

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHNSON, CRYSTAL,)
)
Plaintiff,)
vs.)
)
FEDERAL EXPRESS CORPORATION,) CAUSE NO. IP99-1377-C-Y/?
)
Defendant.)

π John H Haskin
Haskin Lauter Cohen & Larue
850 Fort Wayne Avenue
Indianapolis, IN 46204

John R Maley
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204

Carl K Morrison
Senior Attorney
Federal Express Corp, Legal Dept
3620 Hacks Cross Rd 3rd Floor Bldg B
Memphis, TN 38125

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CRYSTAL JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	CAUSE NO. IP 99-1377-C -Y/K
)	
FEDERAL EXPRESS CORPORATION)	
)	
Defendant.)	

**REPORT AND RECOMMENDATION REGARDING
PLAINTIFF’S MOTION FOR SANCTIONS**

FedEx built its reputation on its overnight delivery of packages. However, in the discovery dispute underlying Crystal Johnson’s motion for sanctions now pending before the Court, months have passed and FedEx still has not delivered certain discovery documents. Alleging FedEx and its in-house counsel, Frederick Douglas, violated the Court’s Order for failing to timely produce discovery, Johnson seeks sanctions pursuant to Federal Rule of Civil Procedure 37. For the reasons set forth below, the Magistrate Judge recommends that Johnson’s motion for sanctions be GRANTED, and that FedEx and Douglas be sanctioned as set forth below.

I. Background

Johnson filed suit against FedEx alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., in that she was subjected to discrimination based on her race and sex, subjected to a hostile working environment, and retaliated against for asserting her rights under Title

VII.

On March 28, 2001, Johnson filed a motion to compel discovery. On October 29, 2001, the Court held a status conference to address the motion to compel. The Court, after hearing arguments from the parties, made the following pertinent rulings memorialized in its October 31 entry:

1. Defendant shall produce all complaints concerning Federal Express employee Christopher Hartowicz, including but not limited to complaints made by Phyllis McConnell, Blanche Bond-Hudson, Tira Starks, and/or Plaintiff;
2. Defendant shall produce any other documents pertaining to these complaints and any investigation resulting from these complaints, unless Defendant claims that production of these documents is precluded based on privilege raised in response to Plaintiff's second request for production of documents;
3. With respect to any such document not produced on privilege grounds, Defendant shall prepare a Vaughn index;
4. The Defendant shall produce to Plaintiff the foregoing documents and Vaughn index by November 16, 2001

[Order dated October 31, 2001, Docket #50].

Before the November 16, 2001 production deadline, FedEx's in-house counsel Douglas requested that Johnson's counsel grant him additional time to respond to the Court's Order. Counsel for Johnson agreed, so long as Douglas provided the responsive documents in time for her to review in preparation for the December 4 depositions of Hartowicz and his supervisor, Buck McGugan. However, Douglas failed to provide any documents responsive to the Court's Order prior to these depositions.

Despite Douglas' failure, and without the benefit of responsive documents, the depositions proceeded as scheduled. Deposition testimony revealed that McGugan and FedEx employee John

Helms took notes in conducting their investigations into complaints lodged against Hartowicz by Johnson, Phyllis McConnell, and Ehtel Hicks. McGugan testified that he submitted his investigative notes to FedEx's EEO department where they became part of a file on these charges. Due to his faulty recollection into the specifics of the investigation, McGugan testified that he would have to review his notes to give accurate deposition testimony. [McGugan Dep., pp. 13, 16, 19-26, 30-33, 62-63]. As a result, the depositions were suspended, and counsel agreed to commence a second day of depositions for Hartowicz and McGugan.

On December 11, FedEx produced documents reflecting complaints made by McConnell about employees other than Hartowicz. However, these documents were not responsive to the Court's Order.

On December 19, Johnson's counsel sent Douglas a letter pursuant to Local Rule 37.1 addressing FedEx's noncompliance with the Court's Order. Subsequently, on January 2, 2002, Douglas advised Johnson's counsel that he located some documents regarding McConnell's complaints against Hartowicz, and that he would produce them along with a Vaughn index as soon as possible. Twelve days later, on January 14, 2002, Johnson's counsel received documents reflecting McConnell's complaint against Hartowicz along with a privilege log relating to these documents.

Johnson states that to date, FedEx has not produced any documents concerning its investigation into Johnson's internal complaint and no documents concerning other complaints against Hartowicz, including but not limited to complaints lodged by Bond-Hudson, Starks, Hicks, or Ken Paul, all who are known to have filed internal complaints against Hartowicz.

