

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Michael R. Cuenca,]	
]	
Plaintiff]	
vs.]	CASE NO. 98-4180-SAC
]	
School of Journalism, University of Kansas,]	
Myron A. Kautsch, and]	
James K. Gentry,]	
]	
Defendants.]	
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**PLAINTIFF’S REPLY TO DEFENDANTS’ RESPONSE TO PLAINTIFF’S MOTION
FOR DEFAULT JUDGMENT**

COMES NOW the Plaintiff, Michael R. Cuenca, *pro se*, and submits the following REPLY TO DEFENDANTS’ RESPONSE TO PLAINTIFF’S MOTION FOR DEFAULT JUDGEMENT.

This reply is filed within the 10 days imposed by D.Kan. 7.1, computed per Fed. R. Civ. P. 6(a).

1. In paragraphs 1 through 16 of their Response brief, Defendants’ Counsel recount for the Court much of the activity of this case. They have presented a litany of complaints about how hard they’ve had to work on this case, quotations of requests for production, and responses to requests for production. Throughout this Response brief they characterize the Plaintiff’s claims as “outlandish”, “speculative”, and “pure fantasy”, which might lead one to believe that they actually can prove the Plaintiff wrong. However, nowhere in this section, or anywhere else in this Response brief, does Defendants’ Counsel actually deny that they withheld from their initial Fed. R. Civ. P. 26(a)(1)(B) disclosures the crucial and critical evidence described in the Plaintiff’s Evidentiary Supplement to his Motion for Default Judgment (Doc. 128). They do not deny that they withheld evidence of their

previous violations of Executive Order 11246, in violation of Fed. R. Civ. P. 26(a)(1)(B) and also 26(e)(1). Additionally, even though Defendants' Counsel characterize as "speculative" the Plaintiff's assertion that Defendants also withheld this information throughout other litigation before this Court, they do not deny that this evidence was withheld from those plaintiffs. They do not deny these allegations because they cannot. They did, indeed, withhold the evidence described by the Plaintiff, both in this case and those that have come before. Hence, the Court should, at this juncture be concerned only with the type of sanctions to now apply.

2. Exhibits 2 through 4 of the Plaintiff's Evidentiary Supplement are correspondence between the Defendant University of Kansas and the U.S. Department of Labor's Office of Federal Contract Compliance Programs, which enforces Executive Order 11246. EO 11246 requires employers that receive federal funding to comply with equal opportunity protections and affirmative action efforts that are more extensive than those required of non-funded employers. Employers found out of compliance can be debarred from receiving any federal funding. As these documents show, Defendant University of Kansas' compliance with EO 11246 was found to be deficient by the OFCCP after a compliance review in 1994.
3. This evidence of Defendant University of Kansas' deficient compliance is of a type that is probative, direct evidence of motive in civil rights cases, as described in Section 604.3(c)(4) of the U.S. Equal Employment Opportunity Commission Compliance Manual (attached as Exhibit 1), which states:

(4) The following examples of direct evidence of motive illustrate situations in which respondent refuses to correct a discriminatory practice which it is or should be aware of.

Section (ii) of which reads:

(ii) A situation in which the EEOC or another federal or state agency has conducted a compliance review and has found the employer's compliance status to be deficient, but the employer has failed to take any corrective action.

4. Exhibit 1 of the Plaintiff's Evidentiary Supplement is a report that provides substantiation of the Plaintiff's complaints of discrimination. This report was produced by the Defendants and then suppressed. These internal studies and analyses suppressed by the Defendants constitute additional evidence of their refusal to correct a discriminatory practice of which it was aware, per the EEOC compliance rule listed above. In fact, Defendants abused the protective order ordered by the Court to keep this evidence from the Plaintiff for as long as possible, perhaps in the hope that the Plaintiff's attorney would not understand the significance of the evidence. They abused the protective order by attaching a one-page roster of the participants to the report in order to classify the entire report as a "personnel record" to justify their including it in the protected materials. As the Court can see in the document as it is presented in Exhibit 1—without the roster—it would be nearly impossible and wholly speculative to try to guess who the quoted employees were. Indeed, without reading the attached transcripts, there is no way at all anyone could even guess who the employees were. In fact, Kansas Statute No. 45-221(d) (the Kansas Open Records Act) orders public agencies to "separate or delete" material that "pertains to an identifiable individual" and "make available to the requester any remaining portions". This should have been a public

document from the day it was published. But Defendants knew it would hurt their cases in the many civil rights complaints and lawsuits pending against them, so they made a conscious decision to suppress the report.

5. Typical of this Defendants' common practice of falling back on half-truths to defend their conduct, on the final paragraph of page 8 of their Response brief they claim that they "have produced for inspection, or provided hard copies of", five listed categories of documentation. What they have omitted from this claim is that not one of these categories of evidence was included in their initial 26(a) disclosures. In fact, only the first of these listed categories was produced at any time during the discovery phase of this case. The remainder was produced only after pressure from the Plaintiff during the past year. They even attempt to make it sound as if they have produced "all annual affirmative action plans", but the sentence is deceptive. They have produced what they say are "all annual affirmative action plans *developed* by the University of Kansas" (emphasis added) for the period of 1994 to 2001. However, they have not produced affirmative action plans for the years 1995-1996, 1996-1997, 1998-1999, 1999-2000, or 2000-2001. They say that they have produced "all records required by 41 CFR 60-2.12(m)", but that is another deceptive sentence and an outrageous untruth. As you can see at number 2 on the letter attached as Exhibit 2, they confirm that they claim the existence of only those records "to the extent we were able to do these compilations" and that "they are incorporated within the above affirmative action plans." Since they haven't produced a complete set of affirmative action plans, then, they haven't produced a complete set of the other data either. Additionally, in the third paragraph of their Response brief, Defendants' Counsel claims

that the Court should discount the Plaintiffs' "sweeping allegations" because the "plaintiff has these documents in his possession as they are attached to his evidentiary supplement." This also omits the truth that the Plaintiff has these documents only through action outside the litigation and that Defendants' Counsel did not produce them. Obviously, these are significant attempts to deceive the Court while rationalizing their misconduct.

6. In what apparently is an argument that the withheld Minority Focus Group roster isn't really material evidence, Defendants' Counsel at the bottom of page 9 of their Response assert that Plaintiff should have been able to recite for his attorney the names of the 30 other participants in the Minority Focus Groups. But they omit the fact that there were 3 separate groups and that they have hidden the roster from the rest of the world, so that no one but them would know who participated. And that also discounts the reality that the Plaintiff knew none of the other participants in his own group and never met any of them again until he read about the discrimination lawsuit of one of them in the newspaper two years later.
7. Defendants' uncontroverted failure to produce all of the documentation required by Rule 26(a) and the evidence specifically requested by Plaintiff in his original request for production amounts to an "Evasive or Incomplete Disclosure, Answer, or Response", which, according to Fed. R. Civ. P. 37(a)(3), amounts to "a failure to disclose, answer, or respond."
8. Also, Defendants have late characterized Plaintiff's requests nos. 33 and 44 (quoted in Defendants' Response at paragraph 4) as being overbroad. However, that argument is

particularly flimsy since Rule 26(a) also uses the same, exact sweeping call for “all documents”—along with several additional broadly generalized categories of potential evidence. Anyone who looks at the withheld evidence would easily understand that it is exactly the type of documentation that a civil rights plaintiff would seek. It is the very type of documentation that is required by law for employers to maintain specifically in the case that they are sued over employment activities. The Defendants knew they had this information, they knew it would harm their case, they knew they should have included it in their initial disclosures, they knew they should have produced it for discovery, but they withheld it. In paragraph 5 of their Response, Defendants attempt to assert that they produced some great volume of information in response to Nos. 33 and 44 of Plaintiff’s request for production, perhaps to infer that it was merely overlooked by the Plaintiff. But, in paragraph 6 of their Response, Defendants list their entire production in response to Nos. 33 and 44 of the Plaintiff’s first request for production. As you see, the documentation was quite limited and they did not produce the OFCCP correspondence, which would have revealed their EO 11246 violations. They didn’t even produce the records upon which the OFCCP compliance review was based. They produced no affirmative action plans in their initial disclosures or in response to the Plaintiffs’ RFPs. They did not produce the internally-generated reports on the working conditions for minority employees. They also omit the fact that it was the Plaintiff’s attorney and the Plaintiff that together reviewed all the documents produced and made available in Defendants’ Counsel’s office. As they point out in paragraph 7 of their response, none of their 26(a) disclosures were subject to any protective order and so

Plaintiff is and always has been fully aware of all documentation produced both in their initial disclosures and in response to requests Nos. 33 and 44.

