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

JOHN HENRY HART,

Plaintiff,

No. CIV S-10-1672 KJM EFB PS

vs.

PAE GOVERNMENT SERVICES
INCORPORATED,

Defendant.

ORDER

On June 22, 2011, the court heard defendant’s motion to compel plaintiff to respond to defendant’s First Set of Requests for Production of Documents pursuant to Federal Rule of Civil Procedure (“Rule”) 37(a) and to produce all responsive documents, Dckt. No. 25; defendant’s motion to compel plaintiff’s deposition pursuant to Rule 37(a), Dckt. No. 26; and defendant’s related requests for expenses pursuant to Rule 37(d). Attorney Jean Kosela appeared at the hearing on behalf of defendant; plaintiff failed to appear. As stated on the record, and for the reasons stated on the record at the hearing, defendant’s motions to compel are granted and defendant’s related requests for expenses are granted in part.

I. Motion to Compel Response to First Set of Requests for Production of Documents

On March 8, 2011, defendant served its first set of First Set of Requests for Production of Documents on plaintiff. Dckt. No. 25-2, Cheng Decl. ¶ 2; Ex. A. Plaintiff failed to respond to

1 the document requests. Cheng Decl. ¶ 3. Defendant then sent a meet and confer letter to
2 plaintiff inquiring about the responses, but plaintiff again failed to respond. Cheng Decl., ¶¶ 4.
3 5; Ex. B. Given plaintiff's utter failure to respond, defendant next filed a motion to compel
4 plaintiff to respond to the requests. *See* Dckt. No. 25. In violation of the court's Local Rules,
5 plaintiff failed to file an opposition or a statement of non-opposition to the motion. Accordingly,
6 on May 20, 2011, the undersigned ordered plaintiff to show cause why he should not be
7 sanctioned for his failures and directed plaintiff to file a response to the motion to compel. Dckt.
8 No. 28.

9 On May 25, 2011, plaintiff filed a response. Dckt. Nos. 29, 30. He argues that (1) most
10 of the records sought by the defense are not related to this case, including plaintiff's
11 unemployment records since his departure from defendant's employment; (2) most of the
12 requested records are part of plaintiff's EEOC file; and (3) plaintiff does not have access to the
13 addresses of his associates with whom he worked in Djibouti. Dckt. No. 29. Plaintiff also
14 attached almost 200 pages of documents which he contends are responsive to the requests for
15 production of documents.¹ Dckt. Nos. 29, 30. However, plaintiff then failed to appear at the
16 hearing on the motion to compel.

17 Rule 37(a)(3)(B) provides that "[a] party seeking discovery may move for an order
18 compelling an answer, designation, production, or inspection . . . if: . . .(iv) a party fails to
19 respond that inspection will be permitted--or fails to permit inspection--as requested under Rule
20 34." Additionally, Rule 37(a)(4) provides that evasive or incomplete disclosures are to be
21 treated as a failure to respond. Here, although plaintiff objects to some of the document
22 requests, as discussed above, the undersigned finds that those objections were waived by
23 plaintiff's failure to timely respond to the document requests and his lack of justification for that
24

25 ¹ Plaintiff also seems to suggest in his opposition that he had previously produced the
26 documents to defendant. Dckt. No. 29. However, at the hearing, defendant contended that it had
not received the documents prior to plaintiff's recent submission.

1 failure. Because it is unclear whether plaintiff's recent submission of documents is fully
2 responsive to defendant's First Set of Requests for Production of Documents, defendant's motion
3 to compel is granted. Within twenty-one days of the date of this order, plaintiff shall produce all
4 documents responsive to defendant's First Set of Requests for Production of Documents, without
5 objection, or shall provide a written verification under penalty of perjury that he has conducted a
6 reasonable search for, and has already produced, all such responsive documents within his
7 possession, custody, or control.

8 Defendant also seeks sanctions in the amount of \$2,299.50 against plaintiff for failing to
9 respond to the discovery requests without any substantial justification. Dckt. No. 25-1; Cheng
10 Decl. ¶ 6. It is clear that defendant is entitled to sanctions pursuant to Rule 37(d)(1)(A)(ii),
11 which provides that the court may order sanctions if "a party, after being properly served with . .
12 . a request for inspection under Rule 34, fails to serve its answers, objections, or written
13 response." *See also* Fed. R. Civ. P. 37(d)(2) ("A failure described in Rule 37(d)(1)(A) is not
14 excused on the ground that the discovery sought was objectionable, unless the party failing to act
15 has a pending motion for a protective order under Rule 26(c)."); Fed. R. Civ. P. 37(d)(3)
16 ("Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in
17 addition to these sanctions, the court must require the party failing to act, the attorney advising
18 that party, or both to pay the reasonable expenses, including attorney's fees, caused by the
19 failure, unless the failure was substantially justified or other circumstances make an award of
20 expenses unjust."). In light of plaintiff's pro se status, the undersigned finds that an award of the
21 entire amount sought by defendant would be unjust. Instead, plaintiff shall pay \$1000.00 to
22 defendant's counsel within thirty days of the date of this order to cover some of the expenses
23 caused by plaintiff's failure to respond to defendant's document requests. However, plaintiff is
24 hereby admonished that he must become familiar and comply with his discovery obligations
25 under the Federal Rules of Civil Procedure and his pro se status does not excuse that requirement
26 and will not preclude future sanctions for violation of the federal or local rules, or orders of the

1 court.

