

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

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LATUNDRA SHINAULT, )  
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 Plaintiff, )  
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 vs. ) No: 03-2309-Ma/V  
 )  
 SEARS LOGISTIC SERVICES, )  
 )  
 Defendant. )

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ORDER DENYING DEFENDANT'S MOTION TO STRIKE EXPERT WITNESS  
DISCLOSURE AND TO EXCLUDE TESTIMONY

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Before the court is the January 9, 2004 motion of the defendant, Sears Logistic Services ("Sears"), pursuant to Rule 37(c)(1) of the Federal Rules of Civil Procedure, to strike plaintiff Latundra Shinault's expert witness disclosure and to exclude Shinault's expert witness from testifying. Sears seeks this sanction based on Shinault's alleged failure to comply with the reporting requirements of Rule 26(a)(2)(B). The motion was referred to the United States Magistrate for a determination. For the following reasons, Sears' motion is denied.

BACKGROUND

Shinault's action, filed May 2, 2003, alleges that Sears terminated her because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Sears denies this allegation, asserting that its disputed employment actions "were taken for reasons other than discrimination" on account of Shinault's sex.

On December 31, 2003, Shinault mailed a document to Sears' counsel entitled "Disclosure of Plaintiff's (Rule 26) Expert." Attached to the document was a letter to Sears' counsel from Dan Myers informing Sears that he was currently treating Shinault for depression. The letter also indicated that Shinault felt that her termination from Sears caused her depression.

#### ANALYSIS

Sears objects to all use of Myers' testimony on grounds that Shinault failed to comply with the reporting requirements of Rule 26(a)(2)(B). This rule provides that the disclosure of witnesses who are "retained or specially employed to provide expert testimony" must be accompanied by a detailed written report containing

a complete statement of all opinions to be expressed and the basis therefor; 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 testimony; and a listing of any other cases in which the witness had testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26(a)(2)(B). Sears alleges that Shinault has proffered Myers as a Rule 26 expert but has failed to comply with the rule's detailed reporting requirements. Consequently, Sears claims that Myers' testimony should be excluded.

Despite the fact that Shinault has indicated that Myers is a Rule 26 expert, it appears, based on all the surrounding facts,

that Myers is a treating physician, which does not require a plaintiff to provide a Rule 26(a)(2)(B) report. There is no indication that Shinault specially retained Myers to provide expert testimony to assist the court in understanding the evidence or in determining a fact in issue. On the contrary, it appears that Shinault was seeing Myers to treat her for depression.

The written report requirement of Rule 26(a)(2)(B) applies only to those experts who are retained or specially employed to provide testimony in the case or whose duties as an employee of a party regularly involve the giving of testimony. FED. R. CIV. P. 26(a)(2)(B), Advisory Committee's Note to the 1993 amendment. "A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report." *Id.* As a treating physician, Myers' involvement did not give rise to the need for Rule 26 expert witness report.

#### CONCLUSION

Shinault had no duty to comply with the written report requirement of Rule 26(a)(2)(B) with regard to Myers. Accordingly, Sears' motion is denied.

IT IS SO ORDERED this 11th day of February, 2004.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE