

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

CURTIS HALL,)
)
 Plaintiff,)
)
 vs.) No. 03-2004-M1V
)
 NORTHWEST AIRLINES,)
)
 Defendant.)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO
COMPEL DISCOVERY AND TO AMEND SCHEDULING ORDER
AND
ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND MOTION
FOR PRODUCTION OF DOCUMENTS SECOND SET

Before the court is the December 5, 2003 motion of the defendant, Northwest Airlines ("Northwest"), to compel the plaintiff, Curtis Hall, to respond to interrogatories required to be answered pursuant to Rule 33(b) of the Federal Rules of Civil Procedure and to produce documents as required by Rule 34(b). Pursuant to Rule 37(c)(1), Northwest also requests that Hall be precluded from using any witness testimony or documents not disclosed prior to the end of discovery in response to the mandatory disclosures requirements of Rule 26(c). Northwest further seeks an extension of the discovery deadline in order to take Hall's deposition after the aforementioned discovery responses are received and moves to revise the scheduling order previously entered in this case to allow for bifurcated discovery proceedings pursuant to Rules 6(b), 16(b), and 16(c)(12)(16) so that any discovery regarding the plaintiff's alleged mental injury would take place after the court rules on Northwest's motion for summary judgment. Additionally, Northwest seeks expenses and attorney fees

incurred in preparation of this motion. The plaintiff, Curtis Hall, timely responded. The motion was referred to the United States Magistrate Judge for a determination. For the reasons set forth below, Northwest's motion is granted in part and denied in part.

Also before the court are plaintiff Hall's Motion to Compel and Hall's Motion for Production of Documents, both filed October 20, 2003. These motions were also referred to the United States Magistrate Judge for determination. For the reasons that follow, Hall's motions are denied.

Hall, originally filed this action *pro se* on January 6, 2003 alleging that he had suffered unlawful employment discrimination while working for Northwest. The district court entered a scheduling order on April 15, 2003, which set July 15, 2003 as the deadline for initial disclosures and December 5, 2003 as the deadline for discovery. On July 11, 2003, Hall served upon Northwest a pleading, styled "Motion for Production of Documents," which in essence resembled a motion to compel Northwest to produce certain documents. (Pl.'s Mot. to Extend Disc. Deadline and Mem. in Supp. of Same at 1.) The Motion for Production of Documents was not filed with the court. Northwest responded in opposition on July 29, 2003. (*Id.*) Subsequently, Hall filed and served on the defendant a motion to compel and a motion for production of documents second set on October 20, 2003.

On October 17, 2003, Northwest served on Hall requests for admissions, requests for interrogatories, and requests for production of documents. (Mem. in Supp. of Def.'s Mot. to Compel

Disc. and to Amend Scheduling Order at 1.) Hall subsequently responded to the requests for admissions but failed to respond to Northwest's requests for production of documents and interrogatories. (*Id.*) Additionally, Hall failed to make his Rule 26(a)(1) initial disclosures. (*Id.* at 2.)

The deposition of Hall was scheduled to take place on December 2, 2003, just three days before the discovery deadline. (*Id.* at 2.) Northwest was notified the day before the deposition that Hall had obtained an attorney to represent him.¹ (*Id.*) At Hall's deposition, he testified that he was being treated by two medical doctors and two licensed social workers, but he could provide no addresses or contact information. (*Id.*) Northwest then asked Hall to identify when responses to its remaining discovery requests would be forthcoming. (*Id.*) Hall acknowledged that he had not responded to Northwest's requests and agreed to do so. (Pl.'s Answer to Def.'s Mot. to Compel at 2.) However, Hall and his newly acquired counsel would not provide a specific date upon which the responses would be served because Hall's new attorney was unfamiliar with the status of outstanding discovery. (*Id.*) Northwest filed its present motion to compel on December 5, 2003, the discovery cutoff date. Shortly thereafter, Hall completed the interrogatory answers and responses to requests for production and provided Northwest with his initial disclosures. (*Id.*) In light

¹ Hall retained his present counsel, James R. Becker, Jr., on December 1, 2003, and his counsel immediately contacted Northwest to inform them of Hall's new representation. (Mem. in Supp. of Def.'s Mot. to Compel Disc. and to Amend Scheduling Order at 1.) Becker filed his appearance as counsel of record with the court on December 8, 2003.

of the recent response and production by Hall's new attorney and his prompt filing for an extension of the discovery deadline, Northwest's motion to compel as to the initial disclosures, requests for production, and interrogatories is now moot and denied as such.

As a result of the plaintiff's delay in serving its initial disclosures, Northwest argues that Hall should be precluded from presenting witnesses and documents not disclosed as required by Rule 26. Specifically, Northwest asserts that Hall identified witnesses and documents that were previously unknown during his deposition, including treating physicians who Hall claims can connect his emotional distress and mental injury to the workplace. (Mem. in Supp. of Def.'s Mot. to Compel Disc. and to Amend Scheduling Order at 4.) It appears to the court that Northwest's motion as to the preclusion of witnesses, documents, and experts is premature at this time. For example, Hall has not even indicated that he will be designating any experts for trial. Until the plaintiff does so, the court does not have enough information before it on which to rule on this issue. Accordingly, Northwest's motion is denied without prejudice. Northwest, however, can renew its motion or file a Rule 37 motion if Hall does designate experts or indicate his intention to call undisclosed witnesses.

Furthermore, Northwest seeks an extension of the discovery deadline to allow it to redepose the plaintiff after it receives information provided in the late discovery responses and requests that the scheduling order previously entered in this case be amended to allow for bifurcated discovery proceedings so that any

discovery regarding the plaintiff's alleged mental injury and damages would take place after the court rules on Northwest's motion for summary judgment. Hall has agreed to another deposition to be taken after Northwest has had an opportunity to review the late filed discovery responses and has not opposed Northwest's motion to bifurcate discovery proceedings. In the interest of justice and to facilitate "the speedy[] and inexpensive disposition of this action," the court will extend the discovery deadline to allow Northwest to redepose the plaintiff within thirty days of this order based on the additional information provided in late discovery. In addition, for good cause shown and upon the agreement of the parties, the Rule 16(b) Scheduling order entered in this case is amended to allow Northwest a short period of discovery into Hall's alleged mental injury and damages in the event that Northwest does not prevail on its motion for summary judgment. Accordingly, Northwest shall have thirty days from the entry of the order denying its motion for summary judgment to conduct discovery into Hall's alleged mental state and damages. All other dates established by the scheduling order remain the same. Absent good cause shown, the scheduling dates set by this order will not be modified or extended.

Finally, Northwest argues that it is entitled to reasonable expenses, including attorney fees, associated with bringing this motion pursuant to Rule 37 of the Federal Rules of Civil Procedure. Rule 37 provides that if a motion to compel is granted:

"the court shall . . . require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in making the

motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's non-disclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust."

Fed. R. Civ. P. 37(a)(4)(A); see also Fed. R. Civ. P. 37(c). Although Hall, acting *pro se*, failed to provide initial disclosures, produce documents, and answer interrogatories in a timely fashion, he did retain counsel prior to the discovery deadline who acted in a prompt manner to respond to Northwest's discovery requests. Additionally, Hall's counsel has been willing to cooperate with Northwest in resolving discovery disputes and has filed a motion to extend discovery. Therefore, discovery sanctions would be unjust and are not warranted. Northwest's motion as to attorney fees and expenses is denied at this time.

As for Hall's Motion to Compel, which arose out of Northwest's failure to provide information in response to Hall's pleading styled "Motion for Production of Documents," and Hall's Motion for Production of Documents Second Set, the motions are denied. Rule 34 of the Federal Rules of Civil Procedure addresses the proper procedure for the production of documents and provides that "[a]ny party may serve on any other party a request to produce . . . any designated documents . . . which are in the possession, custody or control of the party upon whom the request is served." FED. R. CIV. P. 34(a). Additionally, Rule 34 provides the responding party with thirty days to answer or otherwise respond to those requests. FED.

R. Civ. P. 34(b). Here, Hall failed to comply with Rule 34 when he did not serve Northwest with the proper request for production of documents, thereby making his "Motion for Production of Documents" and subsequent Motion to Compel premature and improper.

Furthermore, a review of the record indicates that the plaintiff did not file a certificate of consultation with his motions. Local Rule 7.2 requires that "[a]ll motions . . . shall be accompanied by a certificate of counsel . . . affirming that, after consultation between the parties to the controversy, they are unable to reach an accord as to all issues or that all other parties are in agreement with the action requested by the motion." Local Rule 7.2(a)(1)(B). Failure to file a Rule 7.2 certificate "may be deemed good grounds for denying the motion." *Id.* Accordingly, the plaintiff's motions to compel and for production of documents are denied.

IT IS SO ORDERED this 6th day of January, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE