

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

JILL WATERS :
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 : CIVIL ACTION
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 v. :
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 : NO. 03-CV-2909
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 GENESIS HEALTH VENTURES, :
 INC. :

MEMORANDUM & ORDER

SURRICK, J.

November 24, 2004

Presently before the Court is Defendant Genesis Health Ventures, Inc.'s Motion to Strike Plaintiff's Fourth Supplemental Disclosure (Doc. No. 78) and Plaintiff's Response thereto. (Doc. No. 82.) For the following reasons, Defendant's Motion will be denied.

Plaintiff alleges that Defendant terminated her unlawfully. Specifically, Plaintiff alleges race discrimination, in violation of 42 U.S.C. § 1981 and the Pennsylvania Human Relations Act (PHRA), and disability discrimination, in violation of the Americans with Disabilities Act (ADA) and the PHRA. Plaintiff, who is Caucasian, alleges that her African-American supervisor, Marvin Kirkland, unlawfully discriminated against her.

Defendant seeks to strike supplementary disclosures filed by Plaintiff. Those disclosures identify five additional witnesses who may have knowledge relevant to Plaintiff's race discrimination claim. Plaintiff contends that four of these witnesses, Cindy Wilcox, Dawn Perecheck, Dana Kruzcyk and Mary Lawrence, have information regarding Kirkland allegedly

falsifying medical documents to protect an African-American graduate practical nurse. (*Id.*) The fifth witness, Josette Rawls, is that nurse. (*Id.*) Plaintiff claims that she learned of these witnesses only days before supplementing her disclosures. (*Id.* at unnumbered 2.) Defendant filed the instant Motion seeking to strike Plaintiff's disclosures claiming prejudice. (Doc. No. 78 at 4.)

Federal Rules of Civil Procedure 26(a) requires parties to provide "the name of . . . each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses . . . identifying the subjects of the information." Fed. R. Civ. P. 26(a)(1)(A). Federal Rule of Civil Procedure 26(e)(1) requires that discovery be supplemented if information later acquired would have been subject to Rule 26(a)(1) mandatory disclosure requirements. *See Fleet Capital Corp. v. Yamaha Motor Corp.*, Civ. A. No. 1047, 2002 WL 31108380, at *2 (S.D.N.Y. Sept. 23, 2002). It is well settled that the exclusion of evidence is "an extreme sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 905 (3d Cir. 1977).

In *Pennypack*, the Third Circuit instructed that we must weigh the following factors before striking disclosures:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
- (2) the ability of that party to cure the prejudice;
- (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;
- (4) bad faith or willfulness in failing to comply with the district court's order.

Id.

Defendant claims that it will be severely prejudiced by the inclusion of witnesses because discovery ended on August 9, 2004, and because Defendant filed a summary judgment motion based on the record at the time discovery closed. (Doc. No. 78 at 4.) Plaintiff points out that during a settlement conference in our Chambers on November 2, Defendant admitted that she had already questioned the named witnesses, all of whom are employed by Defendant. (Doc. No. 82 at unnumbered 2.) Moreover, Plaintiff argues that she served Defendant with her Fourth Supplemental Disclosure on or about October 26, 2004, over two months before the scheduled trial in this case. (*Id.* at unnumbered 1.) Under the circumstances, we fail to see how Plaintiff is guilty of willful deception or a flagrant disregard of the Orders of this Court. Moreover, we fail to see how Plaintiff suffered the kind of prejudice that would justify exclusion of these witnesses. This is so notwithstanding the fact that a motion for summary judgment is presently pending.

Plaintiff argues that even if Defendant were prejudiced by the supplemental disclosures, it can easily cure the prejudice because all five witnesses are agents of Defendant, Defendant has admitted in Chambers to having already questioned the witnesses in “doing an extensive investigation,” and the one remaining witness who was not questioned, Mary Lawrence, was deposed on November 10, 2004. (Doc. No. 82 at unnumbered 2.) It seems apparent that any prejudice that might exist has been or can be cured by Defendant.

Plaintiff states that the witnesses were added over two months before trial is scheduled. Defendant states that reopening discovery proceedings would delay what has been a lengthy discovery process. We agree that the discovery process in the instant lawsuit has been far too extended and contentious. Nevertheless, we will permit depositions of these five additional witnesses who may have information about Kirkland’s alleged discriminatory behavior.

Defendant alleges that Plaintiff's late disclosure of witnesses was done in bad faith. (Doc. No. 78 at 8.) Defendant offers nothing in support of this bald assertion. Plaintiff explains that it learned of the supplemental witnesses only days before filing the Fourth Supplemental Disclosure. (Doc. No. 82 at unnumbered 5.) We have no reason to believe that Plaintiff is lying.

Accordingly, we will deny Defendant's Motion to Strike Plaintiff's Fourth Supplemental Disclosure.

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GENESIS HEALTH VENTURES, :
INC.

ORDER

AND NOW, this 24th day of November, 2004, upon consideration of Defendant Genesis Health Ventures, Inc.'s Motion to Strike Plaintiff's Fourth Supplemental Disclosure (Doc. No. 78, No. 03-cv-2909) and Plaintiff's response thereto, it is ORDERED that the Motion is DENIED.

BY THE COURT:

S:/R. Barclay Surrick, Judge