

ORIGINAL

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

AUG 30 2002

at 3 o'clock and 53 min. P.M. of
WALTER A. Y. H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NATALIE T., ETC.,)	CIVIL NO. 01-00656 LEK ✓
)	
Plaintiff,)	
)	
vs)	
)	
PAUL LEMAHIEU, ETC., ET AL.,)	
)	
Defendants.)	
_____)	

ORDER IMPOSING SANCTIONS

On April 18, 2002, this Court issued a Minute Order requiring the presence of a variety of school officials at a hearing in the matter; and on April 30, 2002, this Court issued a Minute Order requiring the submission of a confirmation letter regarding training by Jessie Mitchell, a school-based behavioral specialist. A hearing regarding compliance with the Court's Orders was held before the Honorable Leslie E. Kobayashi on May 9, 2002. At the hearing, counsel for Defendants Paul LeMahieu, Superintendent of the Hawaii Public Schools; and the Department of Education, State of Hawaii (collectively "State Defendants") conceded failure to comply with the Court's Orders dated April 18 and 30, 2002.

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As a result, on May 10, 2002, this Court issued an Order to Show Cause, ordering State Defendants to show good cause, if any, why sanctions should not be imposed for contempt as a result of their repeated failures to comply with the Court's Orders. State Defendants filed a Memorandum on Order to Show Cause on May 23, 2002. Plaintiff Natalie T., individually and as guardian ad litem of Benedict T., a minor ("Plaintiff") filed a Memorandum in Support of the Order to Show Cause Why Contempt Sanctions Should be Imposed on May 30, 2002, to which State Defendants filed a reply memorandum on June 6, 2002. The Order to Show Cause Hearing was held before the Honorable Leslie E. Kobayashi on June 10, 2002. Stanley E. Levin, Esq., appeared on behalf of Plaintiff; Deputy Attorney General Pamela A. Toguchi appeared on behalf of State Defendants.

The Court having reviewed the pleadings, exhibits, declarations, and memoranda, and having heard and considered oral arguments of counsel, hereby finds as follows:

BACKGROUND

On March 15, 2002, this Court granted Plaintiffs' Motion to Find Defendants in Contempt, filed on December 18, 2001 ("Contempt Order"). Among other things, the Contempt Order provided specific deadlines for State Defendants to finalize and implement a Positive Behavioral Support Plan ("Behavioral Plan") for Plaintiff's minor child, Benedict T. (Order ¶ 1.) The

Behavioral Plan required "review by and input from Benedict's mother Natalie T. (sic), his aunt Faith T. (sic) and other IEP team members" and approval by Jessie Mitchell, "who the parties agree is a neutral recognized behavioral expert from the Behavioral Counsel and Research Center ("BCRC") located in Kailua, Hawaii." (Id. ¶¶ 1b-c (emphasis in original).) In addition, the Behavioral Plan was to be "implemented by all personnel, not just classroom teacher, who work with Benedict (teacher, therapeutic aides, educational aide, parents, administrators, etc.)" and required that "training from BCRC be provided to Benedict's family and any other person who deals with Benedict and who is involved in implementation of the behavioral plan." (Id. ¶¶ 1g-h.)

On April 18, 2002, a status conference was held with counsel regarding Plaintiff's complaint that State Defendants had failed to comply with deadlines in the Contempt Order. In particular, the Behavioral Plan had not been implemented as required nor had Plaintiff received the requisite training. As a result, a hearing was ordered to be held on May 9, 2002. State Defendants were ordered to have the following persons physically present at this hearing regarding compliance with the Contempt Order: the school principal, the minor's current teacher, the education aide, the therapeutic aide, the school-based behavioral specialist, and Jessie Mitchell. As Ms. Mitchell was not State

Defendants' employee, defense counsel was specifically ordered to prepare and serve the subpoena required to command Ms. Mitchell's presence at the hearing.

On April 30, 2002, State Defendants' counsel was ordered to submit a letter confirming the scheduling of behavioral training by Ms. Mitchell for Plaintiff. A deadline of May 2, 2002, was given for State Defendants' counsel to submit the confirmation letter to the Court.

On May 9, 2002, a hearing was held regarding State Defendants' compliance with the Contempt Order. Plaintiff and another witness, Faith T., testified that the Behavioral Plan had never been reviewed with them nor had they received any behavioral training from Ms. Mitchell. State Defendants were given an opportunity but did not present any witnesses regarding their compliance with the Contempt Order. None of the witnesses ordered to appear by the Court were present. Nor was any evidence presented that Ms. Mitchell had been subpoenaed to appear. State Defendants also failed to submit, as had been previously ordered, the letter confirming Ms. Mitchell had given or was scheduled to give Plaintiff the requisite training.

DISCUSSION

Imposition of civil contempt for a party's failure to comply with a court order is within the court's inherent power:

"[C]ourts have inherent power to enforce

compliance with their lawful orders through civil contempt." Spallone v. United States, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L.Ed.2d 644 (1990) (quoting Shillitani v. United States, 384 U.S. 364, 368, 86 S. Ct. 1531, 16 L.Ed.2d 622 (1966)); accord Waffenschmidt v. MacKay, 763 F.2d 711 (5th Cir. 1985) ("Courts possess the inherent authority to enforce their own injunctive decrees."). A party may be held in civil contempt where it "fail[ed] to take all reasonable steps within the party's power to comply [with a specific and definite court order]." In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 10 F.3d 693, 695 (9th Cir. 1993). Wilfulness is not an element of contempt. Id. ("there is no good faith exception to the requirement of obedience to a court order").

FTC v. Productive Mktg., Inc., 136 F. Supp. 2d 1096, 1107 (C.D. Cal. 2001).

Violation of a court's order, for purposes of proving civil contempt, must be demonstrated by "'clear and convincing evidence,' not merely a preponderance of the evidence." United States v. Ayres, 166 F.3d 991, 994 (9th Cir. 1999) (quoting In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993)). "An alleged contemnor may defend against a finding of contempt by demonstrating a present inability to comply." Id. (citation omitted). Additionally, "substantial compliance" will suffice:

"'Substantial compliance' with the court order is a defense to civil contempt, and is not vitiated by 'a few technical violations' where every reasonable effort has been made to comply." In re Dual Deck Video Cassette

Recorder Antitrust Litigation, 10 F.3d 693, 695 (9th Cir. 1993); accord Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885 (9th Cir. 1982) ("It is clear that substantial compliance with the terms of a consent judgment is a valid defense to a charge of . . . civil contempt.").

Productive Mktg., 136 F. Supp. 2d at 1107 (footnote omitted).

1. Failure to Comply With the Court's Orders.

This Court finds that, by clear and convincing evidence, State Defendants failed to obey a Court Order dated April 18, 2002, requiring the presence of school officials at a hearing in the matter, and an Order dated April 30, 2002, requiring the submission of a confirmation letter regarding training by a behavioral specialist. State Defendants' counsel admits that State Defendants have completely failed to comply with these Court's Orders. She offers no excuse other than mere inadvertent oversight on her part as a "defense" for violating the Court's Orders.¹ (Defs.' Reply Mem. at 3-4.) This is not, however, a valid excuse -- "[w]ilfulness is not an element of contempt." Productive Mktg., 136 F. Supp. 2d at 1107. The failure of State Defendants to have the witnesses appear as ordered at the hearing on May 9, 2002 and to provide the letter

¹ The Court notes counsel's repeated assertions that State Defendants were not culpable for defense counsel's inadvertence and oversight with respect to the Court Orders in issue, and that defense counsel takes sole responsibility for the violations.

confirming Ms. Mitchell's training of Natalie T. on the behavioral plan compel the finding of non-compliance with the Court's orders and, thus, of contempt.

While "a district court ordinarily should not impose contempt sanctions solely on the basis of affidavits," the decision not to hold "a full-blown evidentiary hearing does not violate due process" where the affidavits or declarations "offered in support of a finding of contempt are uncontroverted" Peterson v. Highland Music, Inc., 140 F.3d 1313, 1323 (9th Cir. 1998) (citing Hoffman v. Beer Drivers & Salesmen's, 536 F.2d 1268, 1276-77 (9th Cir. 1976)). Here, the Court expressly gave State Defendants ample notice and an opportunity to respond. State Defendants did not present any witnesses at the hearing on the Order to Show Cause. The only declaration offered was from counsel which largely consisted of inadmissible hearsay. There is, therefore, overwhelming evidence of State Defendants' complete failure to comply with the Court's Orders of April 18 and 30, 2002.

In imposing civil contempt, the Court is mindful that the State Defendants' failure to comply with the Court's Orders and the Contempt Order have caused a significant delay in implementing a critical behavioral modification plan and providing parent training, as well as the delivery of treatment and/or other services for Benedict T. The Court again reminds

the parties, and in particular State Defendants, that the essence of this case is the education of an eleven-year-old boy. Simply put, the State Defendants' failure to comply with the Court's Orders have unilaterally caused significant delays which have deprived Benedict T. of critical educational services. State Defendants have, at every turn, essentially scorned their responsibility to this child and to obey the Court's Orders. Such behavior is intolerable and demands severe consequences.

2. Pamela A. Toguchi.

Given the serious and chronic nature of counsel's unprofessional conduct, the Court takes the unusual step of noting here counsel's repeated failures to comply with a multitude of deadlines in this case. For example, at a December 17, 2001 status conference the Court ordered State Defendants to provide, by December 21, 2001, proof of compliance with paragraph 2 of the parties' settlement agreement. Counsel for State Defendants failed to file the proof of compliance on December 21, and it is unclear from the record whether any proof of compliance was ever filed. Further, on February 1, 2002, at a further hearing regarding enforcement of the settlement agreement and on Plaintiffs' Motion to Find Defendants in Contempt, the Court ordered State Defendants to submit to the Court, by February 12, 2002, a response to Plaintiffs' proposed agreement, as well as to provide Plaintiffs' counsel, by February 5, 2002,

general status information regarding State Defendants' plans and/or assessment of Benedict T.'s placement and education. State Defendants turned over a late response to Plaintiffs' counsel on February 14, 2002. Additionally, despite repeated directives by the Court to submit payment of attorneys' fees and costs to Plaintiffs' counsel, State Defendants' counsel was uncooperative in producing payment and/or updating Plaintiffs' counsel on the status of payment. As a result of counsel's nonfeasance, this Court was forced to issue, on March 22, 2002, an Order Setting Deadline, ordering payment of the fees. These examples reflect just a fraction of counsel's and, thus ultimately, State Defendants' failures to comply with the orders of this Court and their propensity to ignore deadlines.

Indeed, since her representation of State Defendants commenced in October of 2001, counsel has repeatedly tested the patience of this Court and her adversary with her unprofessional and oftentimes indifferent conduct. Counsel has been repeatedly reminded of her obligations and the potential penalties for noncompliance. See Local Rule ("LR") 11.1, 16.1. The Court has struggled with State Defendants in an effort to meet with school and/or Department of Education representatives to assess the status of and/or implementation of behavioral modification plans, parental training, etc., and at every step has been met with inexcusable delay and foot-dragging. As a result, the Court has,

on several occasions, warned State Defendants' counsel of the serious risks of representing State Defendants in this fashion and in continuing her contumacious conduct. Counsel's failure to comply with deadlines set by the Court and to proceed in a reasonable and/or cooperative manner with opposing counsel has significantly delayed the progress of this case, and most importantly, deprived Benedict T. of a free appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487.

As detailed above, the record clearly reflects numerous missed deadlines and failures to comply with orders of the Court. Accordingly, the Court imposes, as sanctions pursuant to LR 11.1 and as warranted by counsel's chronic delays and disregard, that Pamela A. Toguchi is barred from further representation of State Defendants in this action and that she is ordered to pay personally the amount of \$1,500.00 to the Clerk of the Court.

3. Sanctions Against State Defendants.

The Court, having determined State Defendants should be held in contempt for failing to comply with the Court's Orders of April 18 and 30, 2002, must fashion an appropriate sanction. To do so, courts are guided by the following:

Sanctions for civil contempt may only be employed for either or both of two distinct remedial purposes: "(1) to compel or coerce obedience to a court order . . . ; and (2) to compensate the contemnor's adversary for

injuries resulting from the contemnor's noncompliance[.]"

