

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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NICOLE HOWELL and )  
JOSEPH HOWELL, )  
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 Plaintiffs, )  
 )  
vs. ) No. 03-2098-MLV  
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FEDERAL EXPRESS CORPORATION, )  
ADECCO-TAD TECHNICAL SERVICES, )  
and FRANK CIVERA, )  
 )  
Defendants. )

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ORDER DENYING DEFENDANT ADECCO'S MOTION TO STRIKE PLAINTIFF'S  
EXPERT DISCLOSURES AND GRANTING IN THE ALTERNATIVE ADECCO'S  
MOTION TO EXTEND DEADLINE FOR DEFENDANT'S EXPERT DISCLOSURES AND  
PLAINTIFF'S MOTION FOR ADDITIONAL TIME TO SUPPLEMENT EXPERT  
DISCLOSURES

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Before the court is the April 30, 2004 motion of the defendant, Adecco-TAD Technical Services ("Adecco"), pursuant to Rule 37 of the Federal Rules of Civil Procedure, to strike the plaintiff's expert disclosures as untimely and failing to comply with the requirements of Federal Rule 26(a)(2)(B). In the alternative, Adecco requests that the court direct the plaintiff to properly re-file her expert disclosures and extend the time for Adecco to designate its own experts. Also before the court is the motion of the plaintiff, Nicole Howell, seeking additional time to supplement her expert disclosures and opposing the defendant's motion to strike. The motions were referred to the United States

Magistrate Judge for determination. For the reasons that follow, Adecco's motion to strike the plaintiff's expert disclosures is denied without prejudice and in the alternative, the court grants the defendant's motion to extend the deadline for the defendant's expert disclosures and the plaintiff's motion seeking additional time to supplement her expert disclosures.

Plaintiff Nicole Howell claims that she suffers from post traumatic stress disorder caused by her exposure to defendant Frank Civera while employed by defendants Federal Express and Adecco. This exposure is the subject of the present lawsuit. The original scheduling order in this case directed the plaintiff to file her expert disclosures by December 15, 2003. On February 2, 2004 and upon motion of the plaintiff, this court revised the scheduling order in this case to accommodate the diagnosis of Ms. Howell's clinical psychologist, Dr. Dale V. Kelman, who advised that proceeding under the original scheduling order would place Ms. Howell's treatment for post traumatic stress disorder in jeopardy.

According to the revised scheduling order, the deadline for the plaintiff's Rule 26 expert disclosures was April 15, 2004, and the defendant's Rule 26 expert disclosures were due May 14, 2004. On April 23, 2004, the plaintiff filed expert disclosures. In the expert disclosures, Ms. Howell identified four experts that would testify at trial: Dale Kelman, PhD, who is Ms. Howell's treating

psychologist; Parker Cashdollar, PhD, Ms. Howell's economic expert; Martha Gordon, M.D., who has been counseling Ms. Howell for her post traumatic stress disorder; and Nancy Hughes, a certified rehabilitation counselor. In her expert disclosures, Ms. Howell failed to submit any expert reports but indicated she would supplement the disclosures at a later date. The trial of this case is scheduled for September 7, 2004 and the date for completion of discovery is June 15, 2004.

Adecco argues that the court should strike Howell's expert disclosures because the plaintiff disregarded Local Rule 26.1(c) and Federal Rule of Civil Procedure 26(a)(2)(B) by filing her expert disclosures a week late and without leave from the court to do so. Additionally, Adecco contends that Howell's expert disclosures are inadequate under Rule 26 (a)(2)(B) and that the plaintiff's experts should be stricken as a sanction pursuant to Rule 37.

Rule 26(a)(2)(A) of the Federal Rules of Civil Procedure requires a party to disclose the identity of any witness who will give an opinion under Rule 702 of the Federal Rules of Evidence. According to Rule 26(a)(2)(B), the disclosure of the identity of an expert witness who is retained or specially employed to provide expert testimony in the case must be accompanied by a written report prepared and signed by the witness. The report must contain

a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26(a)(2)(B). The disclosures are to be made in writing, signed, served, and filed with the court at the time directed by the court. FED. R. CIV. P. 26(a)(4). If the court does not direct a time for the disclosures, the disclosures shall be made at least 90 days before the trial date. FED. R. CIV. P. 26(a)(2)(C).

In her response to the defendant's motion and in her motion seeking additional time in which to supplement the expert disclosures, Howell has agreed that her expert disclosures filed on April 23, 2004 were inadequate under 26(a)(2)(B) and untimely filed. Nevertheless, plaintiff's counsel contends that the court should excuse her failure to comply with the scheduling order for several reasons. First, counsel for plaintiff has expressed that she has not tried a case in federal court in many years and confused the more lenient rules of state court with the strictness of the federal rules. Next, plaintiff's counsel claims that she mistakenly assumed that the identification of the expert witnesses

and provision of their curriculum vitae would satisfy the requirements of the federal rules until the disclosures could be properly supplemented. Plaintiff's counsel also asserts that Ms. Howell has not reached a maximum level of recovery and that Ms. Howell's condition has hindered the plaintiff's experts' ability to form opinions. Finally, counsel for plaintiff contends that Adecco waived the right to object to the timing of the disclosures because they consented to extend the time for filing.<sup>1</sup>

The court is of the opinion that sanctions are not warranted at this time and that plaintiff's counsel's failure to comply with the revised scheduling order was not willful or in bad faith. Because Adecco has suffered no prejudice at this time by the plaintiff's failure to provide proper expert disclosures pursuant to Rule 26, the deadline for the plaintiff to provide its expert report will be extended. Accordingly, the plaintiff is ordered to serve on the defendants and file with the court expert disclosure reports that fully comply with Rule 26(a)(2)(B) within seven (7) days of the entry of this order. If the plaintiff fails to comply fully with Rule 26(a)(2)(B) or with this order, the defendant may

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<sup>1</sup> Counsel for the defendant disputes plaintiff's counsel's argument that they waived their right to file a motion to strike and deny that they "impliedly consented" to extend the plaintiff's time for filing expert disclosures. (Reply to Pl.'s Response to Adecco's Mot. to Dismiss to Strike Pl.'s Expert Disclosures at 1.)

renew its motion to strike. Additionally, failure to comply with this order may subject the plaintiff to the sanction of dismissal. Because the court has given the plaintiff extra time for its expert disclosures, it will award the defendants additional time as well. The defendant's expert disclosures are now due twenty-one (21) days from the entry of this order. The deadline for completion of expert depositions is extended to July 15, 2004. All other previous deadlines remain unchanged.

IT IS SO ORDERED this 4th day of June, 2004.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE