

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE, et al.,

Plaintiffs,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

Case No. 2:08 CV 575

Judge Frost

Magistrate Judge King

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION
FOR SANCTIONS FOR DEFENDANT'S FAILURE TO COMPLY
WITH THIS COURT'S DISCOVERY ORDERS**

I. INTRODUCTION

Defendant John Freshwater's ("Freshwater's") Response to Plaintiffs' Motion for Sanctions (Doc. No. 97) provides no credible explanation for his failure to comply with this Court's Written Order (Doc. No. 83) or its subsequent April 21, 2010 Oral Orders. Rather, Freshwater continues to make representations to this Court that simply are not true and to provide misleading explanations about what he claims he has done to comply with the Court's Orders. Contrary to Freshwater's claims in his Response, he and his attorney, R. Kelly Hamilton, did not provide the Dennises with affidavits attesting to the fact that all materials subject to the Court's Orders and to the Dennises' discovery requests had been produced *until he attached them to his Response brief*. (See Def.'s Response at 4-5.) They were not attached to the exhibit Mr. Hamilton handed to Plaintiffs' counsel at the state termination hearing. That assertion is false. Likewise, Freshwater's response concerning the billing records he was supposed to provide is highly misleading. Freshwater contends he does not have hard copies of

the billing records any longer and Mr. Hamilton states he does not have “any computer file containing any metadata related to billing records” for Freshwater, but that inappropriately skirts the question of whether Mr. Hamilton has hard copies of these billing records. (*See id.*, Ex. 3 at 19 ¶ 3, 21 ¶ 4.) We do not know the answer to that question based on his affidavit, but we do know that he has not produced them, as this Court required. Finally, Freshwater continues to hide the ball with respect to the religious materials that were in his classroom. He now contends in his affidavit he has produced everything (*id.*, Ex. 3 at 19-20); but that does not square with his and others’ testimony at the state termination hearing about what was in his classroom and what he removed.

Enough is enough. Freshwater’s persistent discovery violations and his unjustifiable responses warrant the imposition of sanctions in the form of evidentiary inferences, costs and attorneys’ fees.

II. ARGUMENT

A. Freshwater Provided No Affidavits Avowing That Materials Subject To The Court’s Orders And The Dennises’ Discovery Requests Had Been Produced At The Time He Said He Did.

Freshwater states that the Dennises’ counsel have “mischaracterized” things by claiming that they did not receive his and his counsel’s affidavits. (*Id.* at 4.) That is wrong. Mr. Hamilton did not produce the affidavits as he states. Mr. Hamilton contends that he handed the two affidavits (one signed by Mr. Hamilton, the other by Freshwater) to the Dennises’ counsel at Freshwater’s termination hearing on April 30, 2010 “attached to and in conjunction with the delivery of Employee Exhibit 161[.]” (*See id.* at 4-5.) That is not true. Although Mr. Hamilton did hand counsel a copy of Employee Exhibit 161, the affidavits were not attached to that exhibit. (Douglas Mansfield Decl. ¶ 6 (attached as “Exhibit A”).) If this were but an isolated incident, the Dennises would be inclined to give Freshwater the benefit of the doubt and

conclude that Mr. Hamilton made a mistake. But that is impossible under the circumstances here. Exhibit 3 that Freshwater filed with his Response, which contains a copy of Employee Exhibit 161 with the affidavits attached, is not a fair and accurate representation of what Mr. Hamilton provided to Mr. Mansfield on April 30, 2010. (*Compare* attached “Exhibit B” with Def.’s Response, Ex. 3).¹

To the contrary, Mr. Hamilton approached Mr. Mansfield at the termination hearing on April 30, 2010, stated that he was providing a copy of Employee Exhibit 161, and handed Mr. Mansfield an 18-page, stapled document. (Douglas Mansfield Decl. ¶ 4.) He did not say “Here’s Employee Exhibit 161 and the affidavits we needed to provide to you”; he never mentioned affidavits, never used the word affidavit, and did not supply any affidavits at that time. (*Id.* at ¶¶ 6-7.) Mr. Mansfield reviewed Employee Exhibit 161 when Mr. Hamilton gave it to him and, after seeing that it contained only Employee Exhibit 161, handed it to Leslie McCarthy, who also represents the Dennises in this lawsuit. (*Id.* ¶¶ 5, 9; *see also* Leslie McCarthy Decl. ¶ 4 (attached as “Exhibit C”).)