FedEx states there are "justifiable reasons" for its failure to produce documents ordered by the

Court. FedEx explained these reasons in its opposition to Plaintiff's sanctions motion and during a February 7, 2002 settlement conference at which Plaintiff's sanctions motion was discussed at some length. FedEx claims that: (1) after a search, it is unable to recover alleged complaints by Bond-Hudson and Starks; and (2) Douglas was in trial from November 19 to December 7 and thus "unable to play a more active role in the search for the documents." [Def.'s Br., pp. 2-3]. In any event, Douglas states that once FedEx discovered additional documents on January 2, 2001 relating to a complaint lodged by McConnell, these documents were produced on January 14. *Id.* at 4. FedEx further states that despite "great steps" to locate the alleged complaints by Bond-Hudson and Starks, no such documents have been found. *Id.*

II. Discussion

A. Plaintiff's Motion For Sanctions

Federal Rule of Civil Procedure 37(a)(4)(A) "allows the party who [brings] a motion to compel to recover the reasonable expenses incurred in making the motion, including attorney's fees if the Court grants the motion or if the disclosure is provided after the motion was filed."

Second Chance Body Armor, Inc. v. American Body Armor, Inc., 177 F.R.D. 633, 636 (N.D.

Ill.1998), citing Rickels v. City of South Bend, 33 F.3d 785, 786 (7th Cir. 1994). The Court may deny

the motion for sanctions if it finds "the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." Alek v.

University of Chicago Hospitals, 2001 WL 1543518, *1 (N.D. Ill. 2001). However, "[w]hen a court grants a motion to compel discovery, an award of reasonable expenses, including attorney's fees,

should be made under Fed. R. Civ. P. 37(a)(4)(A).” Harris v. Moorman’s Inc., 2001 WL 238118, *2 (S.D. Ind. 2001) (Hamilton, J.). See also Illinois Tool Works, Inc. v. Metro Mark Products, Ltd., 43 F. Supp.2d 951, 960 (N.D. Ill. 1999), quoting Rickels, 33 F.3d at 786 (“Rule 37 presumptively requires every loser to make good the victor's costs”); Tuszkiewicz v. Allen-Bradley Co., Inc., 173 F.R.D. 239, 242 (E.D. Wis. 1997) (“Rule 37 allows the party who brought to motion to compel to recover the expenses incurred in making the motion.”); Rickels v. City of South Bend, Ind., 33 F.3d 785, 786-87 (7th Cir. 1999) (Rule 37(a)(4) contains a presumption that the victor on a motion to compel is entitled to its costs, including attorney’s fees).

Where the motion to compel is granted, the burden is on the opposing party to show that an award of costs would be unjust or that the opposing party’s position was substantially justified. Alek, 2001 WL 1543518, *1; Steadfast Insurance Co. v. Auto Marketing Network, Inc., 1999 WL 446691 *1 (N.D. Ill. 1999).

The Court finds that FedEx’s nonproduction is not substantially justified, and no circumstances make an award of sanctions unjust in this case. The record is replete with examples of how FedEx violated the Court’s Order. For instance, as part of an “on-going search,” FedEx asserts that it is unable to locate internal complaints by Bond-Hudson and Starks filed against Hartowicz. [Def.’s Br., pp. 3-4]. However, the Order clearly requires that *all complaints* made against Hartowicz be produced. Apparently, on its own accord, FedEx improperly limited its responses to just internal complaints. [See Def.’s Br., pp. 1-3, n. 1].¹ In addition, FedEx has failed to produce internal

¹ If in fact FedEx was unable to locate documents responsive to the Court’s Order, the proper course of action would be to notify the Court of its unfruitful search. However, the Court was not

complaints Johnson lodged against Hartowicz, and has not produced information regarding its investigation into that complaint, documents potentially both relevant to her claims and damaging to FedEx.

FedEx states it discovered additional documents into complaints made by McConnell on January 2, 2002 but failed to produce them until January 14, two months after the Court- imposed deadline. Further, FedEx failed to produce the Hicks' complaint until January 28, two and a half months after the Court-imposed deadline and eleven days after Johnson filed her motion for sanctions. Making matters worse, these discovery responses came more than a year and a half after Johnson first served the underlying discovery requests on July 5, 2000.

Unfortunately for FedEx, it may not avoid sanctions by producing documents after the motion for sanctions is filed. See, e.g., Illinois Tool Works, 43 F. Supp.2d at 960, citing Second Chance Body Armor, Inc. v. American Body Armor, Inc., 177 F.R.D. 633, 636 (N.D. Ill. 1998) (“Second Chance Body Armor makes it clear that a party may not avoid sanctions merely by producing the documents after a motion has been filed. To allow a party to avoid sanctions by such a contrivance would defeat the purpose of the rules, which is to promote voluntary discovery without the need for motion practice.”); Fautek v. Montgomery Ward & Co., 96 F.R.D. 141, 145 (N.D. Ill. 1982) (“[u]ltimate production of the material in question does not absolve a party where it has failed to produce the material in a timely fashion.”).

Further evidence of the impact of Douglas' behavior is demonstrated at the December 4

notified of this fact until FedEx's response to Johnson's motion for sanctions and verbally by Douglas at the Court-ordered settlement conference on February 7, 2002.

depositions of Hartowicz and McGugan. When Douglas requested from Johnson's counsel additional time to comply with the Court's Order, Johnson's counsel acquiesced, so long as Douglas agreed to produce responsive documents in time for her to prepare for the depositions. However, FedEx failed to produce any documents ordered by the Court. At their depositions, Hartowicz and McGugan had difficulty recalling the specifics of complaints made against Hartowicz. In fact, McGugan testified that he would need to look at his notes to recall specifics. [See McGugan Dep., pp. 13, 16, 19-26, 30-33, 62-63]. FedEx failed to produce these notes, or even notify the Court of their nonproduction. As a result, a second day of depositions is necessary.

In addition to his alleged inability to locate responsive documents, Douglas states he has "justifiable reasons" for his noncompliance. Douglas admits that "FedEx's compliance [or lack thereof] has taken a while," stating he was in trial from November 19 to December 7, and that although he has been practicing law for twelve years, he has only been with FedEx since October 1, 2001. [Def.'s Br., pp. 2-3]. However, trial attorneys with twelve years of experience recently hired by large corporations are also required to comply with Court orders and are subject to the parameters of Rule 37. See, e.g., United States v. Golden Elevator, Inc., 27 F.3d 301, 302 (7th Cir. 1994) ("Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won."); Hal Commodity Cycles Management v. Kirsh, 825 F.2d 1136, 1139 (7th Cir. 1987) ("The Federal Rules of Civil Procedure, as well as local rules of court, give ample notice to litigants of how to properly conduct themselves.").

Accordingly, the Magistrate Judge recommends that the Court sanction FedEx and its in-house counsel Douglas consistent with the recommendations set forth in Section II-B of this entry.

B. Appropriate Sanction

A court is not required “to fire a warning shot” before selecting a sanction. Corporate Express, Inc. v. US Office Products Co., 2000 WL 1644494, *6 (N.D. Ill. 2000), quoting Hal Commodities Cycles Mgmt. Co. v. Kirsch, 825 F.2d 1136, 1139 (7th Cir. 1978). Nor is a court required to select the “least drastic” or “most reasonable” sanction. Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 672 (7th Cir. 1996).

Since this Court finds Johnson has established a clear basis for sanctions under Rule 37(a)(4)(A) and 37(b)(2), the Court now considers the appropriate sanction, “mindful that the purpose [the sanction] must not be punitive, but rather compensatory, to redress harm that has been caused, or coercive in order to secure further compliance.” Oxford Capital Illinois, L.L.C. v. Sterling Payroll Financial, L.L.C., 2001 WL 1491521, *9 (N.D. Ill. 2001), citing South Suburban Housing Center v. Berry, 186 F.3d 851, 854 (7th Cir. 1999), and In the Matter of Maurice, 73 F.3d 124, 127, 128 (7th Cir. 1995).

In light of these principles, the Magistrate Judge first recommends that FedEx and its in-house counsel Douglas be ordered within 10 days of the District Judge’s adoption of this entry to comply with the Magistrate Judge’s Order dated October 31, 2001, and file a report with the Court by that date showing its compliance.

Second, the Magistrate Judge recommends that FedEx be required to pay a monetary sanction consisting of: (1) 2 hours (at \$175/hr.) to prepare Johnson’s December 19, 2001 L.R. 37.1 letter; (2) 9

hours (at \$200/hr.)² to prepare the motion for sanctions; and (3) 7 hours (at \$200/hr.) for taking subsequent depositions of Hartowicz and McGugan. This total monetary sanction of \$3550 is far less than the \$6980 Johnson sought. Overall, however, the Court finds this figure more appropriate given the conduct at issue. For example, Johnson sought 15 hours for preparing for and taking the first depositions of Hartowicz and McGugan, and “at least 10 more hours” for their subsequent depositions. [Pl.’s Br., p. 5]. While the conduct at issue undoubtedly caused Johnson to incur additional costs and fees in connection with these depositions, only these additional fees – not all deposition fees – are properly charged to FedEx. Seven hours appears reasonable and appropriate for these additional fees under the circumstances. In addition, Johnson requests 12.6 hours (at \$175/hr.) for drafting the underlying motion to compel and brief in support thereof. A review of the motion to compel and supporting brief reveals that Johnson did not seek attorney fees or costs incurred when she filed that motion. In any event, the disputes giving rise to this motion were largely resolved at the Court’s October 29, 2001 telephonic status conference. Thereafter, the Court issued its October 31, 2001 Order that the Magistrate Judge finds FedEx violated. Therefore, the Magistrate Judge recommends that Johnson receive no fee award for filing the motion to compel.

Third, the Magistrate Judge recommends that FedEx produce Hartowicz and McGugan for further deposition testimony in Indianapolis at any reasonable time requested by Johnson, and that FedEx pay court reporter costs for the second day of the Hartowicz and McGugan depositions, including Johnson’s costs of obtaining the transcript of the second day of the depositions.

² At the time Johnson’s counsel, Suzanne Newcomb, filed Johnson’s motion for sanctions, her hourly rate increased to \$200 per hour.

Finally, the Magistrate Judge recommends that for the duration of this litigation, Douglas, who was granted leave to appear in this case pro hac vice, be prohibited from appearing at any proceeding without being accompanied by local counsel or from signing any pleading without the document also bearing local counsel's signature.³ The Court finds these requirements necessary for several reasons. First and foremost, Douglas failed to abide by this Court's Order. Any attorney who practices in this district carries an obligation to comply with the orders of this Court. This obligation is at least as great on attorneys granted permission to appear pro hac vice. Local Rule 83.5(d) expressly contemplates that the Court may require the appearance or participation of local counsel "[w]henever necessary to facilitate the conduct of the litigation...." This is certainly appropriate given FedEx's discovery-related missteps. Other reasons justifying a stepped-up local presence include: (1) at the December 5, 2001 initial pretrial conference, FedEx appeared through its local counsel only. At this conference, the Court addressed matters that counsel should discuss with FedEx in preparation for the settlement conference. When Douglas appeared for the settlement conference, he informed the Court that this information was not shared with him; (2) Douglas appeared at the settlement conference without a party representative from FedEx, contrary to this Court's November 20, 2001 Order. Local counsel should be well aware of this Court's practice of requiring a party representative for settlement conferences; and (3) in addition to Douglas, the docket reflects that several attorneys from FedEx have appeared pro hac vice in this case, including Michael J. Vint and Carl K. Morrison. All of the foregoing suggests that this case

³ The Court contemplated recommending that Douglas' pro hac vice appearance be revoked, but upon reflection believes that he should be permitted to continue to appear in this case so long as he abides by the restrictions set forth above.

could benefit by having an increased local presence.

III. Conclusion

Accordingly, the Magistrate Judge recommends that the Court sanction FedEx and its in-house counsel, Frederick Douglas, for violating the Court's Order dated October 31, 2001. The Magistrate Judge finds reasonable and appropriate the following sanction:

- Order FedEx and its in-house counsel Frederick Douglas within 10 days of the District Judge's adoption of this entry to comply with the Magistrate Judge's Order dated October 31, 2001, and file a report with the Court by that date showing its compliance;
- Order FedEx to pay Plaintiff and her counsel attorney fees in the amount of \$3550 within 10 days of the District Judge's adoption of this entry;
- Order FedEx to produce Hartowicz and McGugan for further deposition testimony in Indianapolis at any reasonable time requested by Plaintiff;
- Order FedEx to pay court reporter costs for the second day of the Hartowicz and McGugan depositions, including Plaintiff's costs of obtaining the transcript of the second day of the depositions; and
- Prohibit Douglas from appearing at any proceeding in this action without being accompanied by local counsel or from signing any pleading in this action without the document also bearing local counsel's signature.

Any objections to the Magistrate Judge's Report and Recommendation shall be filed with the Clerk in accordance with 28 U.S.C. § 636 (b)(1), and failure to file timely objections within the ten days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

So ordered.

DATED this ____ day of March, 2002.

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

Copies to:

John H. Haskin
Suzanne S. Newcomb
HASKIN LAUTER & LaRUE
850 Fort Wayne Avenue
Indianapolis, IN 46204

Frederick L. Douglas
Federal Express Corporation
3620 Hacks Cross Road
Building B, 3rd Floor

Memphis, TN 38125

John R. Maley
Jeffrey L. Lund
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, IN 46204