IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and MARION SHAUB, Plaintiffs	:	**CIVIL ACTION NO. 1:CV-02-1194**
v.	:	**(Judge Kane)**
FEDERAL EXPRESS CORPORATION, Defendant	:	

MEMORANDUM AND ORDER

Before the Court are several motions filed in the above captioned case. Each motion will be disposed of as follows.

I. Plaintiff's and Intervener's Motion to Extend Discovery for Additional Depositions (Doc. No. 31).

Although discovery closed on May 30, 2003, Plaintiff EEOC and Intervener Shaub request permission to depose two witnesses whose importance to this litigation was not learned until late in discovery. These witnesses are Mr. Hovis and a man named "Rich."

Mr. Hovis is a supervisor in the Federal Express security department. Plaintiff and Intervener assert that on May 27, 2003 in the deposition of Mr. Lind, a former security officer at Federal Express, they learned that Mr. Hovis received various emails and other information relevant to Ms. Shaub's claims in this matter. Accordingly, Plaintiff and Intervener assert that importance of Mr. Hovis's testimony was not learned until the deposition of Mr. Lind. According to Plaintiff and Intervener, "Rich" is a Federal Express employee who has registered complaints with Federal Express's management concerning sexually inappropriate behavior of Steve

Crumblings. Ms. Shaub asserts that she also registered complaints against Steve Crumblings and therefore, the testimony of "Rich" is relevant to her claims.

Defendant argues that Plaintiff and Intervener knew of these two witnesses well before the close of discovery and failed to depose them within the time allotted. Therefore, argues Defendant, discovery should not be reopened to allow Plaintiff and Intervener an opportunity to depose these parties. This argument is unpersuasive. Discovery in Title VII cases should not be unnecessarily limited. Sempier v. Johnson & Higgins, 45 F. 3d 724, 734 (3d Cir. 1995). Defendant has not provided this court with a sufficient explanation as to how allowing these deposition will prejudice its case. Accordingly, Plaintiff and Intervener's motion will be granted.

II. Plaintiff's and Intervener's Motion to Compel Discovery Responses (Doc. No. 32).

Plaintiff and Intervener seek, among other things, sanctions against Defendant and challenge the sufficiency of Defendant's answers to certain requests for admissions ("RFAs") under Federal Rule of Civil Procedure 36. Plaintiff and Intervener also seek to prohibit Defendant from using testimony from certain witnesses since the late disclosure of these witnesses presents undue prejudice and surprise.

A. RFAs

Rule 36(a) is used "to narrow the issues for trial to those which are genuinely contested." United Coal Co. v. Powell Const. Co., 839 F.2d 958, 967-68 (3d Cir. 1988). A denial "is a perfectly reasonable response" when a disputed issue is the subject of a request for admission. Id. Moreover, a Rule 36 request for admission should be "in simple and concise terms in order that it can be denied or admitted with an absolute minimum of explanation or qualification." Id. "Rule 36 should not be used unless the statement of fact sought to be admitted is phrased so that it can

be admitted or denied without explanation." Id.

The Court finds that Defendant's answers to RFAs 5, 6, 7, 9, and 14 comply with the requirements of Rule 36. Accordingly, this Court will not compel Defendant to answer these RFAs in more detail. Additionally, Defendant's answer to RFA 1 is inadequate. The disclosure of the requested information for the ten year period requested by Plaintiff may lead to admissible evidence. Defendant shall also respond to RFAs 2, 3, 4 and 13. Defendant's answers to these RFAs are inadequate. Each of these RFAs requests Defendant to answer questions concerning the case of Loraine Metz, a similarly situated plaintiff who recently settled a similar Title VII action with Defendant. Instead of admitting or denying each of these RFAs, Defendant objects to the relevance of these requests. Defendant's objections are based on the assertions that the Metz matter is not pending before this Court, the Metz matter is not relevant to the present claim and the Metz matter is unlikely to lead to admissible evidence. This Court, however, has previously ruled that information regarding the Metz matter is discoverable as it is likely to lead to evidence relevant to the present matter. Accordingly, Defendant's objections based on relevancy will be overruled and Defendant will be compelled to answer RFAs 1, 2, 3, 4 and 13.

B. Late Disclosure of Witnesses

Plaintiff and Intervener argue that Defendant has violated Federal Rule of Civil Procedure 26 in that it failed to disclose the names of several potential witnesses until May 27, 2003, three days before the close of discovery. These witness include: Aaron Williams, Tracey Krasevic, Cindy Smiley, Brenda Hammer, Scott Glinnick, Williams Moser, Brandon Cole, Terry Ilgenfritz, Jay Stoner, Jeff Noel, Matt Callahan, Charles Keim, Mike Houtz, Doyle Hendricks, Kimberly Althouse, Jack Poole, James Steffen, Marc Clark and other Ramp Truck Driver personnel from

the Harrisburg, Pennsylvania location to be used as rebuttal witnesses. Defendant failed to provide Plaintiff and Intervener with the addresses or telephone numbers of any of these witnesses. Moreover, Defendant has failed to provide Plaintiff and Intervener with any information concerning the potential testimony of these witnesses.

Of these witnesses, Defendant does not contest that Jack Poole, James Steffen and Marc Clark were not previously mentioned in depositions. Moreover, some of these witness are management officials of Federal Express. Finally, Plaintiff and Intervener contend that Defendant exhibited bad faith by expressly advising Tracey Krasevic, assistant to Robert Flynn, Federal Express's Senior Manager, not to speak to attorneys from the opposing parties.

Plaintiff and Intervener request that this Court sanction Defendant, pursuant to Federal Rule of Civil Procedure 37, by prohibiting the introduction of testimony from any of these witnesses. Rule 37(c) states, in relevant part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

A party's misconduct is harmless if it involves an honest mistake, coupled with sufficient knowledge by the other party of the material that has not been produced. Tolerico v. Home Depot, 205 F.R.D. 169, 176 (M.D. Pa. 2002). Moreover, "even under Rule 37, [t]he imposition of sanctions for abuse of discovery . . . is a matter within the discretion of the trial court." Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995). In considering whether to exclude evidence as a sanction under Rule 37, this Court must consider: (1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the

ability of the party to cure that prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or wilfulness in failing to comply with a court order or discovery obligation. Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 148 (3d Cir. 2000).

Defendant argues that many of the witnesses disclosed on May 27, 2003 were known to Plaintiff and Intervener. Specifically, Defendant asserts that all but Jack Poole, James Steffen and Marc Clark were known to Plaintiff and Intervener well before the close of discovery as their names were mentioned during various depositions. Moreover, Defendant asserts that these three witnesses only became relevant when Defendant was researching a response to Plaintiff and Intervener's expert report on May 21, 2003. Finally, Defendant argues that Tracy Krasevic, as the assistant to Robert Flynn, relayed litigation related information to the Senior Manager of Federal Express and is therefore an agent of Defense Counsel whose testimony is protected by the attorney-client privilege.

On the record before this Court, it is clear that there is some prejudice to Plaintiff and Intervener in the admission of at least Jack Poole, James Steffen and Marc Clark. Moreover, Plaintiff correctly argues that they are unable to cure this prejudice as discovery has closed. Finally, because Defendant has not provided contact information for these witness, Plaintiff and Intervener assert that they cannot initiate depositions. However, considering that this Court is compelled to amend the deadlines established in the case management order in order to facilitate the resolution of other discovery disputes, admission of these witnesses will not disrupt trial in this matter. Accordingly, this court will order Defendant to supply Plaintiff and Intervener with the addresses and telephone numbers of all witnesses on its disclosure list and all individuals disclosed

pursuant to this Court's order, dated April 26, 2003 (Doc. No. 26). Moreover, Defendant will be ordered to disclose to Plaintiff and Intervener, within ten days of this order, the substance of the testimony for any witnesses it anticipates calling at trial. Finally, Defendant will be ordered to cooperate in scheduling any depositions Plaintiff and Intervener wish to conduct so as to allow for discovery to be completed within the deadlines of the amended case management order. Should Defendant fail to comply with these mandates, the Court will determine an appropriate sanction.

C. Miscellaneous Discovery Disputes.

Plaintiff and Intervener also assert in their motion that Defendant has not produced computer generated reports summarizing hours worked by employees during the relevant time frame ("FAMIS report"). Defendant claims it did not produce these documents because Plaintiff and Intervener never properly requested FAMIS reports, but rather requested all time cards for the relevant time period, which defendant supplied. This is the second time this Court has addressed these records. In a telephone conference held April 25, 2003, Defense counsel advised this Court that no computer generated reports existed and that the only means of disclosing this information was by producing the actual time cards of the relevant employees. Thus, counsel was directed to disclose the time cards. Remarkably, now counsel would decline to produce those reports, now that their existence is confirmed, alleging that Plaintiff's and Intervener's request only asked for time cards. Counsel's clever "cat and mouse" approach to discovery borders on contemptuous. Defendant will be ordered to produce all relevant FAMIS reports within ten days of this order. Should Defendant fail to comply with this order, the Court will determine an appropriate sanction.

Finally, the parties dispute who should furnish copies of depositions previously taken in

the Metz matter. Although Plaintiff and Intervener are entitled to discovery of these materials, they must request all copies of deposition transcripts, at their expense, from the court reporting service that transcribed them.

III. Defendant's Motion for Leave to File a Sur-Reply Brief (Doc. No. 49).

On June 30, 2003, pursuant to Local Rule 7.7, Defendant requested permission to file a sur-reply brief in relation to the Plaintiff and Intervener's motion to compel discovery responses. However, in violation of Local Rule 7.7, Defendant filed its sur-reply brief on July 2, 2003, before this Court ruled on his motion requesting permission to do so. This Court does not require additional briefing on this matter in order to resolve these discovery disputes. Accordingly, Defendant's motion for leave to file a response (Doc. No. 49) will be denied and Defendant's Sur-Reply Brief (Doc. No. 51) will be stricken from the record.

IV. Defendant's Motion for Summary Judgment (Doc. No. 44).

On June 30, 2003, Defendant filed a motion for summary judgment (Doc. No. 44). As the Court has determined that a limited extension of discovery is appropriate in this matter, this motion will be denied as moot, and Defendant may re-file its motion according to the amended case management order. As the motion for summary judgment is denied, the briefs filed in relation that motion shall be stricken from the record. Moreover, because these briefs will be stricken, all motions filed in an attempt to cure defects in the briefs related to the summary judgment motion will be denied as moot (Doc. Nos. 66, 67 & 68).

The Court notes that every party's brief filed in relation to this motion for summary judgment violated the local rules of this court. Not one of the parties included a statement of facts in their briefs, rather each party attempted to incorporate by reference the facts contained in

their statements of undisputed facts. Local Rule 7.8 provides, in relevant part:

> No brief may incorporate by reference all or any portion of any other brief . . . . The brief of the moving party shall contain a procedural history of the case, a statement of facts, a statement of questions involved, and argument. The Brief of the opposing party may contain a counter statement of facts and of the questions involved and a counter history of the case. If counter statements of facts or questions involved are not filed, the statements of the moving party will be deemed adopted . . . A brief may address only one motion, except in the case of cross motions for summary judgment.

LR 7.8. The court also notes that all of the parties violated this rule upon filing their briefs related to discovery motions. Each party filed a combined brief addressing several motions in direct violation of Local Rule 7.8's clear mandate that "[A] brief may address only one motion." This Court encourages the parties to familiarize themselves with the local rules before re-filing any motions or submitting any additional briefs. The Court also advises that failure to comply with the requirements of the local rules may serve as a basis to strike a party's filing or deny a motion, or may warrant an order requiring that local counsel participate directly in legal representation.

V. Order

AND NOW, this 8th day of September, 2003, **IT IS ORDERED THAT**:

1. Plaintiff's and Intervener's Motion for Extension of Time to Extend Discovery for Additional Depositions (Doc. No. 31) is **GRANTED**.

2. Plaintiff's and Intervener's Motion to Compel Discovery Responses (Doc. No. 32) is **GRANTED** in part as follows:

    a. Defendant's objections to Requests for Admissions 1, 2, 3, 4 and 13 are **OVERRULED**. Defendant is **ORDERED** to respond to the Requests for Admissions 1, 2, 3, 4 and 13 within 10 days of this Order;

    b. Defendant is **ORDERED**, within 10 days of this order, to supply Plaintiff and Intervener with the addresses and telephone numbers of all witness on its disclosure list and all individuals disclosed pursuant to this Court's order, dated April 26, 2003 (Doc. No. 26);

    c. Defendant is **ORDERED** to disclose to Plaintiff and Intervener, within 10 days of this order, the substance of the testimony for any witness it anticipates calling at trial;

    d. Defendant is **ORDERED** to cooperate in scheduling any depositions Plaintiff and Intervener wish to conduct so as to allow for discovery to be completed within the deadlines of the amended case management order;

    e. Defendant is **ORDERED** to produce all relevant FAMIS reports within 10 days of this order.

    f. Should Defendant fail to comply with these mandates, the Court will determine an appropriate sanction.

    g. **IT IS FURTHER ORDERED THAT** Plaintiff's and Intervener's request for sanctions is **DENIED**.

3. Defendant's Motion for Leave to File a Response to Plaintiff and Intervener's Reply in Support of Motion to Compel Discovery and for Sanctions (Doc. No. 49) is **DENIED**. **IT IS FURTHER ORDERED THAT** Defendant's Sur-Reply Brief (Doc. No. 51) is **STRICKEN** from the record.

4. Defendant's Motion for Summary Judgment (Doc. No. 44) is **DENIED** without prejudice to re-file in accordance with the amended case management deadlines.

5. The briefs associated with the motion for summary judgment (Doc. Nos. 45, 56, 57, 63) are **STRICKEN** from the record.

6. Plaintiff's Motion for Leave to Add Additional Exhibits to its Response to Defendant's Motion for Summary Judgment (Doc. No. 66) is **DENIED** as moot.

7. Intervener's Motion for Permission to File Sur-Reply Brief (Doc. No. 67) is **DENIED** as moot. It is further ordered that the proposed sur-reply brief (Doc. No. 68) is **STRICKEN** from the record.

8. An Amended Case Management Order will follow.

S/ Yvette Kane
Yvette Kane
United States District Judge

Dated: September 9, 2003.