2 II. Motion to Compel Plaintiff's Deposition

3 On March 8, 2011, defendant served plaintiff a notice to take his deposition on May 5,
4 2011. Dckt. No. 26-2, Cheng Decl., ¶ 2; Ex. A. However, on May 5, 2011, plaintiff failed to
5 appear for his deposition, even though counsel for defendant never received an objection or any
6 communication from plaintiff to justify his refusal to appear for his deposition. Cheng Decl. ¶ 3.
7 Defendant then filed a motion to compel plaintiff to appear for his deposition, but plaintiff failed
8 to file an opposition or a statement of non-opposition to the motion, as required by the Local
9 Rules. See Dckt. No. 26. Accordingly, on May 20, 2011, the undersigned ordered plaintiff to
10 show cause why he should not be sanctioned for his failures and directed plaintiff to file a
11 response to the motion to compel. Dckt. No. 28.

12 Plaintiff filed a response on May 25, 2011, but did not address his failure to appear for
13 his noticed deposition and did not provide any justification for that failure. See generally Dckt.
14 Nos. 29, 30. Then, as noted above, plaintiff failed to appear at the hearing on the motion to
15 compel.

16 Rule 37(a)(3)(B) provides that “[a] party seeking discovery may move for an order
17 compelling an answer, designation, production, or inspection . . . if: . . . (i) a deponent fails to
18 answer a question asked under Rule 30 or 31.” Because plaintiff failed to appear for his
19 deposition, and has provided no justification for that failure, defendant’s motion to compel is
20 granted. Within sixty days of the date of this order, at a specific date and time to be noticed by
21 defendant, plaintiff shall appear for his deposition without objection.

22 Defendant also seeks sanctions against plaintiff in the amount of \$2,410.25 for causing
23 defendant to have to unnecessarily incur costs and fees related to plaintiff’s nonappearance at the
24 noticed deposition. Dckt. No. 26-1; see also Cheng Decl., ¶¶ 4-5; Ex. C. The undersigned
25 agrees that defendant is entitled to sanctions pursuant to Rule 37(d)(1)(A)(i), which provides that
26 the court may order sanctions if “a party . . . fails, after being served with proper notice, to

1 appear for that person's deposition.” *See also* Fed. R. Civ. P. 37(d)(3) (“Sanctions may include
2 any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions,
3 the court must require the party failing to act, the attorney advising that party, or both to pay the
4 reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was
5 substantially justified or other circumstances make an award of expenses unjust.”). However,
6 again in light of plaintiff’s pro se status, the undersigned finds that an award of the entire amount
7 sought by defendant would be unjust although plaintiff has now been warned. Instead, plaintiff
8 shall pay to defendant’s counsel within thirty days of the date of this order \$603.50 to cover the
9 cost of the court reporter and videographer at the May 5, 2011 deposition, as well as \$328.50 to
10 cover one hour of attorney preparation time in advance of the deposition.

11 III. Conclusion

12 Accordingly, IT IS HEREBY ORDERED that:

13 1. Defendant’s motion to compel plaintiff to respond to defendant’s First Set of Requests
14 for Production of Documents is granted and defendant’s related request for sanctions is granted
15 in part. Dckt. No. 25.

16 2. Within twenty-one days of the date of this order, plaintiff shall produce all documents
17 responsive to defendant’s First Set of Requests for Production of Documents, without objection,
18 or shall provide a verification under penalty of perjury that, after a reasonable search, plaintiff
19 has already produced all responsive documents within his possession, custody, or control.

20 3. Defendant’s motion to compel plaintiff’s deposition is granted and defendant’s related
21 request for sanctions is granted in part. Dckt. No. 26.

22 4. Within sixty days of the date of this order, at a specific date and time to be noticed by
23 defendant, plaintiff shall appear for his deposition without objection.

24 5. Within thirty days of the date of this order, plaintiff shall pay \$1932.00 (based on the
25 awards of \$1000.00, \$603.50, and \$328.50 addressed above) to defendant’s counsel.

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1 6. Plaintiff is admonished that continued failures to comply with the Local Rules and/or
2 the Federal Rules of Civil Procedure may result in the imposition of sanctions, including
3 additional monetary sanctions and/or terminating sanctions which would result in the dismissal
4 of this action.

5 SO ORDERED.

6 DATED: June 28, 2011.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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