Ms. McCarthy reviewed the same stapled document, and did not see any affidavits attached to it. (Leslie McCarthy Decl. ¶ 5.) After the termination hearing had concluded for the day, Ms. McCarthy took the document back to the Jones Day offices in Columbus where she gave it to Matthew Johnson, another attorney who represents the Dennises in this case, and asked him to add it to their case files. (*Id.* at ¶ 6; *see also* Matthew Johnson Decl. ¶ 3 (attached as

¹ Employee Exhibit 161, which consists of some photocopied pages from one of Freshwater’s science textbooks, is one item that Freshwater had not provided that the Court ordered him to provide. (*See* Pls.’ Mot. to Compel Prod. of Docs. and Further Dep. of John Freshwater (Doc. No. 67) at 4 (requesting educational materials); Pls.’ Mot for Sanctions at 10-11 (same).) The Dennises requested a copy of that text book in discovery (which contains Freshwater’s handwritten notes), but Freshwater has produced only those pages he decided to copy and mark as an exhibit at his termination hearing. (*See* Def.’s Response, Ex. 3.) Employee Exhibit 161 does not contain all pages from the textbook, and therefore, for purposes of this case, constitutes an insufficient disclosure of responsive materials and thus another continuing violation of the discovery rules.

“Exhibit D”).) Mr. Johnson reviewed the same stapled document, and after seeing only Employee Exhibit 161, later placed it in a file folder. (Matthew Johnson Decl. ¶ 4.) None of these attorneys received or saw the affidavits purportedly provided by Mr. Hamilton to Mr. Mansfield on April 30, 2010. Nor did any of these attorneys or the Dennises ever receive the affidavits until they were filed with the Court on May 10, 2010. (Douglas Mansfield Decl. ¶ 8 XX; Leslie McCarthy Decl. ¶ 7; Matthew Johnson Decl. ¶ 6.)

In alleging that the Dennises received these affidavits prior to May 10, Freshwater is asking this Court to believe that Mr. Hamilton thought it proper to deliver Court-ordered affidavits to the opposing party by inconspicuously stapling them to the back of an exhibit from the termination hearing, with no written or verbal acknowledgement that the affidavits were being provided. (Douglas Mansfield Decl. ¶ 7.) Given the pending trial date at that time, the recent oral conference with the Court, and the outstanding discovery issues that needed to be resolved, it is inexplicable that the affidavits (if timely prepared, as Freshwater’s purportedly was on April 22) were not sent far earlier than the claimed hand-delivery on April 30. What is more, Freshwater’s purported April 22, 2010 affidavit reads like a document structured specifically to respond to the arguments raised in the Dennises’ Motion for Sanctions filed on May 7, 2010, not like an independently drafted document. (*Compare* Def.’s Response, Ex. 3 at 19-20 *with* Pls.’ Mot. for Sanctions.)

Freshwater and Mr. Hamilton simply did not produce the affidavits in the manner or at the time they contend. They may have timely prepared their affidavits, but they were not timely produced, and they do not suffice to adequately answer the questions this Court required them to answer.²

² The production of electronic files for these affidavits would indicate when they were prepared, but would not, of course, show when they were provided to the Dennises’ counsel.

B. Freshwater's Response Regarding The Production Of Billing Records For The Purported May 2008 Affidavits Is Wholly Inadequate.

Freshwater's Response and exhibits in support actually confirm that Freshwater and Mr. Hamilton violated the Court's April 21, 2010 Oral Orders to submit all billing records relevant to the drafting or preparation of Freshwater's purported May 2008 affidavits. The Response includes only a single sentence regarding the billing statements, merely noting that Freshwater's attached affidavit "addresses . . . [a]ny 'billing statements' for the entire calendar year of 2008." (Def.'s Response at 7.) But Freshwater's affidavit does not fully "address" the Court's Order. Rather, it supplies yet another excuse for Freshwater's failure to comply with discovery procedures—that he asked Mr. Hamilton to "stop sending detailed billing accounts because it depressed [him]" and that he does not have copies of the bills. (*Id.*, Ex. 3 at 19 ¶ 3.)

