

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

MARJORIE ROBERTSON,)	
)	
Plaintiff,)	
)	
vs.)	No. 02-2672MaV
)	
CITY OF MEMPHIS, and ANDREA JAYE))	
MOSBY-WHARWOOD, individually,)	
)	
Defendant.)	

ORDER ON PLAINTIFF'S MOTION TO SET ASIDE ORDER ON DEFENDANT'S
MOTION TO HAVE FIRST REQUEST FOR ADMISSIONS DEEMED ADMITTED

Before the court is the motion of the plaintiff, Marjorie Robertson, to set aside the order entered by this court on May 3, 2004, granting the motion of the defendant, Andrea Jaye Mosby-Wharwood, to have her first requests for admissions deemed admitted by default pursuant to Rule 36(a) due to Robertson's untimely responses. The city of Memphis opposes the motion to set aside the order on the grounds that Robertson has failed to file a certificate of consultation as required by the local rules of court, that the motion to set aside is untimely, and that the motion is meritless. Wharwood opposes the motion on the grounds that Robertson has failed to file a certificate of consultation, that the motion is untimely, and that her late responses are insufficient. The motion was referred to the United States

Magistrate Judge for determination. For the reasons that follow, the motion is granted.

Robertson filed this lawsuit against the City of Memphis and Wharwood on September 8, 2003, alleging retaliation in violation of Title VII of the Civil Rights Act, of 42 U.S.C. § 1983, and of the Tennessee Human Rights Act, Tenn. Code Ann. 4-21-101 *et seq.* Wharwood and the city of Memphis filed answers to the complaint in November of 2003. A scheduling order was entered on November 24, 2003 setting a discovery cutoff of July 1, 2004. Trial is set for November 29, 2004.

On March 8, 2004, Wharwood served requests for admissions, consisting of thirty-three separate requests, on Robertson by mailing same to her counsel, Justin S. Gilbert and Michael L. Russell. On March 11, 2004, the court entered an order allowing both attorneys to withdraw as counsel for Robertson. Gilbert then forwarded the requests for admission to Robertson. Robertson failed to respond to the requests within the time period allowed by Rule 36.

Having received no responses to the requests for admission within thirty days after service, Wharwood's counsel, on April 13, 2004, served a motion to have the requests deemed admitted by default by mailing same to Robertson's address. Meanwhile, Javier Bailey entered an appearance as counsel for the Robertson on April

8, 2004. Robertson, through her attorney, Javier Bailey, served responses to the requests for admissions, on Wharwood, on April 19, 2004. On April 21, 2004, District Judge Samuel H. Mays, Jr. referred Wharwood's motion to the U.S. Magistrate Judge for determination. A copy of the order of reference was served on Bailey as counsel for the plaintiff. Receiving no response to the motion, the court, on May 3, 2004, granted Wharwood's motion to have her requests for admission be deemed admitted. Robertson then filed the present motion on May 26, 2004, to set aside the court's May 3, 2004 order.

Although Robertson styled her motion as one to set aside the court's earlier order, the court will treat the motion as a Rule 36(b) motion to withdraw admissions. Because there is no time limit for filing a Rule 36(b) motion, the issue of timeliness of Robertson's motion is moot. In addition, although Robertson has not complied with Local Rule 7.2 which requires consultation between the parties before the filing of a motion, the court will waive the requirement in this limited instance because the city of Memphis and Wharwood have evidenced by their responses that consultation would be futile and also because of time concerns. In the future, the plaintiff and her counsel are warned that failure to comply with Local Rule 7.2 may be deemed good grounds to deny any motion.

Rule 36(b) allows a court to "permit withdrawal or amendment [of an admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." FED. R. CIV. P. 36(b). A court, exercising discretion, may grant a party's motion to amend or withdraw defaulted admissions to assist in the "normal, orderly presentation of the case" absent a showing of prejudice by the other party. *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355, 357 (W.D. Mich. 1980).

In determining whether to permit withdrawal of an admission, courts apply a two-prong test: (1) whether the presentation of the merits of the action will be subserved if the admission is not withdrawn; and (2) whether the party who obtained the admission will be prejudiced. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997); *Dynasty Apparel Indus. v. Rentz*, 206 F.R.D. 596, 601-02 (S.D. Ohio 2001); *Herrin v. Blackman*, 89 F.R.D. 622, 624 (W.D. Tenn. 1981). The first prong is satisfied when refusing withdrawal of the admission would practically eliminate any presentation on the merits of the case. *Dynasty*, 206 F.R.D. at 601.

The city of Memphis argues that the first prong is not satisfied here because the admitted requests would not eliminate

the necessity of having Robertson prove her case. While the city is correct in its assertion, the ability of Robertson to present her case is not determinative. Here, the requests for admission at issue are directed to Wharwood's proof of whether her stated reason for terminating Robertson's employment were non-discriminatory and not pretextual. These admissions would basically eliminate the need for the city of Memphis and Wharwood to present any evidence at trial to prove that Wharwood's reason for terminating Robertson's employment was not pretextual.

With regard to the second prong, the burden is on the party who obtained the admission to satisfy the court that he would be prejudiced if the admission is withdrawn. The city of Memphis argues that it would be forced to conduct discovery on the issues addressed in the requests for admissions. It appears to the court that most of the issues addressed in the requests could be resolved by a deposition of the plaintiff, and if the plaintiff has not yet been deposed, there is ample time remaining to depose her. The court finds therefore that Wharwood and the city of Memphis have failed to satisfy the court that they will be prejudiced in any capacity by allowing Robertson to withdraw the defaulted admissions.

Robertson's motion to set aside the earlier order deeming the requests admitted by default is granted. In the interest of

convenience, the court will allow Robertson's untimely responses to the requests for admissions that were served on the defendants on April 29, 2004, to be accepted as timely filed. As to responses which Wharwood perceives to be insufficient, Wharwood may move the court to determine the sufficiency in accordance with Rule 36(a) after consultation between the parties.

IT IS SO ORDERED this 7th day of June, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE