

**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 MOTION FOR DEFAULT JUDGMENT

COMES NOW the plaintiff, Michael R. Cuenca, *pro se*, and submits the following MOTION FOR DEFAULT JUDGEMENT under Fed. R. Civ. P. 37(c)(1) and Fed. R. Civ. P. 37(b)(2)(C).

1. Plaintiff Michael R. Cuenca filed the instant suit *pro se* on October 9, 1998. Plaintiff served defendants in January of 1999. Defendants answered the complaint on February 17, 1999. Defendants served their initial 26(a) disclosures on April 26, 1999.
2. In their initial disclosures, Defendants’ Counsel failed to produce material and probative evidence in violation of Fed. R. Civ. P. 26(a)(1)(B), which requires the disclosure of:

a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
3. Plaintiff’s Title VII complaint alleges with particularity discrimination based on race. Hence all evidence in the Defendants’ possession that would establish the discriminatory climate for minority employees in the Defendants’ workplace would be required by Rule 26(a), as would all evidence regarding the Defendants’ record of violations of federal civil rights laws and executive orders.

4. Defendants' Counsel withheld from the Plaintiff a 1997 Summary Report titled "A Focus Group Report on KU Minority Faculty", prepared by Beverly Davenport Sypher and James Patterson, which details the widespread dissatisfaction of minority faculty employed by Defendants.
5. Defendants' Counsel withheld from the Plaintiff correspondence between Defendant University of Kansas and the Office of Federal Contract Compliance Programs, which enforces Executive Order 11246, which requires with particularity affirmative action and equal opportunity protections. Said correspondence established that Defendants had been found out-of-compliance with Executive Order 11246.
6. Defendants' Counsel withheld from the Plaintiff all annual affirmative action plans, which would have detailed underutilizations of minorities in the Defendants workplace and the effectiveness of previous efforts to correct such underutilizations.
7. Defendants' Counsel withheld all records required by 41 C.F.R. 60-2.12(m), such as "progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status". Such evidence would have shown the rates at which minority applicants for hire or promotion are rejected and would be probative of discriminatory hiring and promotion practices.
8. Defendants' Counsel withheld their Employer Information Report EEO-1 forms required to be filed with the EEOC by C.F.R. § 1602.7.
9. This material evidence clearly relates to "disputed facts alleged with particularity in the pleadings" (Rule 26(a)(1)(B)) and would have been probative of Plaintiff's complaint. The withheld evidence would have revealed previous violations of federal civil rights

mandates. The evidence would likely be probative of a pattern and practice of discrimination in this workplace.

10. Even though all of this material evidence should be in the public record, Plaintiff has obtained portions of these required disclosures only after diligent research and continual prodding of Defendants' Counsel. As the Court well knows, Defendant University of Kansas has even fought determinedly against producing much of this evidence. The Court must wonder, then, just how much more material, probative evidence Defendants' Counsel has also withheld.
11. This material and probative evidence had also been previously withheld from the Kansas Human Rights Commission and the U.S. Equal Employment Opportunity Commission.
12. This material and probative evidence was also withheld from the plaintiffs in the following cases before this court: *Annett v. University of Kansas*, Case No. 99-2070-CM, and *Aquilino v. University of Kansas*, Case No. 99-2231-KHV. The withheld evidence would have been material and perhaps probative in these cases, likely affecting a different outcome in each.
13. Failure to disclose information required by Fed. R. Civ. P. 26(a) invokes Fed. R. Civ. P. 37(c)(1), which then authorizes the Court to impose sanctions that include Fed. R. Civ. P. 37(b)(2)(C), which authorizes the Court to impose "a judgment by default against the disobedient party."
14. As a result of these willful and multiple failures to disclose material evidence, the Court in this case and all others currently pending within it, can have no confidence as to the future integrity of Defendant University of Kansas' production of evidence, nor in their good

faith compliance with the Federal Rules of Civil Procedure. This historical and ongoing practice of withholding material and probative evidence is clearly an indication of what the U.S. Supreme Court has called “‘flagrant bad faith’ and a ‘callous disregard’ of their responsibilities.” *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

15. The 10th Circuit has described this as “willful failure” that is:

“any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.” *M.E.N. Co.*, 834 F.2d at 872-73 (quoting *In re Standard Metals Corp.*, 817 F.2d 625, 628-29 (10th Cir.), modified on reh’g on other grounds sub nom. *Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987)).

