

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-22912-CIV-LENARD/SIMONTON ✓
Consolidated with
CASE NO. 02-23544-CIV-LENARD/SIMONTON

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

XIOMARA GUERRERO; OFELIA
RODRIGUEZ; MARIBEL SUAREZ;
JORGE FIOL; ERNESTO HEDMAN;
HILARIO PINEDA; JUAN CARLOS
SUAREZ; and ALEXIS SILVA,

Intervenor Plaintiffs,

v.

AIRGUIDE CORPORATION, PIONEER
METALS, INC., and GOODMAN
GLOBAL HOLDINGS, INC.,

Defendants.

JUAN SANCHEZ,

Plaintiff,

v.

AIRGUIDE CORPORATION, PIONEER
METALS, INC., and GOODMAN
GLOBAL HOLDINGS, INC.,

Defendants.

ORDER ON DEFENDANTS' MOTION TO COMPEL
MORE COMPLETE INITIAL DISCLOSURES

Presently pending before this Court is Defendants' Motion To Compel More

73/6/

Complete Initial Disclosures (DE # 59, filed 7/7/03). This motion is referred to the undersigned Magistrate Judge (DE ## 11, 19, 28). The motion is fully briefed (DE ## 65, 66, 67, 70).

I. The Complaint

The Equal Employment Opportunity Commission (hereafter EEOC), Intervenor Plaintiffs and Plaintiff Sanchez have brought these consolidated actions alleging hostile work environment sexual harassment and/or retaliation for engaging in protected activities, and related state law claims (DE ## 1, 30).

II. The Instant Motion

A. Defendants' Position

Defendants ask this Court to compel all Plaintiffs to provide a more complete initial disclosure of damages computations and to award Defendant the attorney's fees and costs they incurred in making this motion. Defendants contend that in their various March 31, 2003 initial disclosures, all Plaintiffs listed the only the general categories of damages which they sought, and provided no computation at all of the dollar amounts of those damages, in violation of Fed.R.Civ.P. 26(a)(1)(c). Defendants contend that all Plaintiffs had a duty to provide computations of damages in their initial disclosures (DE # 59). In their replies, Defendants specified the categories of damages to which they believe they were entitled to in the initial disclosures: the estimated dollar value of each Plaintiff's wages and compensation earned at Airguide; their interim earnings after their employment with Airguide; and any out-of-pocket medical expenses they incurred which may be attributed to Defendants (DE ## 67, 70). Defendants assert that all Plaintiffs have the information necessary to compute damages, and that because Plaintiffs may amend

their disclosures at any time, a lack of certainty provides no excuse for their non-compliance (DE # 59).

Defendants further state that their motion was timely under the Local Rules because the thirty day time period in Local Rule 26.1 H. never began to run because during the time the EEOC sent its April 16, 2003 letter and the time Defendants filed the instant motion, Defendants were waiting for the EEOC to supplement its initial disclosures as promised in the letter. Defendants also note that Local Rule 26.1 H. allows the court discretion to permit a late-filed motion for reasonable cause shown, with the reasonable cause being that Defendants waited eleven weeks to see if the EEOC would supplement its Initial Disclosure as promised in its letter. Defendants also state that the good faith conference requirement of Local Rule 26.1 I was satisfied by Defendants' April 10, 2003 letter to the EEOC requesting supplementation of the initial disclosures (DE # 70).

B. Plaintiffs' Positions

1. The EEOC's Position

The EEOC responds that the motion should be denied as Defendants failed to make a good faith effort to resolve the dispute before filing the instant motion, in violation of Local Rule 26.1.I, and then filed the instant motion more than thirty days after the grounds for the motion arose, in violation of Local Rule 26.1 H. 1. The EEOC states that Defendants' only effort to resolve the dispute was a letter dated April 10, 2003, to which the EEOC responded within six days, and that Defendants never made any further attempt to discuss the matter, but then waited for more than eleven weeks before filing the instant motion. The EEOC also states that it has complied with the initial disclosure

requirements regarding compensatory and punitive damages, and that it cannot compute the damages it is seeking with regard to back pay and rightful-place promotion damages until Defendants provide the EEOC with relevant information. The EEOC also contends that Defendants' initial disclosure was inadequate. The EEOC also asks that Defendants' request for an award of sanctions be denied (DE # 66).

