UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff	)	No. 01 C 4427
v.	)	Judge Joan B. Gottschall
INTERNATIONAL PROFIT ASSOCIATES, INC.,	)	
Defendant	)	

ORDER

Before the court is defendant International Profit Associates' ("IPA's") renewed motion for sanctions charging the Equal Employment Opportunity Commission ("EEOC") with various discovery abuses. This is the fourth round of briefing on this issue. IPA's original motion for sanctions was denied by Magistrate Judge Denlow on February 23, 2004. IPA timely filed objections to Judge Denlow's order, which this court overruled because IPA's papers were "long on outrage and short on the kind of information the court needs to evaluate Judge Denlow's ruling." Order at 2 (Oct. 7, 2004). The court invited IPA to resubmit its motion for sanctions with the caveat that IPA provide, at minimum, the following information:

(1) the specific discovery failure at issue, indicating specifically what occurred and when;
(2) the date on which (and the form in which) IPA complained of that failure to Judge Denlow;
(3) Judge Denlow's ruling;
(4) if Judge Denlow's ruling was unsatisfactory, when that ruling was appealed to this court; and
(5) if Judge Denlow's ruling was satisfactory but subsequently violated by the EEOC, the specifics of the violation and the efforts, if any, to bring the violation to Judge Denlow's attention.

Id. The court cautioned the IPA that chronology was important because Judge Denlow based his ruling in part of the IPA's alleged delay in bringing the matters to his attention. *Id.*

After reviewing IPA's renewed motion for sanctions, on May 31, 2005, this court noted deficiencies in IPA's renewed motion and directed additional briefing. Specifically, IPA had not provided the court with actual deposition transcripts; IPA had reproduced only certain questions and answers from some of the cited depositions. Because these excerpts were devoid of context (and not authenticated), the court directed IPA to provide it with the relevant portions of the transcripts. Additionally, the court noted that the structure of IPA's brief made it difficult to determine the chronology of the alleged discovery violations. The court directed IPA to provide the court with a table illustrating its compliance with the information requested in the court's October 7, 2004 order. The court required IPA to provide in its table entries citations to its renewed motion and to the specific page numbers of the exhibits upon which it relies.

On July 15, 2005, IPA filed the table as well as a statement of compliance and exhibits. In its supplement filings, IPA argues that EEOC committed two sanctionable discovery abuses: (1) the EEOC submitted inaccurate and incomplete disclosures and failed to adequately supplement them, and (2) the EEOC gave claimants improper instructions not to answer IPA's questions at their depositions.

I. Inaccurate and Incomplete Disclosures

Although this is IPA's fourth bite at the apple, it continues to do a poor job presenting the issues to the court. The court made clear in its May 31, 2005 order how IPA should supplement its renewed motion. The court directed that "each specific alleged failure should be listed as a separate row," but IPA included only one row in its table which stated one discovery failure

(which is more accurately described as a category of discovery failures) – that the EEOC submitted inaccurate and incomplete disclosures. Additionally, although the court directed IPA to include citation to the specific page numbers of the exhibit(s) relied upon by IPA, it did not do so in its table. Thus, despite this court's attempt to give IPA another chance to explain adequately its basis for its motion for sanctions, the court is left largely to piece IPA's argument together from its prior submissions. The court is loathe to do so and could simply deny the motion on this basis. However, after struggling to understand IPA's supplemental briefing in conjunction with its renewed motion for sanctions, the court will reach the merits. It concludes that IPA has not shown that the harsh sanctions it seeks in its renewed motion are warranted.

Reviewing IPA's table, as to the specific discovery failure at issue, IPA states that EEOC's initial responses in August of 2001 to IPA's interrogatories were "woefully inadequate." In support of this discovery failure, IPA cites its renewed motion for sanctions, pages 10-19 and Exhibits K-U.[1] Because IPA has referenced such a large portion of its brief as well as numerous exhibits, the specific discovery failure of which it complains remains ambiguous. Assuming that the "starting point" in IPA's table is the allegedly deficient 2001 initial disclosures, IPA states that it subsequently filed two motions to compel: (1) the December 26, 2001 motion to compel specifics as to claimed damages and (2) the January 22, 2002 motion to compel EEOC's notes of its interviews with claimants that served as the basis for its written disclosures.

As to its motion to compel damage specifics, on January 9, 2002, Judge Denlow granted

[1]This hardly was what the court had in mind when it entered its May 31, 2005 order. Citing nine pages of brief and eleven exhibits does nothing to simplify or clarify the issues.

the motion in part and ordered the EEOC to provide IPA with itemized out-of-pocket damages and "a general description of the nature of the emotional distress, if any, caused by defendants' conduct (e.g., headaches, loss of sleep, loss of concentration)," but Judge Denlow did not require EEOC to provide a dollar quantification of the emotional distress damages.

As to its motion to compel EEOC's interview notes with claimants, on March 27, 2002, Judge Denlow denied the motion, holding that these notes were protected from discovery by attorney-client privilege and the work product doctrine. IPA did not file any objections to Judge Denlow's order with this court.

Subsequent to these motions, IPA argues that it raised the issue of EEOC's inadequate disclosures with Judge Denlow again at a hearing on May 8, 2002. At this hearing, IPA argues that Judge Denlow created a procedure for EEOC and IPA to supplement their initial disclosures.[2] Although IPA makes much of this procedure in its brief, the "procedure" is far from clear in the excerpts of the transcript that IPA provided to this court. Although in its May 31, 2005 order, the court did not specifically direct IPA to file a complete copy of this transcript, it did inform the IPA that its renewed motion must be "specific, self-contained, coherent, and factually-supported." Order at 4 (May 31, 2005). This IPA failed to do when it provided the court with only excerpts of the May 8, 2002 hearing.

Additionally, it appears that this hearing was conducted on other motions, such as EEOC's motion to compel answers to its interrogatories, and not on any motion by IPA to

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[2]IPA describes this procedure as follows: "(1) EEOC was required to provide to IPA the details of each incident of alleged harassment, (2) IPA was required to investigate and respond to each disclosed incident of alleged harassment (much like the form of an answer to a complaint), and (3) IPA was to provide the results of its investigation to EEOC by way of a written discovery response to each detailed allegation." Renewed Motion for Sanctions at 11.

compel EEOC to update its disclosures. At that time, IPA had noticed about forty depositions, and IPA argued that the disclosures as to some of the proposed deponents were vague. Judge Denlow stated:

> [IPA] should sit down with the EEOC and ask them specifically whether there would be any more information that would be gleaned about the specifics if [IPA] took the deposition or not. And if [EEOC] tell[s] [IPA] no, then they should be bound by the statement. If they say yes, then I think [IPA] should, before [IPA] take[s] the deposition, be given some idea as to what the time frame was and who was involved. But the whole reason for giving [IPA] the information was so that [IPA would] have a pretty good idea going what [IPA was] facing.

Tr. at 33 (May 8, 2002). Judge Denlow also stated:

> It's now time for [EEOC] to contact [the deponents] and say look, your deposition is going to be taken. Before it's taken, I'd like to know from you whether or not you really have any more information than what's provided here. If you do, then let's go ahead with the deposition, and let's give [IPA's counsel] some additional people or dates and let him go ahead and inquire. If not, then let [IPA's counsel] know, look, this is all this person had and will stand by it.

Id. at 36. Thus, it appears that Judge Denlow's primary concern was ensuring that IPA did not take unnecessary depositions when the deponent could give no more specifics beyond what was provided in the disclosures.[3]

After it took two of claimants' depositions, IPA argues, it became clear that EEOC's disclosures contained inaccuracies and that EEOC was attempting to add new claims during the

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[3]It does not appear that Judge Denlow made such specific orders at the May 8, 2002 hearing as IPA alleges. IPA states that Judge Denlow "specifically ordered the EEOC to re-contact the claimants to ensure their disclosures were accurate and complete." The court cannot find such a specific order in the transcript provided.

IPA also states that "Magistrate Judge Denlow emphasized that the EEOC had an obligation to supplement its written disclosures with any new claims or information prior to commencing a deposition or be precluded from using that claim or information at trial." The court could not locate anything approaching this in the excerpts of transcript provided. It may be that IPA intended to cite the transcript of the June 17, 2002 hearing for these rulings but mistakenly did not.

depositions. Thus, IPA filed a motion to compel on June 10, 2002, seeking more specific answers to its interrogatories as to the claims of harassment. On June 17, 2002, Judge Denlow denied the motion to compel. In making that ruling, Judge Denlow expressed concern that the disclosures be sufficient so that neither party was unfairly surprised. Specifically, Judge Denlow ruled that additional details that came out in depositions would be admissible but that new allegations not provided in the disclosures would later be excluded. Tr. at 31 (June 17, 2002).

IPA filed objections to Judge Denlow's denial of its motion to compel. On July 10, 2002, this court overruled IPA's objections, holding that EEOC had reasonably provided full and complete answers to IPA's interrogatories.

After taking eleven more depositions, on January 31, 2003, IPA filed another motion to compel, arguing that EEOC's disclosures contained inaccuracies and omissions. IPA asked Judge Denlow to order EEOC to file interrogatory responses verified under oath by the claimants. On February 12, 2003, Judge Denlow denied IPA's motion because EEOC counsel's verification of the interrogatory responses was sufficient. It does not appear that IPA filed any objections to that ruling with this court.

Finally, IPA states:

> Thereafter the EEOC continued to ignore Magistrate Judge Denlow's procedure and IPA made a record of each such violation trusting that untimely claims would be barred or that claimants would be brought back as a sanction after IPA conducted its investigation of claims not disclosed prior to the deposition.

Table of Efforts at 5. Thus, the court assumes that, after Judge Denlow's ruling on February 12, 2003, IPA did not bring any additional asserted violations to Judge Denlow's attention until it filed its motion for sanctions on December 8, 2003.

At the heart of IPA's renewed motion are alleged discovery violations that occurred after

Judge Denlow's February 12, 2003 order. Although IPA asserts that it "made a record of each such violation," it did not detail the violations in its table. The table does little to illuminate these claims, other than to indicate that they were never brought to Judge Denlow's attention.[4]

In response to this court's May 31, 2005 order, IPA provided excerpts of numerous claimants' depositions where the claimants testified that they had never reviewed their interrogatory responses personally. Yet Judge Denlow ruled (and the court can discern no error in his ruling) that it was permissible for the lawyers to verify the interrogatory responses. *See* Order (Feb. 12, 2003). In other words, EEOC interviewed claimants and summarized these interviews in the disclosures. There is nothing sanctionable about the fact that claimants did not directly review the responses themselves.

In its renewed motion for sanctions, IPA also argues that several claimants admitted in their depositions that the disclosures were inaccurate or that information was omitted from the disclosures. IPA refers specifically to the depositions of claimants 92, 78, 45, 104, 60, 9, and 21, and it has provided the court with excerpts of these depositions as well as many others. The court notes that it is not terribly surprising, given the large number of claimants in this case, that EEOC made mistakes in summarizing some interviews, that claimants made mistakes when they were interviewed, or that some claimants simply remembered things differently when they were deposed. Additionally, it is unclear how IPA was prejudiced by these inaccuracies or omissions

[4]The court notes that Judge Denlow held approximately ten hearings on discovery motions brought by the parties during the time period between his February 12, 2003 order and IPA's original motion for sanctions on December 8, 2003.

in the disclosures.[5] As discussed below, IPA may be entitled to some sanction such as having certain evidence barred from being introduced at trial, but to the extent that EEOC has committed any discovery violations, they do not rise to a level that would warrant the harsh sanctions requested by IPA.

Thus, IPA's motion for sanctions on this ground is denied. To the extent that, either in a motion for summary judgment (or in opposition thereto) or at trial, EEOC relies on evidence that IPA believes was improperly withheld during discovery, IPA may move to strike (in a summary judgment motion) or move *in limine* to exclude such evidence from trial. To avoid unnecessary motion practice, the court directs the parties to confer prior to the filing of such motions so that it is clear what evidence IPA finds objectionable and what evidence EEOC intends to introduce. In the event that IPA files any such motion, it must make clear the precise prejudice it claims to have suffered as a result of each alleged violation (not a category of violations). The court will not deal in generalities.

II. EEOC's Instructions Not to Answer

EEOC should be sanctioned, IPA argues, for improperly instructing claimants not to answer questions during their depositions. IPA admits that it never brought these concerns to Judge Denlow's attention, but instead relied on EEOC to file a motion for protective order.

Fed. R. Civ. P. 30(d)(1) states: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present

[5]For example, Claimant No. 72's disclosure apparently stated that Mr. D and Mr. B made inappropriate comments. At her deposition, Claimant No. 72 testified that only Mr. B made a comment. It is unclear that IPA was prejudiced by this inaccuracy in the disclosure. If other claimants testified that Mr. D made inappropriate statements, any investigation that IPA made as to Mr. D would not have been wasted effort.

a motion under Rule 30(d)(4)." Fed. R. Civ. P. 30(d)(4) allows a party or deponent to move to terminate the deposition or limit its scope if the movant makes "a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." IPA makes much of the fact that EEOC never moved for a protective order on some topics it instructed claimants not to answer, and IPA argues that it was not required to file a motion to compel after each such instruction. IPA's Statement in Compliance at 4.

Contrary to IPA's argument, it could have moved to compel answers to its questions under Fed. R. Civ. P. 37(a)(2)(B). Both IPA and EEOC provided the court with excerpts from Claimant No. 19's deposition, which occurred on May 15, 2002, early in the process of taking depositions. Exhibit F to IPA's Renewed Motion; Exhibit I to EEOC's Response to IPA's Statement of Compliance. Claimant No. 19's deposition makes clear that when IPA felt that EEOC improperly instructed a claimant not to answer questions, it knew how to contact Judge Denlow and seek a ruling on the issue. IPA was not helpless because EEOC never moved for a protective order. Instead, when EEOC did not do so, IPA could have filed a motion to compel. By failing to do so and instead waiting until the vast majority of the depositions were complete, IPA waived this issue. *See Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir. 1994) (holding that unreasonable delay may render a motion for discovery sanctions untimely).

III. Relief Sought in the Renewed Motion for Sanctions

IPA has requested particularly harsh sanctions in its renewed motion. IPA asks this court to: (1) dismiss EEOC from the suit, require that each claimant pursue her claims individually, and award IPA all fees and costs incurred in this case and (2) bar EEOC and the claimants from

introducing evidence as to damages sustained or evidence as to alleged harassment that was not detailed in the interrogatory answers, and award IPA all fees and costs associated with bringing this motion. The court sees nothing in the renewed motion for sanctions that would warrant such a harsh penalty.

As an alternative sanction, IPA asks this court to order that each claimant provide updated discovery, including resumption of the claimants' depositions, and that EEOC bear the cost of this discovery. This request is overly broad because IPA has not identified the prejudice it suffered as to each claimant. Indeed, because IPA presented the deposition excerpts in seemingly random order, the court cannot discern whether IPA has identified problems with discovery from each and every claimant. Without knowing the scope of the additional discovery sought and the precise prejudice IPA is seeking to remedy, the court declines to order such a sweeping sanction.[6]

IV. Conclusion

For the foregoing reasons, the renewed motion for sanctions is denied.

ENTER:

____/s/_____
Joan B. Gottschall
United States District Judge

Dated: April 25, 2006

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[6]In its Reply in Support of Its Statement of Compliance, IPA for the first time requests as a sanction that this court preclude a damage award exceeding $15,000 per claimant (both compensatory and punitive) should a judgment be entered against IPA at trial. Because IPA did not request this relief until its reply to the statement of compliance, it did not give EEOC an opportunity to respond to this proposed sanction. Thus, IPA has waived this argument. *Luellen v. City of East Chicago*, 350 F.3d 604, 612 n.4 (7th Cir. 2003) (citing *Wildlife Exp. Corp. v. Carol Wright Sales, Inc.,* 18 F.3d 502, 508 n.5 (7th Cir. 1994)) ("Arguments raised for the first time in the reply brief are waived.").