10, 2013 - plaintiff's counsel unsuccessfully attempted to procure this discovery. *Id.* As demonstrated by these communications, plaintiff's counsel: did not secure certain documents which ostensibly should have been produced in connection with the Secretary's initial disclosures; requested them on multiple occasions; did not receive the requested documents; and subsequently filed the instant motion to compel. *Id.*

Defendant is correct that the undersigned encourages parties to resolve discovery disputes

[1]Local Rule 37.1 provides that motions to compel "shall not be filed in this Court . . . unless counsel have first exhausted among themselves all extrajudicial means for resolving the differences." S.D. Ohio Civ. R. 37.1.

by use of an informal telephone discovery conference. *See* Magistrate Judge Litkovitz's Civil Procedures, at 3, www.ohsd.uscourts.gov/judges/fplitkovitz.htm. This is and has been the Court's general practice for resolving discovery disputes. Yet, some discovery issues cannot be readily resolved through informal discussions. When, as here, it is alleged that a party may have misrepresented the existence of documentation or information responsive to a Court Order, it behooves the Court to have full and comprehensive briefing on the matter. For this reason, the Court vacated the August 6, 2013 informal discovery conference and ordered the parties to submit formal briefs. (Doc. 32). Given the Court's Order for formal briefings and the evidence of plaintiff's attempts to resolve this matter without Court intervention, the Secretary's motion to strike plaintiff's motion to compel is **DENIED**.[2] The Court will now address the crux of plaintiff's motion.

By way of background, plaintiff is a former employee of the United States Air Force. Plaintiff alleges that she was wrongfully terminated following a request for reasonable accommodation for a documented disability and filing an internal gender discrimination complaint. Plaintiff further alleges that prior to her termination, her supervisor began "papering" her personnel file with alleged complaints to justify her termination and that none of these complaints were mentioned in her 2010 performance appraisal. Plaintiff's amended complaint provides that this supervisor documented plaintiff's proficiency in the January 2010 performance appraisal but, nevertheless, stated in April 2010 that plaintiff lacked the requisite skills to perform her job as a computer engineer to justify her wrongful termination. (Doc. 11, ¶¶ 2-6). It

[2]In support of his contention that the plaintiff's motion should be stricken, the Secretary cites to *Despot v. American Income Life Ins. Co.*, No. 1:10-cv-932, 2012 WL 787387 (S.D. Ohio Mar. 9, 2012), where the undersigned denied the plaintiff's motion to compel for failure to adhere to Local Rule 37.1. This reliance is misplaced. In *Despot*, the plaintiff had put forth no evidence that he had made any attempt whatsoever to meet and confer with defense counsel prior to seeking Court intervention. In contrast, plaintiff here has put forth ample evidence that her counsel communicated with defense counsel on multiple occasions in an attempt to resolve this

is this January 2010 performance appraisal that is the subject of plaintiff's motion to compel.

Pursuant to the Court's Standing Order, as modified by the Court's May 21, 2013 Order adopting the discovery protocols, the Secretary was required to provide to plaintiff specified categories of documents, including plaintiff's performance evaluations, personnel file, and policies and guidelines governing, *inter alia*, employment termination, within 30 days. (Doc. 22).

On June 29, 2013, plaintiff's counsel notified counsel for the Secretary that he had not received the January 2010 appraisal or any documents relating to the January 13, 2010 meeting held between plaintiff and her supervisor discussing her review. Defense counsel responded on July 1, 2013, that more documents were being sent that day, including plaintiff's personnel file. After receiving the newly produced documents on July 2, 2013, plaintiff's counsel notified counsel for defendant that he still had not received the January 2010 appraisal or associated communications and expressed his concern that these documents were being withheld from discovery. On July 8, 2013, defense counsel responded and informed plaintiff's counsel that: (1) as reflected in the personnel file produced to plaintiff's counsel, plaintiff received only one appraisal during her tenure with defendant for the period of June 29 to September 30, 2009; (2) no appraisal was done in January 2010; (3) the January 13, 2010 meeting involved goals and objectives, not an appraisal, and defendant had not been able to locate any notes from the meeting; (4) there are no further appraisals for plaintiff as demonstrated by screen shots from the San Antonio, Texas computer search for plaintiff's computerized records; and (5) there is no second appraisal in the computer system. Plaintiff's counsel responded that same day re-asserting that the January 2010 appraisal existed and his request for the same. At that time, plaintiff's counsel requested that defense counsel investigate the matter and provide an update by

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dispute, but received no answer or non-responsive replies. *See* Doc. 29, Ex. 4.

July 12, 2013, noting that the January 2010 appraisal was extensively quoted in plaintiff's amended complaint. Plaintiff also noted that there were various other documents which appeared to be missing from the personnel file provided by defendant, which was maintained by the supervisor plaintiff alleges had discriminated against her. On July 10, 2013, defense counsel provided the January 2010 appraisal, but stated that his position remained correct as there was only one appraisal in plaintiff's file – the January 2010 appraisal – and that the other 2009 appraisal previously tendered was not an appraisal but an interim review. Defense counsel explained that the document was culled from a computer program used by plaintiff's prior supervisor for maintaining personnel records. However, there was no explanation for the absence of this document from plaintiff's personnel file or why it was not previously uncovered during the gathering of discovery documents from plaintiff's supervisor. Plaintiff's counsel responded later that day requesting: (1) a detailed explanation as to why defense counsel previously represented that the January 2010 appraisal did not exist; (2) an explanation for why the document was removed from the computer system; (3) records demonstrating the supervisor's access to the computer system following plaintiff's termination; (4) emails from plaintiff's supervisor relating to the January 2010 performance evaluation and his communications with human resources in December 2009 regarding plaintiff's salary enhancement; (5) a log of entries for plaintiff's personnel file; and (6) an explanation as to why the requested documents were not in the personnel file. Plaintiff notified defense counsel that if he did not receive a response by July 12, 2013, he would seek judicial intervention. *See* Doc. 29, Ex. 4. Plaintiff's motion was filed July 19, 2013.

Plaintiff now moves the Court for an order compelling the Secretary to: (1) comply with

the May 21, 2013 standing order (Doc. 23); (2) produce documents currently being withheld[3]; (3) explain the failure to timely produce the January 2010 performance appraisal; (4) explain why defense counsel represented that there was no January 2010 performance appraisal in existence; and (5) explain who removed the January 2010 appraisal from plaintiff's paper personnel file and from the official computer database. Plaintiff argues that the January 2010 appraisal is vital to her case as it contradicts her supervisor's statements regarding her abilities and his stated basis for terminating her and, thus, is evidence of pretext. Plaintiff asserts that defendant's failure to provide the January 2010 appraisal despite his obligation under the Court's Order, combined with his counsel's representation that the document did not exist, supports granting her motion to compel as it raises the specter that defense counsel is being misinformed by his client or is not diligently adhering to his discovery duties.

The Secretary's response rests largely on his assertion that plaintiff's motion should be stricken for failure to exhaust her extrajudicial remedies. As discussed above, this argument is not well-taken. The remainder of the Secretary's response simply reiterates the position of defense counsel that the failure to produce the January 2010 appraisal was inadvertent (Doc. 35 at 3) and that, in any event, plaintiff was already given the appraisal in May 2012 prior to the filing of this lawsuit. (Doc. 43 at 2). The Secretary has provided a more detailed explanation of the erroneous representation by way of defense counsel's affidavit. (*Id.* at Ex. 1, Declaration of Clarence P. Guillory, Jr.). Mr. Guillory declares that his "representation that there was no second or January 2010 appraisal" was "based on [his] conversation with an employee of the

[3]Specifically, plaintiff seeks the log that her supervisor was required to fill out whenever a document was placed in her personnel file or she was disciplined; training records; emails containing the supervisor's communications regarding plaintiff's salary increase and merit bonus; the hard copy of the January 2010 appraisal which may contain handwritten notes; regulations applicable to the supervisor's obligations to document the personnel file and performance problems; and the Secretary's policies and procedures as required under the May 21, 2013 Order. (Doc. 29 at 11-12).

Civilian Personnel Office (CPO)." *Id.* Mr. Guillory further states that he was under the incorrect assumption that the interim review in plaintiff's personnel file was an annual review and that only after being directed to the allegations in the amended complaint by plaintiff's counsel, did he have plaintiff's former supervisor search his computer files at which time he discovered the January 2010 performance appraisal. *Id.* Notably, Mr. Guillory's declaration fails to explain what information caused him to represent that there was no January 2010 appraisal or why he did not have plaintiff's supervisor perform the computer search prior to making said representation.[4]

The attorneys for the Secretary assert that the erroneous representation concerning the January 2010 appraisal was inadvertent and based upon misinformation received from Air Force personnel. Nevertheless, counsel have a duty to supervise and coordinate the discovery process. Counsel are required to monitor "the party's efforts to retain and produce the relevant documents. Proper communication between a party and [his] lawyer will ensure (1) that all relevant information . . . is discovered," continually retained, and produced to the opposing party. *John B. v. Goetz*, 879 F. Supp.2d 787, 869 (M.D. Tenn. 2010) (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)). Further, a lawyer "must become fully familiar with [his] client's document retention policies, as well as the client's data retention center." *Zubulake*, 229 F.R.D. at 432.

Here, it appears that counsel for the Secretary did not have the requisite understanding of the Secretary's retention architecture prior to affirmatively stating that the January 2010 appraisal did not exist. Mr. Guillory's declaration intimates that this error was inadvertent and the result of attorney-client miscommunication.[5] Regardless, this misrepresentation could have

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[4]While Mr. Guillory states that he questioned plaintiff's supervisor about the existence of appraisals other than the already tendered September 2009 review, he does not relate the supervisor's response. *See* Doc. 35, Ex. 1, ¶ 4.

[5]Plaintiff posits another theory: that this evidence was knowingly concealed from the personnel file in a

had dire consequences to plaintiff's prosecution of her lawsuit had she not been aware of the appraisal and insisted upon its existence. Thus, while the undersigned does not find at this time that the Secretary and defense counsel have acted in bad faith, it is appropriate to grant plaintiff's motion, in part, to ensure that all responsive documents are located and produced, not only those of which plaintiff is already aware.

Therefore, plaintiff's motion to compel is **GRANTED**. There is no question that plaintiff is entitled to the documents requested pursuant to the Court's Standing Discovery Order. The Secretary is **ORDERED** to provide plaintiff with any and all documents which meet the criteria identified on pages six through eight of the Standing Order. *See* Doc. 23 at 6-8. This includes, but is not limited to, the supervisor's log documenting submissions to the personnel file and disciplinary action; training records; the hard copy of the January 2010 performance appraisal; communications from plaintiff's supervisor regarding plaintiff's salary enhancement and termination; and any and all policies and procedures governing the maintenance of plaintiff's personnel file, discipline, and termination procedures. The Secretary shall tender these documents on or before **October 2, 2013**.

Plaintiff also seeks an Order compelling the Secretary or his counsel to explain the basis for the representation that the January 2010 appraisal did not exist and the reason for its removal from plaintiff's paper personnel file and the department's computer system. While the original and supplemental declarations of Mr. Guillory account for some of the actions taken to locate the January 2010 appraisal, they are incomplete. *See* Doc. 35, Ex. 1; Doc. 43, Ex. 1. The declarations do not describe the specific investigative steps taken by defense counsel, such as who he contacted, aside from plaintiff's former supervisor (Mr. McJilton), and what sources he searched to locate the January 2010 appraisal. It is not apparent to the Court why Mr.

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defensive maneuver.

McJilton's "My Workplace" program was not initially searched for documents and information responsive to the Court's Standing Order. Nor has there been any explanation why the January 2010 appraisal was not located in plaintiff's personnel file or on the computer database on which it presumably should have been found, or why Mr. McJilton apparently denied the existence of the January 2010 appraisal when he personally participated in it. Given the circumstances precipitating plaintiff's motion, the Secretary must provide a detailed explanation in response to the Court's questions.

In conclusion, the Secretary's motion to strike plaintiff's motion to compel (Doc. 35) is **DENIED** and plaintiff's motion to compel (Doc. 29) is **GRANTED**. The Secretary is **ORDERED** to tender any and all documents described in the Standing Order and as identified by plaintiff on or before **October 2, 2013**.[6] The Secretary is further **ORDERED** to provide a detailed response addressing the Court's questions raised on page 9 of this Order by **October 2, 2013**.[7] Depositions on the merits shall be stayed until the Secretary complies with this Order.

IT IS SO ORDERED.

9/18/13
Date

Karen L. Litkovitz
United States Magistrate Judge

[6] The Court strongly advises both counsel for plaintiff and the Secretary to engage in direct communications with each other either face-to-face or via telephone to resolve future discovery disputes. While email communication is useful for record-keeping, it deprives counsel of the ability to request and receive responses instantaneously. Further, such direct communication is the basis of Fed. R. Civ. P. 37's "meet and confer" requirement as it is well-accepted that many disputes may be resolved by speaking directly to the other party. *See Remy Inc. v. Tecnomatic, S.P.A.*, No. 1:11-cv-991, 2013 WL 1311095, at *3 (S.D. Ind. Mar. 26, 2013) (identifying the value in actually meeting with counsel either face-to-face or by telephone as a more interactive discussion often resolves a better forum than emails for resolving disputes); *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev. 1993) (the meet and confer requirement "promote[s] a frank exchange between counsel to resolve issues by agreement"); *Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121 F.R.D. 284, 289 (N.D. Tex. 1988) (same). The Court therefore urges counsel to engage in direct communication to discuss and resolve potential future disputes.

[7] In view of this Order, the Court denies plaintiff's request to conduct a limited deposition of Mr. McJilton on search efforts. *See* Doc. 36 at 18.