2. The Position of Plaintiff Sanchez and the Intervenor Plaintiffs

Plaintiff Sanchez and the Intervenor Plaintiffs respond that they made their initial disclosures based upon the information available to them at that time. They note that Defendants did not produce any documents in their initial response until May 6, 2003, and have objected on work product grounds to producing the complete personnel file of Plaintiff Sanchez. All Plaintiffs state that they will supplement their initial disclosures with damages computations as they obtain the necessary information (DE # 65).

III. Analysis

A. The Motion Is Denied As Untimely Filed

Initially, the instant motion is denied for failure to comply with Local Rule 26.1 H.1. Defendants did not have reasonable cause for filing this motion ninety-eight days after the occurrence of the grounds for the motion.

On March 31, 2003, the EEOC served its initial disclosures on Defendants (Ex. A to DE # 59). On March 31, 2003, Plaintiff Sanchez and the Intervenor Plaintiffs served their initial disclosures on Defendants (Ex. B to DE # 59).

On April 10, 2003, Defendants sent a letter to the EEOC (Ex. E to DE # 59), requesting computation of the dollar amount of each category of damages the respective Plaintiffs sought from Defendants. On April 16, 2003, the EEOC sent a letter to

Defendants stating that it did not agree that the damages portion of its Initial Disclosures was deficient, that it did not at that time have accurate data to compute damages, and invited Defendants' counsel to contact EEOC counsel to further discuss resolving the issues without the need for motion practice (Ex. G to DE # 59).

On April 10, 2003, Defendants sent a letter to Plaintiff Sanchez and the Intervenor Plaintiffs (Ex. C to DE # 59), requesting computation of the dollar amount of each category of damages the respective Plaintiffs sought from Defendants. On May 23, 2003, Defendants sent a similar letter to Plaintiff Sanchez and the Intervenor Plaintiffs, stating that Defendants had not received any response from them and if Defendants did not hear from them by May 27, 2003, Defendants would file a Motion to Compel (Ex. D to DE # 59). On May 30, 2003, counsel for Plaintiff Sanchez and the Intervenor Plaintiffs served a letter on Defendants stating that they did not have sufficient information to make a complete and accurate calculation of damages (Ex. F to DE # 59).

The motion is denied because it was filed more than thirty days after the occurrence of the grounds for the motion, in violation of Local Rule 26.1 H.1. The initial disclosures at issue were filed on March 31, 2003. On April 16, 2003, the EEOC responded to Defendants' letter, stating that they did not agree with Defendants' position and that their disclosures as to damages were complete. The undersigned finds that the occurrence of the grounds for the motion was on March 31, 2003, when Defendants received the initial disclosures. The Local Rule gave Defendants here thirty days to confer with Plaintiffs, and then file a motion to compel if they so chose. Therefore, the instant motion, filed more than three months later, was untimely filed.

Even if the occurrence for the grounds for the motion was April 16, 2003, when the

EEOC responded to Defendants' April 10, 2003 letter, the motion was still untimely filed, as Defendants waited almost three months to file it.

Similarly, the undersigned finds that the occurrence of the grounds for the motion as to Plaintiff Sanchez and the Intervenor Plaintiffs was on March 31, 2003, when Defendants received the initial disclosures. Therefore, the instant motion, filed more than three months later, was untimely filed.

Again, even if the occurrence for the grounds for the motion was May 30, 2003, when Plaintiff Sanchez and the Intervenor Plaintiffs responded to Defendants' April 10, 2003 and May 23, 2003 letters, stating that they did not agree with Defendants' position and that their disclosures as to damages were complete, the instant motion was still untimely filed, as Defendants waited almost thirty-eight days to file it.

Defendants' argument that there was reasonable cause for the delay in filing the motion because they were waiting for all Plaintiffs to supplement their initial disclosures is disingenuous, and is rejected. Adopting Defendants' position would make the Local Rule's thirty-day time period open-ended.¹

B. Plaintiffs' Initial Disclosures Were Sufficient

Furthermore, the motion is denied because all Plaintiffs' damage computations in their initial disclosures were sufficient, based upon the information in their possession.

All Plaintiffs have complied with the requirements of Rule 26(a)(1)(C) in the damage computations contained in their initial disclosures. In its initial disclosure, the EEOC provided Defendants with the range of dollar amounts which it is seeking for

¹In light of this ruling, there is no need to reach Plaintiff EEOC's argument that the motion should be denied for violating Local Rule 26.1 I.

Plaintiffs' non-economic compensatory damages, depending on the amount of employees which it is determined that Defendants employ. Moreover, Plaintiffs do not have to provide in their initial disclosures any more detail concerning non-pecuniary damages than they provided. See *Williams v. Trader Pub. Co.*, 218 F.3d 481, 486 (5th Cir. 2000); *Burrell v. Crown Cent. Petroleum, Inc.*, 177 F.R.D. 376, 386 (E.D. Tex. 1997).

Plaintiffs also correctly stated that they were not in possession of the information necessary to make back pay computations, and that they will supplement their initial disclosures when they receive the information. Plaintiff EEOC has stated the method by which it will make these computations, and is simply waiting to receive from Defendants the information necessary to make these computations. Defendants have not successfully refuted that Plaintiffs are not in possession of the wage, benefit and other employee compensation records necessary to accurately compute Plaintiffs' back pay claims in this litigation.

It is disingenuous for Defendants to state, in a conclusory fashion, that they have been prejudiced by all Plaintiffs' failure to provide a complete damages computation in their initial disclosures, and that Plaintiffs are the only persons with access to this information (DE ## 67, 70). Defendants have access to much, if not all of the information necessary to make the damage computations requested.

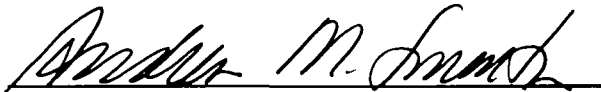
Defendants' reliance on *Viveros v. Nationwide Janitorial Association, Inc.*, 200 F.R.D. 681 (N.D. Ga. 2000), is misplaced. In *Viveros*, the District Court found that "Plaintiffs should be able to make a good faith estimate of damages and methods of calculations based on the information they have available." *Id.* at 683. Here, the undersigned finds that Plaintiffs have provided their methods of calculation to

Defendants, and also finds that Plaintiffs are not able to make a good faith estimate of damages based on the information which they have available. Therefore, Defendants' motion to compel is denied. Plaintiffs are reminded of their continuing duty to supplement as to their damages computations as relevant information becomes available.

Therefore, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion To Compel More Complete Initial Disclosures (DE # 59, filed 7/7/03), is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 4th day of September, 2003.



ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Joan A. Lenard
United States District Judge
Cheryl A. Cooper, Esq.
2 South Biscayne Blvd
2700 One Biscayne Tower
Miami, FL 33131-2483
Facsimile # (305)536-4494
(Attorney for Plaintiff EEOC)
Amarillys E. Garcia-Perez, Esq.
2151 Le Jeune Road, Suite 204
Coral Gables, FL 33134
Facsimile # (305)446-2774
(Attorney for Intervenor Plaintiffs and
Plaintiff Sanchez)

W. Russell Hamilton, III, Esq.
Angel Castillo, Jr., Esq.
Raquel Elejabarrieta, Esq.
Morgan, Lewis & Bockius LLP
5300 Wachovia Financial Center
200 South Biscayne Blvd.
Miami, FL 33131-2339
Facsimile # (877)432-9652
(Attorney for Defendants)