UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN FRESHWATER, *et al.*,	)	CASE NO. 2:09 CV 464
	)	
Plaintiffs,	)	JUDGE FROST
	)	MAGISTRATE JUDGE KING
v.	)	
	)	**DEFENDANTS' REPLY TO PLAINTIFFS FRESHWATER'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND STIPULATION TO DEFENDANTS' REQUEST FOR EXTENSION OF TIME**
MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	
	)	

I. INTRODUCTION

Nothing in Plaintiffs' brief in opposition provides this Court with reason to deny the Defendants' motion to compel and request for sanctions. In fact, Plaintiffs utterly fail to defend against the motion to compel. Instead, Plaintiffs would have this Court participate in their delay tactics by granting them additional time not to provide the requested discovery, but to respond to the motion. Put simply, Plaintiffs' brief in opposition demonstrates their counsel's unwillingness to follow discovery rules.

II. LAW & ARGUMENT

A. Plaintiffs Did Not Act in Good Faith in Responding to Defendants' Discovery Requests

Plaintiffs claim they "have done all they can do to timely respond to Defendants discovery." (Doc. 60, at 2). This statement is completely false. As Defendants' motion to compel specifies, Plaintiffs originally had until June 2, 2010, and June 9, 2010, respectively, to provide their responses to Defendants'

discovery requests. (Doc. 57, at 3-4). Plaintiffs failed to meet those deadlines and failed to file for an extension of time. *Id.* After the deadlines provided in the Federal Rules had passed, Plaintiffs' counsel maneuvered around Defendants' further attempts to obtain discovery responses. *Id.* Plaintiffs' counsel ultimately failed to meet his own agreed-upon extended discovery date and once again failed to file for an extension of time. *Id.* Plaintiffs provided initial responses on June 23, 2010, indicating that they would supplement their answers by June 25, 2010. These initial responses were only provided after Defendants put Plaintiffs on notice that they would file a motion to compel on June 26, 2010, if responses were not provided by June 25, 2010. (Doc. 57, at 4). These responses were non-responsive at worst and inadequate at best. *Id.*

Plaintiffs' counsel knew that Defendants would file a motion to compel if they did not have adequate responses provided to them by June 25, 2010. *Id.* Despite this knowledge, Plaintiffs' responses were not provided on June 25, 2010. Instead, Attorney Hamilton sent his clients' responses via regular mail on June 25, 2010, but did not notify Defendants' counsel that they were mailed. As a result of the legitimate belief that no responses were forthcoming, Defendants filed their motion to compel on June 26, 2010. (Doc. 57).

Attorney Hamilton failed to provide even the most basic common courtesy to let Defendants' counsel know that discovery responses were in the mail on June 25, 2010, to avoid the unnecessary time and expense in bringing the motion to compel. Regardless, Plaintiffs' responses received on June 28, 2010, were similarly as non-responsive and/or inadequate as the responses received on June 23, 2010. [*See* Plaintiff John Freshwater's Responses to Defendant Board of Education's First Set of Interrogatories,[1] attached at Exhibit A; Plaintiff John Freshwater's Responses to Defendant Board of Education's Requests for the Production of Documents,[2] attached at Exhibit B; Plaintiff Nancy

[1] For purposes of judicial economy, only Plaintiff John Freshwater's Responses to Defendant Board's interrogatories are attached. Mr. Freshwater's responses to Defendants Short, Watson and White's Interrogatories were substantially similar to those provided to Defendant Board.

[2] While Plaintiff John Freshwater did provide some documents, they are not included here for purposes of judicial economy.

Freshwater's Responses to Defendant Board of Education's First Set of Interrogatories, attached at Exhibit C; Plaintiff Nancy Freshwater's Responses to Defendant Board of Education's Requests for the Production of Documents,[3] attached at Exhibit D (collectively referred to as "Plaintiffs' Responses")]. Further showing Attorney Hamilton's gamesmanship is the fact that Plaintiffs' verification pages in Exhibits A-D provided on June 28, 2010, were executed on June 23, 2010, the same day Plaintiffs sent their "initial responses" indicating they would supplement by June 25, 2010. If Plaintiffs verified their June 28, 2010 responses on June 23, 2010, it begs the question why they were not provided prior to June 28, 2010. Therefore, not only is the statement made by Plaintiffs that they "have done all they can do to timely respond to Defendants discovery" false, but also disrespectful of Defendants and this Court.

Another illustration of Mr. Hamilton's contumacious conduct is the fact that he initially failed to respond to Defendants' Motion to Compel in a timely manner. According to Local Rule 7.2 (a)(2), Plaintiffs had twenty-one (21) days to file a memorandum in opposition to Defendants' Motion to Compel. Defendants' motion was filed on June 26, 2010, giving Plaintiffs through July 17, 2010, to respond. During that time, Defendants' counsel sent Mr. Hamilton a letter outlining all of the deficiencies contained in Plaintiffs' responses. (July 6, 2010, Letter to Attorney Hamilton, attached at Exhibit E). Plaintiffs failed to respond to the letter and failed to file a response to Defendants' Motion to Compel. While Plaintiffs did not respond to the July 6, 2010 letter, Plaintiff John Freshwater did provide "supplemental responses" but they did not address the heart of this discovery dispute. (July 9, 2010, Plaintiff John Freshwater's First Supplemental Response, attached at Exhibit H). Instead, Plaintiffs merely indicated that two experts will be identified in the future. *Id.* Nearly two weeks after the Local Rule 7.2 (a)(2) deadline, this Court sua sponte granted Plaintiffs an extension of time, until August 3, 2010, in which to file a memorandum in opposition.