Toma v. City of Weatherford, 846 F.2d 58 (10th Cir. 1988).

16. The 10th Circuit, in the same case, discussed the authority for imposing default judgment:

In *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869 (10th Cir. 1987), we noted that default judgment (or dismissal) is one of the enumerated sanctions in Federal Rules of Civil Procedure 37(b)(2)(c) and (d) and 16(f). 834 F.2d at 872.

Id.

17. The Court should infer that Defendants’ failure to produce this information is an indication of Defendants’ knowledge that the information would harm their case. In *Dooley v. Altus Medical Corp.*, 1995 U.S. App. LEXIS 13492 (10th Cir. Okla. May 31, 1995), the 10th Circuit referred to the decision in *Nationwide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982), which says:

When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document’s nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him.

18. This Court should impose this harsh sanction of default judgment to deter future violations not only by this Defendant, but also by other parties. The U.S. Supreme Court has ordered that:

The most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League. The Court went on to affirm the District Court's imposition of this severe sanction, ruling that if less severe sanctions had been imposed:

. . . it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

Id.

19. Fed. R. Civ. P. 54(c) describes the scope of a default judgment as:

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

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

Respectfully submitted,

MICHAEL R. CUENCA, *pro se*
3019 Longhorn Dr.
Lawrence, Kansas 66049
(785) 842-8954 – Office
(785) 838-9617 – Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT was hand-delivered, on March 16, 2001, to:

Rose Marino
Special Assistant Attorney General
University of Kansas
245 Strong Hall
Lawrence, KS 66045

MICHAEL R. CUENCA
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**EVIDENTIARY SUPPLEMENT TO PLAINTIFF’S MOTION FOR DEFAULT
JUDGMENT**

COMES NOW the plaintiff, Michael R. Cuenca, *pro se*, and submits the following EVIDENTIARY SUPPLEMENT TO PLAINTIFF’S MOTION FOR DEFAULT JUDGEMENT under Fed. R. Civ. P. 37(c)(1) and Fed. R. Civ. P. 37(b)(2)(C).

EXHIBIT 1.

A single-page “Review of Responses of Focus Group Report”, which describes many “Areas of Improvement” identified by the participants of minority focus groups.

1997 Summary Report titled “A Focus Group Report on KU Minority Faculty”, prepared by Beverly Davenport Sypher and James Patterson.

A document titled “Appendix A: Focus Group Transcriptions”. These complete transcriptions of the minority focus groups detail the widespread dissatisfaction of minority faculty in Defendant University of Kansas workplace.

Plaintiff has omitted from this exhibit a document titled “Minority Focus Group Rosters”, which provides the names of all minority faculty who participated in the focus groups.

This information would have provided plaintiff with a list of minority faculty who might have been willing to corroborate the discriminatory atmosphere in Defendant University of Kansas' workplace.

This roster also would likely help plaintiff's case because this list and the transcripts of the focus groups would have provided Defendant University of Kansas a complete list of those faculty members who were most likely to voice their dissatisfaction—such as the plaintiff in this case—to enable Defendant University of Kansas an opportunity to single out these individuals for illegal Title VII retaliation. This list would have provided the evidence necessary to investigate the status of each of these individuals.

Because this information deals directly with minority issues in Defendant University of Kansas' workplace, Defendants can not claim this information to be outside the scope of Fed. R. Civ. P. 26(a)(1)(B)—particularly since the Plaintiff was one of the participants in the study. Dr. Raymond Pierotti, one of the plaintiffs in *Annett v. University of Kansas*, Case No. 99-2070-CM, was also a participant, but this information was withheld from the plaintiffs in that case, also—all the way through the completion of a trial on the merits.

EXHIBIT 2.

A letter dated June 9, 1995, from Defendant University of Kansas' Chancellor Robert Hemenway to the Office of Federal Contract Compliance Programs (OFCCP), which acknowledges that Defendant University of Kansas was found out-of-compliance with Executive Order 11246. Defendant University of Kansas did not produce this document at any time during the discovery phase of this case, nor did they produce this document at any time during the

completed cases of *Annett v. University of Kansas*, Case No. 99-2070-CM and *Aquilino v. University of Kansas*, Case No. 99-2231-KHV.

This letter also details remedial actions that Defendant University of Kansas promised to take, which includes the promise to “compile a report of the results of its affirmative action program annually.” Defendant University of Kansas has never produced the annual affirmative action plans promised in this letter. This letter was not disclosed to the Plaintiff during the discovery phase of this case. Plaintiff obtained this letter only after learning of the existence of the OFCCP long after the close of discovery. Plaintiff had earlier complained directly to the Defendant University of Kansas’ Office of Equal Opportunity about discrimination, but was never informed of the existence of the OFCCP. This itself is a violation of Executive Order 11246, which requires employers to make their employees aware of the OFCCP and the employees’ right to complain directly to the OFCCP.

Also in this letter, you see reference to the record-keeping required by “41 CFR 60-2.12(m) and 41 CFR 30-3.4A and B.” These records have never been produced by Defendant University of Kansas, despite repeated demands by the Plaintiff for these types of employment records.

EXHIBIT 3.

A letter dated June 21, 1995, from the Office of Federal Contract Compliance Programs to Defendant University of Kansas Chancellor Robert Hemenway, accepting Defendant University of Kansas’ promise to remedy their Executive Order 11246 violations.

This letter includes the following statement:

This determination does not preclude a future determination of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

This letter and the statement above is material evidence in a case alleging illegal Title VII retaliation because it provides evidence of a significant motivation for retaliating against civil rights activists in order to silence them to prevent their actions and complaints from being discovered by this federal agency—which could debar Defendant University of Kansas from receiving any federal funding.

Once again, this material evidence was withheld from this plaintiff and from the plaintiffs in the *Annett* and *Aquilino* cases.

EXHIBIT 4.

A letter dated December 22, 1994, from the Office of Federal Contract Compliance Programs to Defendant University of Kansas, informing Defendant of a compliance review. This letter and the attachment to this letter refer to the record-keeping requirements of various federal laws, including the following:

1. “A Workforce Analysis prepared in accordance with 41 CFR 60-2.11(a)”
2. “A Utilization Analysis prepared in accordance with 41 CFR 60-2.11(b)”
3. “For each job group, a determination of minority and female availability that considers the factors given in 41 CFR 60-2.11(b)(1) and (2)”
4. “The identification of all job groups that are underutilized, as defined in the introductory paragraph to 41 CFR 60-2.11(b).”
5. “Goals for each job group identified as underutilized, consistent with 41 CFR 60-2.12(g), (h) and (i).”
6. “The regulations at 41 CFR 60-1.40(b)(3) and 60-2.13(d) and (g) require an analysis of your promotion practices to determine if upward mobility of minority or female

employees is occurring at a lesser rate (compared to workforce mix) that nonminority or male employees.”

7. “The regulations at 41 CFR 60-2.13(d) and (g) require an evaluation of the degree to which nondiscrimination policy is carried out with respect to employee terminations.”

None of the information described in this letter and its attachment has ever been disclosed to the plaintiff in this case or to the plaintiffs in the *Annett* and *Aquilino* cases.

Defendant University of Kansas’ historical pattern of withholding evidence not only in this case, but throughout the disposition of their other recent Title VII civil rights lawsuits, is indicative of their callous disregard for their evidentiary disclosure responsibilities. Again, the Court can have no confidence in the integrity of this Defendants’ disclosures in this case or in any other cases, now or in the future.

WHEREFORE, Plaintiff respectfully requests that the Court enter default judgment for the Plaintiff on all counts specified in his First Amended Complaint, as requested in PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT.

Respectfully submitted,

MICHAEL R. CUENCA, *pro se*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing EVIDENTIARY SUPPLEMENT TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT was mailed, by depositing such copy in the United States mail, postage prepaid, on March 20, 2001, addressed to:

Rose Marino
Special Assistant Attorney General
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