Bad Ass Coffee Co. of Haw., Inc. v. Bad Ass Coffee Ltd., 95 F. Supp. 2d 1252, 1256 (D. Utah 2000) (quoting O'Connor v. Midwest Pipe Fabrications, Inc., 972 F.2d 1204, 1211 (10th Cir. 1992)); see also Shuffler v. Heritage Bank, 720 F.2d 1141, 1147 (9th Cir. 1983)).

According to the evidence, State Defendants failed to produce the witnesses ordered and to provide the Court with the status report on whether Plaintiff received or was scheduled to receive the requisite training. Failure to produce the witnesses for the May 9, 2002 hearing prevented the Court from determining whether State Defendants were complying with the Contempt Order. The equities and the evidence justify imposing a compensatory sanction upon State Defendants. In determining a fine, the Court must base the fine on actual losses sustained:

Where the court imposes a fine upon the contemnor "for compensatory purposes, the amount of the fine must be based upon the complainant's actual losses sustained as a result of the contumacy." Id. (quoting Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 810 (2d Cir. 1981)). Clearly, the amount of any compensatory fine must be justified by evidence demonstrating the amount of loss to a reasonable degree of certainty. Otherwise, "any sum awarded by the court is speculative and therefore arbitrary." Id. (quoting Allied Materials Corp. v. Superior Prods. Co., Inc., 620 F.2d 224, 227 (10th Cir. 1980)).

Bad Ass Coffee, 95 F. Supp. 2d at 1257.

Plaintiff presented some evidence in her Memorandum which went to Plaintiff's injuries for the hearing not being able to be completed, due to State Defendants' failure to produce the witnesses. With these standards in mind, State Defendants are sanctioned in amounts to be determined to compensate Plaintiff for her reasonable costs, including lost compensation for the time spent by Plaintiff and her witness, for the hearing of May 9, 2002, and reasonable attorneys' fees and costs that were incurred for the hearing of May 9, 2002.

CONCLUSION

In accordance with the foregoing, the Court FINDS, by clear and convincing evidence that State Defendants failed to comply with the Court's Orders of April 18 and 30, 2002 and therefore are in contempt. The Court therefore ORDERS that the following sanctions be imposed:

1. State Defendants are ordered to pay the reasonable costs, including lost compensation for the time spent by Plaintiff and her witness, for the hearing of May 9, 2002;
2. State Defendants are ordered to pay the reasonable attorneys' fees and costs that were incurred for the hearing of May 9, 2002;
and

3. Russell Suzuki, Esq., Deputy Attorney General, and Ms. Toguchi's supervisor shall be counsel of record and shall personally appear at all court hearings in this action.

Plaintiff shall submit the amount of reasonable costs incurred by her, and the accounting of attorneys' fees and costs incurred for the hearing of May 9, 2002, declarations or affidavits attesting to the same, and documentation for the fees and costs (such as billing statements, receipts, or evidence of minimum wage) incurred to the Court by no later than **September 13, 2002 at 4:00 p.m.** Any opposition to Plaintiff's submission must be filed and served no later than **September 20, 2002 at 4:00 p.m.**

The Court FURTHER FINDS Pamela A. Toguchi, Esq., in violation of LR 11.1 and 16.1, and ORDERS the following sanctions be imposed against her personally:

1. She is barred from further representing State Defendants in this action; and
2. She is ORDERED to pay a fine in the amount of **\$1,500.00** to the Clerk of the Court by no later than **September 20, 2002.**

IT IS SO ORDERED.

DATED at Honolulu, Hawaii, August 30, 2002.

Leslie E. Kobayashi

LESLIE E. KOBAYASHI
UNITED STATES MAGISTRATE JUDGE

NATALIE T., ETC. VS. PAUL LEMAHIEU, ETC., ET AL; CIVIL NO.
01-00656 LEK; ORDER IMPOSING SANCTIONS