For his part, Mr. Hamilton swears in his affidavit that "he does not have any computer file containing any metadata related to any billing records for a client named John Freshwater depicting any information concerning affidavits signed by John Freshwater in May 2008." (*Id.*, Ex. 3 at 21 ¶ 4.) That is a misleading response. The Court's Oral Orders did not require billing information metadata. The parties and Court discussed that Mr. Hamilton had to produce only copies of any billing records related to the preparation of Freshwater's May 2008 affidavits. (*See* Pls.' Mot. for Sanctions at 5.) The metadata issue related to Plaintiffs' request for electronic copies of the May 2008 Freshwater affidavits to determine when they were created, but Mr. Hamilton claimed that his computer had been destroyed by water and was thrown away so no electronic files or metadata for those affidavits existed any longer. (*See id.*, April 19, 2010 Letter, Ex. C.) By suggesting he has no "computer file containing any metadata related to any billing records," Mr. Hamilton ignores the question of whether he has hard copies of those records. Indeed, Mr. Hamilton makes no mention in his affidavit (or in Freshwater's Response)

of hard copies of his billing records, whether he has retained these hard copies, and if so, why he has failed to produce them. (*See generally* Def.'s Response.)³

Freshwater simply has failed to provide what the Court required with respect to billing records and is misleading in his explanation for his failure to do so. Accordingly, the Court should order Freshwater and Mr. Hamilton to deliver these billing records to the Dennises' counsel by 5:00 p.m. on May 19, 2010. If the billing records are not produced, the Court should enter an inference that Freshwater's purported May 2008 affidavits were not created during that time period and were, in fact, drafted at a later date. In addition, Freshwater and Mr. Hamilton should be sanctioned for disregarding this Court's Orders.

C. Freshwater Did Not Provide Access To Or Full Copies Of Religious Materials.

Freshwater also distorts the truth regarding the alleged disclosure of religious materials from his classroom. His repeated failure to produce the "inspirational poster" featuring former President George W. Bush praying with his cabinet and his misrepresentation about what he did produce provides a glaring example of the games Freshwater continues to play with discovery. During the telephone conference on April 21, 2010, the Court ordered Freshwater to provide the Dennises with a legible copy of the "inspirational poster" by April 22, 2010 because the original copy he produced was completely blacked out. (*See* attached "Exhibit E".) After the conference, Mr. Hamilton delivered an improved copy of the "inspirational poster," but the text of and citation to a Biblical verse featured on the poster were cropped out. (*See* attached "Exhibit F".) Contrary to Freshwater's assertion that the Dennises did not follow-up regarding

³ Freshwater suggests in his Response that four e-mails that were exchanged between Mr. Hamilton and Mr. Mansfield somehow prove there was no production issue, but that is wrong. Those e-mails principally concerned the cancellation of Freshwater's scheduled deposition because Mr. Hamilton refused to defend him. That contention also ignores the fact that there was a phone conversation in which the Dennises' counsel specifically raised Freshwater's failure to produce and specifically referred Mr. Hamilton to the Dennises' April 22 letter outlining what was required to be produced. (Douglas Mansfield Decl. ¶¶ 10-11.)

this inadequate disclosure (Def.'s Response at 5), the Dennises sent a letter on April 22, 2010 asking for a further improved copy or for the original precisely because the Biblical verse had been cropped out (Pls.' Mot. for Sanctions, Ex. D), and counsel for the Dennises specifically referred to that letter in a May 6, 2010 conversation with Mr. Hamilton (Douglas Mansfield Decl. ¶ 11.)

Freshwater argues that the April 22 copy he delivered "appears legible" (Def.'s Response at 5), but the photocopy of the poster attached as an exhibit to Freshwater's Response brief is not the same as the photocopy with the Bible quote omitted that he delivered to the Dennises on April 22, 2010. (*See* Matthew Johnson Decl. ¶ 8.) Indeed, if the Court compares the attached Exhibit F (the photocopy of the poster that Freshwater provided to the Dennises on April 22, 2010) with Freshwater's Exhibit 7 (a photocopy that Freshwater claims he provided to the Dennises), the differences are immediately obvious.⁴

Freshwater also contends that the Dennises are mischaracterizing things with respect to the Ten Commandments posters, but that is not true. (*See* Def.'s Response at 6.) The parties and the Court discussed on the April 21 conference call the fact that the Ten Commandments poster that was marked as an exhibit at Freshwater's termination hearing was not an original of the one Freshwater had in his classroom, but a copy Mr. Hamilton obtained online and Freshwater identified as identical to the one he had in his classroom. The Court ordered Freshwater to produce a copy of that book cover. Freshwater, however, to this day still has not done that.

⁴ Contrary to Mr. Hamilton's assertions that his prior delivery of the "inspirational poster" was sufficient, Mr. Hamilton's own email of May 6, 2010 in effect acknowledges that the copy that Freshwater delivered did not constitute an adequate production of this document (Def.'s Response, Ex. 6 ("I will have the George Bush Poster delivered to your office.")). Likewise, Mr. Hamilton's delivery of the original poster to the Dennises' counsel on May 11, 2010—less than 24-hours after claiming the previously produced copy was complete and legible—also shows that Freshwater's prior production of the poster was inadequate. (Douglas Mansfield Decl. ¶ 12.) This delivery of the actual poster, of course, came weeks after this Court had ordered Freshwater to produce the poster, weeks after the Dennises' extra-judicial reminder letter of April 22, 2010 (Pls.' Mot. for Sanctions, Ex. D), and days after the Dennises filed their Motion for Sanctions.

Freshwater now contends in his affidavit that he has produced any and all copies of religious and other materials from his classroom, but that claim rings hollow. (*See* Def.'s Response, Ex. 3 at 19-20.) Freshwater's Response simply fails to explain away the missing materials copied at Freshwater's church and the five armloads of materials removed by Freshwater from Mount Vernon Middle School during the summer of 2008. Freshwater, in fact, has taken completely inconsistent positions on the whereabouts of the five armloads of materials he removed from his classroom. In his Response, Freshwater now contends that he produced all of the contents of the five armloads and only threw away "about 20-30 letters written to [him] from Chinese people." (*Id.*, Ex. 3 at 19 ¶ 3.) At his termination hearing, however, he testified that he threw away "most of" these materials. (Pls.' Mot. for Sanctions, Ex. F, *In the Matter of the Termination of Employment of John Freshwater* ("Freshwater Termination Hearing"), John Freshwater Test., 12/30/09, at 4898 ("To be quite honest with you, most of it got thrown into my garbage can there in my barn. So I was pretty upset at the time, and I remember vividly I just pitched it. I pitched it.")) The truth appears to be somewhere in between, but the Dennises have no way of knowing because Freshwater is not forthcoming.

Freshwater, moreover, ignores the fact that the five armloads were partially inventoried by Mt. Vernon School's Superintendent Stephen Short on the day Freshwater removed those materials. (Attached as "Exhibit G".) Some of these inventoried materials were included in the trash bags delivered to the Dennises on April 19, 2010, including the two Bibles and a cooler containing some metric conversion tools and a rock set. (*See* Pls.' Mot. for Sanctions, Ex. I; Def.'s Response, Ex. 9.) But many other materials were not, including religious books and tapes that are listed on Mr. Short's inventory. (*See* Ex. G.) The pictures Freshwater attaches to his

Response show far less than what Mr. Short's inventory reflects. What has been produced comprises one or two "armloads," but nowhere near "five armloads" of materials.⁵

As to the many religious posters that were in his classroom, there is no dispute that Freshwater removed them from his classroom as a result of the School's directive in April 2008 that he do so. (Pls.' Mot. for Sanctions, Ex. G, Freshwater Termination Hearing, John Freshwater Test., 12/10/09, at 4419.) Those materials, as well as religious books, CDs, and videotapes Freshwater admits to having in his classroom, are not contained in Freshwater's classroom materials the School Board still possesses. (Leslie McCarthy Decl. ¶ 8; Matthew Johnson Decl. ¶ 9.) The only reasonable explanation for the whereabouts of those materials is that Freshwater has them. (*See* Pls.' Mot. for Sanctions 7-10.)

If Freshwater chooses to adhere to his revised version of events, he should face sanctions for withholding responsive documents. If he sticks with his earlier testimony that he threw most of it away, he should face sanctions for spoliation—as Freshwater received the five armloads of materials in August 2008, more than two months *after* the filing of this action. (*Id.*, Ex. C.) Either way, Freshwater failed to preserve and/or produce evidence germane to this lawsuit and should be sanctioned for that failure with both the evidentiary inferences requested and monetary sanctions. The Court should enter an evidentiary inference that these materials that Freshwater acknowledges were in his classroom during the 2007-08 school year were religious items that served no secular purpose, as requested in the Dennises' Motion for Sanctions. (*Id.* at 11.)

⁵ Freshwater, likewise, has yet to supply a legitimate reason—in his pleadings or in his affidavit—for his ongoing failure to deliver his personal edition of the textbook *Cells, Heredity, and Classification* (which contain his handwritten notes). (Pls.' Mot. for Sanctions, Ex. J, # 105-108.) Five illegible pages of this book were delivered on April 19, 2010, and the Dennises reminded Freshwater of this insufficient response in their April 22, 2010 letter (*see id.*, Ex. D), but to date nothing else has been produced.

III. CONCLUSION

For the foregoing reasons, the Dennises respectfully request that the Court grant their request for sanctions in the form of evidentiary inferences, attorneys' fees, and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2010, I electronically filed the foregoing Reply with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following at his e-mail address on file with the Court:

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