9. Defendants frequently insinuate, as they do again in paragraph 7 of their response, that their withholding of this evidence should not now be given consideration because neither the Plaintiff's previous attorneys, nor the attorneys for other plaintiffs, never specifically complained about its omission—or that the revelation is in some other way untimely. This assertion ignores the fact that neither the Plaintiff's previous attorneys—nor the other plaintiffs' attorneys—had any way of knowing that much of this critical evidence even existed until it was recently uncovered outside of the litigation. The evidence of their EO 11246 violations is newly-discovered evidence. No one *could have* complained prior to its discovery. And Defendants' Counsel deceptively—and quite successfully—abused the protective order to keep the Minority Focus Group Report from the Plaintiff until just recently.
10. As Defendants' Counsel describes on page 6 of their Response, when determining whether it should apply the “extreme sanction” of default judgment, the Court is directed by the 10th Circuit to consider the following factors:
 - (1) the degree of actual prejudice to the [Plaintiff],
 - (2) the amount of interference with the judicial process,
 - (3) the culpability of the litigant,
 - (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and
 - (5) the efficacy of lesser sanctions.

Jones v. Thompson, 996 F.2d 261, 1993 U.S. App. LEXIS 15006; 26 Fed. R. Serv. 3d (Callaghan) 239, (10th Cir. 1993). And as Defendants' Counsel points out on page 7 of their response, the Court need not follow these five criteria as a "rigid test; rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 647 (D.Kan. 1999).

11. Addressing the first of these criteria, the Defendants have significantly prejudiced the Plaintiff, who was, throughout the complete discovery period, without the benefit of the knowledge of the Defendants' prior civil rights law violations. Knowledge of such evidence, which the EEOC considers probative of motive, would have significantly affected the conduct of discovery and depositions. In the other cases before this Court, such evidence likely would have significantly influenced both the judges and the juries in those cases. Prejudice to the Plaintiff also includes the increased efforts trying to prove illegal motive, when the Defendants had in their possession critical and conclusive evidence of their motive. Defendants claim that Plaintiff is not prejudiced by this violation because he now has this evidence. However, discovery is now closed and the Plaintiff has been significantly prejudiced by not having the opportunity to seek additional evidence and to depose witnesses concerning this evidence. Additionally, the Defendants' conduct in working diligently and utilizing whatever rationalization possible to hide material evidence raises a distinct doubt in the integrity of all of their production. The U.S. Supreme Court has ordered that the keeping of these types of records and their production in civil rights litigation is necessary to prevent undue burden on plaintiffs, ruling:

Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force.

Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657-58, 49 FEP 1519, 1526 (1989).

By withholding the evidence, Defendants have clearly prejudiced the Plaintiff in this regard.

12. As for the second criteria, the Defendants have clearly interfered with the judicial process by willfully failing to disclose evidence of previous civil rights law violations and their knowledge of the widespread dissatisfaction of its minority and female employees. Defendants have interfered with the judicial process by refusing to disclose this evidence when it was clearly mandatory under Rule 26(a); even after it was requested by the Plaintiff in his initial request for production (as Defendants themselves quote in paragraph 4 of their Response); and even after they were informed by Plaintiff that their production was incomplete, as then required by Rule 26(e). Once discovered by the Plaintiff, Defendants' failure to produce this evidence resulted in the Plaintiff's firm belief that additional critical evidence has been withheld, leading to additional action to compel production. Additionally, if this Plaintiff and/or the other plaintiffs had known of this evidence, if the EEOC and the OFCCP had been made aware of the withheld evidence, these cases might very well never have even come into the judicial process. One could argue that Defendants have presented a frivolous defense that has been defensible only through the withholding of evidence. Defendants assert several times that they have produced for various parties all "requested" documentation. This is not true. This specific type of evidence was requested time and again by Plaintiff, beginning with his first

request for production. And the fact remains that Defendant was required by Rule 26(a) to disclose the evidence without request—to this Plaintiff and to all other plaintiffs. Most of the statistical evidence of the Defendants’ hiring and promotion practices—evidence that is required to be kept specifically for its necessity in litigation of civil rights disputes—has not ever been produced. Defendants continue to assert that this evidence is inaccessible due to a very convenient and obviously pretextual claim that they cannot access the data in their own computer database—even though they acknowledge in the letter attached as Exhibit 2 that they do possess the original cards from which the data could be gathered. The judicial process can hardly be well served by the withholding of material evidence and such determined efforts to suppress the evidence even when it exists and has been specifically identified. As Defendants complain in paragraph 3 of their Response, this litigation has dragged on and on. Their complaint is particularly hypocritical since Defendants’ violation has likely been a primary reason that this case has not already been resolved.

13. Third, as for their culpability, the Defendants do not deny that they withheld this evidence from their initial disclosures. In fact, Defendants’ Counsel did not produce the evidence of their EO 11246 violations at any time during this litigation—until after they became aware that the Plaintiff had obtained the evidence from another source. Plaintiff discovered this evidence only after his own research into record-keeping required by civil rights law. Plaintiff was forced to resort to the Kansas Open Records Act to request such documentation directly from the Defendant’s Office of Equal Opportunity. Had the Plaintiff not made that request, the evidence would likely still not be in evidence in this

case. Indeed, Defendants' failure to produce this evidence throughout the course of their previous civil rights litigation is compelling evidence of their intent to withhold this evidence indefinitely. Defendants make no claim that they were unable to disclose this evidence, they merely decided not to disclose it and to then rely on the various plaintiffs' lack of knowledge of the existence of the evidence. Defendants' culpability is obvious.

14. As for the fourth consideration: the 10th Circuit has ruled that a warning of dismissal or default is not necessary prior to an order of default judgment. "The district court's failure to warn [the party] of the possibility of sanctions is of no consequence." *FDIC v. Dailey*, 973 F.2d 1532 (10th Cir. 1992).
15. Finally, the court must weight the efficacy of lesser sanctions. The automatic Fed. R. Civ. P. 37 sanction of preclusion from using the undisclosed evidence would, in this case, be no penalty at all to the Defendants, because their intention was at all times to prevent the use of this evidence.
16. Although the 10th Circuit has ruled that initial imposition of lesser sanctions is not mandatory (See, e.g., *Archibeque v. Atchison, Topeka & Santa Fe Ry.*, 70 F.3d 1172, 1175 (10th Cir. 1995); *Jones v. Thompson*, 996 F.2d 261, 265-66 (10th Cir. 1993) ; *Ehrenhaus*, 965 F.2d at 921-22), the other possible sanctions authorized by Fed. R. Civ. P. 37(c)(1) include:
 - payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the sanctions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.
17. The other sanctions listed in Rule 37(b)(2) include:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

18. The Plaintiff concedes that the Court has the authority to apply the lesser sanctions. However, if the Court applied the lesser sanctions provided for in subsections (A) and (B), the effect would likely result only in prolonging an inevitable judgment against the Defendant. For example:
19. The withheld material evidence is probative of illegal intent and of discriminatory motive. The Court could impose a 37(b)(2)(A) sanction in the form of a partial summary judgment that the fact of pattern and practice of discrimination has been established or that the Defendants' racial intent and motivations have been established. Alternatively, the Court could impose a 37(b)(2)(B) sanction by precluding Defendants from claiming that the reasons for their discriminatory conduct are not pretextual or by precluding them from defending against a showing of pattern and practice. However, in either case, the Defendants would be left with little defense against the charges against them in this case and the Court would merely be unnecessarily prolonging the litigation.
20. Also, Plaintiff has received a letter from Defendant University of Kansas' Director of Equal Opportunity, attached as Exhibit 2, that finally details exactly what documentation Defendant University of Kansas has available for disclosure—or that they are willing to

disclose. As you can see in this letter, they either did not prepare affirmative action plans annually, as required by law and by their agreement with the OFCCP—or they did prepare them and are now hiding them. They did not prepare the annual compilations required by 41 CFR 60-2.12(m)—or they are hiding them. In fact, at paragraph 7 of this letter, you see the Plaintiff’s request for the Affirmative Action postcards from which the applicant flow data of the employer could be determined. This applicant flow data is among the types of evidence required to be kept under 41 CFR 60-2.12(m) specifically for employment litigation, and it is the evidence that the Defendant claims is unavailable because of software problems. You can see they respond that they do not have to disclose the information under the Kansas Open Records Act—but they do not claim the cards do not exist. Since they have the cards and since no restrictions on personnel records exist in litigation, this information should have been disclosed in whatever form it was in their possession. It should have been disclosed under 26(a), it was clearly requested by the Plaintiff in his first request for production, and it should have been disclosed under 26(e) after it was specifically requested when the Plaintiff informed them that their production was incomplete. When one considers that they promised a federal agency that they would provide this information on an annual basis, one must wonder why they now say it does not exist or that they are unable to produce it because of a software problem. Also, they continue to deceitfully assert that the internal reports are “personnel records” which are not required to be disclosed under the Kansas Open Records Act. Even in the face of litigation and even knowing as they do that this Plaintiff is seeking these records, they continue to attempt to suppress this information.

21. It has been clearly established that this Defendant suppresses evidence that would harm its case. Fed. R. Evid. 406 directs that evidence of the habit or routine practice of an organization is relative to their present and future conduct. Knowing, as it does now, that the habit and routine practice of this Defendant is to withhold material evidence, how can the Court be confident that these Defendants have not also withheld a great deal more material evidence? How can the Court be sure that the information that they claim in this letter to be nonexistent is truly nonexistent, and not actually being hidden by the Defendants because it would harm their case?
22. Such suppression of evidence and/or the destroying of or failure to prepare and maintain such records invokes spoliation considerations, which include an inference by the Court that Defendants knew of their peril in the case and deliberately sought to prevent the damaging evidence from being discovered. Such a revelation obviously justifies the most severe of sanctions. (See *Computer Associates International, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990).)
23. In conclusion, the Plaintiff respectfully begs the Court to consider the context of this violation. It is clear that this was a willful violation and that this crucial and critical evidence was withheld deliberately. This withheld evidence was probative of several aspects of civil rights litigation. First, this withheld evidence is probative of illegal motive, as described above in paragraph 3. This Plaintiff and the other plaintiffs could have utilized this evidence to prove pretext. When one considers that in the previous cases, at least some of the plaintiffs' discrimination claims were either dismissed by their Judges for lack of proof of racial motive or found by the jury to not be supported by proof of

racial motive, one must acknowledge that this evidence would likely have had a considerable impact on the probability of success of the plaintiffs of those cases. Second, this withheld evidence would have been utilized by this Plaintiff—and likely by the other plaintiffs—to prove that this Defendant employer’s workplace is marked by a pattern and practice of discrimination against minority and female employees. After such a showing, civil rights plaintiffs shift the burden of proof significantly under the *Teamsters* model, then requiring that the Defendants show that illegal discrimination was not the motive for the acts of disparate treatment of the plaintiffs. (see *Teamsters v. United States*, 431 U.S. 324, 14 FEP 1514 (1977).) Such a finding would also likely have affected the probability of success of these plaintiffs.

24. Indeed, please consider the Defendants’ attitude. Consider the Defendants’ insinuations at every possible opportunity that the Plaintiff is responsible for the long timeline of this case and that they have been overly burdened by what they would like the Court to believe is a frivolous action. All the while, Defendants have had evidence secreted away that proves that the Plaintiff’s case is anything but frivolous and that they are indeed guilty of perpetuating a workplace marred by racial and gender discrimination. Consider their attitude reflected in their Response brief: they continue to attempt to cast the Plaintiff’s uncontroverted assertions as “outrageous”, “speculative”, and “pure fantasy”, even as they again rely on deception to rationalize their conduct.
25. Please remember that even without this evidence of illegal motive in terms of discrimination, Defendant University of Kansas was—in this Court—found by a jury to be liable for illegal retaliation in the *Aquilino* case. Defendants have conducted themselves

in the most heinous and cruel manner; they have determinedly fought against civil rights complaints when they had evidence that the complaints were substantive and they have cruelly retaliated against the victims who have brought those complaints. Defendants conducted internal studies and analyses of the conditions of employment for their minority and female employees. At the same time Defendant was being sued by minority and female employees, the studies and analyses produced results that would have helped the cases of those employees, so the Defendants made a conscious decision to suppress the evidence. This is a public institution, a state agency that not only hid from public inspection the results of these studies and analyses, but also suppressed even the very existence of them. The Court should impose “dismissal or its equivalence,” in this case because the Defendants’ violation conforms to the criteria cited by Defendants’ Counsel on page 6 of their Response: their violation was “predicated upon ‘willfulness, bad faith, or [some] fault ... other than inability to comply.’” *Starlight* at 647.

26. The Court should be outraged by this conduct. This group of people who now represent the University of Kansas and the State of Kansas have acted with flagrant disregard for the principles of due process and the rule of law—and human decency. They have acted as if they feared no consequence—perhaps because they believed that the stature of their employer would protect them from accountability. They have purposefully deceived their legal opponents. They have purposefully deceived this Court.
27. The Court should apply the most severe of sanctions for the reason Defendants’ Counsel cites on page 5 of their response: “to ensure that [Defendant] does not benefit from its failure to comply, and to deter those who might be tempted to such conduct in the

absence of such a deterrent.” *Starlight* at 647. If the Court merely “slaps the hand” of this Defendant after such an obvious attempt to obstruct justice by willfully withholding material evidence, the Court would tell this Defendant and others in this jurisdiction that they have nothing to lose by attempting such obstruction.

28. **WHEREFORE**, Plaintiff again respectfully requests that the Court enter default judgment for the Plaintiff on all counts specified in his First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT was mailed, by depositing such copy in the United States mail, postage prepaid, on April 17, 2001, addressed to:

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