In their anemic brief in opposition, Plaintiffs assert that Defendants' motion to compel should be denied solely because Mr. Hamilton does not have adequate time to respond to Defendants' discovery

[3] While Plaintiff Nancy Freshwater did provide some documents, they are not included here for purposes of judicial economy.

requests. Plaintiffs cite to no legal authority (presumably, because none can be found) supporting the denial of a motion to compel because Plaintiffs' counsel is unable to competently and diligently comply with the most basic of discovery rules.

According to *Wright and Kane*, a court "will award the prevailing party its reasonable expenses, including attorneys fees, incurred in connection with the motion to compel, unless the conduct of the losing party was justified (i.e., not frivolous)." Wright and Kane, FEDERAL PRACTICE AND PROCEDURE, CIVIL RULES QUICK REFERENCE GUIDE, West 2010, at 633; *see id*. at 678. Plaintiffs filed this lawsuit. They cannot claim their reason for failing to respond is justified. In preparing to bring this suit, Attorney Hamilton must have known that there was a distinct possibility that the state administrative hearing would be ongoing at roughly the same time. Defendants even attempted to accommodate Plaintiffs by extending the discovery deadline on multiple occasions to no avail. (Doc. 57, at 6). Defendants must not suffer prejudice in the discovery of this matter solely because of Mr. Hamilton's purported inability to handle the state administrative hearing and this lawsuit contemporaneously. Attorney Hamilton had ample opportunity to either request an extension of time from this Court or work with Defense counsel, in good faith, but he chose to do neither.

Attorney Hamilton suggests that because he "has had to progress the brief due in the administrative hearing by reading over 6,000 pages of transcript, sorting the categories of evidence and 350 exhibits, and preparing a comprehensive written response to the volumes of evidence" he is somehow exempt from complying with the rules of this Court in the case that he and his clients brought themselves. (Doc. 60, at 2). Also, Attorney Hamilton claims that he must handle the administrative hearing and this case "without any assistance or help as Plaintiffs cannot afford the cost of hiring additional help." *Id.* Defendants fail to understand how that purported fact shields Mr. Hamilton and Plaintiffs from complying with basic discovery rules.

Attorney Hamilton's failure to conduct discovery in a timely fashion and in accordance with Federal Rule of Civil Procedure 33 and 34 was "clear, continuous, and with fault." *Catalusci v. Horizon Sci. Acad. - Denison Middle Sch., Inc.*, Case No. 1:08-CV-2562, 2009 U.S. Dist. LEXIS 32980 (N.D.

Ohio 2009). While Attorney Hamilton's situation is unfortunate, it does not excuse Attorney Hamilton from a failure to notify opposing counsel or the court of his ongoing issues. *Id at *4.* "Such notification would have allowed for a reasonable extension of time, either through the consent of opposing counsel or by order of the court, and would have avoided unnecessary costs to all involved." *Id.* Mr. Hamilton could have easily notified the Court or opposing counsel of his time issues before it got to this point. He did not. Therefore, Defendants' motion to compel should be granted and Plaintiffs' request for an extension of time should be denied.

B. Plaintiffs' Discovery Responses Are Inadequate and Non-responsive

i. Initial Responses

Plaintiffs claim they "have been able to provide initial responses to [Defendants'] discovery..." (Doc. 60, at 2).[4] As stated in the motion to compel, Plaintiffs' "initial responses" provided on June 23, 2010, were wholly inadequate and nonresponsive. Indeed, almost all of Plaintiff John Freshwater's responses to interrogatories and requests for the production of documents consisted of the following statement: "As to each of the numerated items requested, Plaintiff will supplement by Friday, June 25, 2010." (Doc. 57, at Exhibit 2). According to Federal Rule of Civil Procedure 37 (a)(4) "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Plainly, Plaintiff John Freshwater's statement that he will supplement by Friday, June 25, 2010 is evasive and incomplete and must be considered a failure to respond. Plaintiff Nancy Freshwater's responses were also deficient in a number of areas. *See* Doc. 57, at 7.

ii. Subsequent Responses

Further compounding Plaintiffs' and Attorney Hamilton's discovery failures, Defendants received no supplemental responses on June 25, 2010. Three days past the already extended deadline, Defendants

[4] Plaintiffs claim they provided complete responses to Defendant Lynda Weston's discovery requests. Whether or not Plaintiffs' responses to Defendant Weston's discovery were complete is irrelevant for purposes of Defendants' motion to compel as Defendant Weston is represented by other counsel and her discovery requests are not presently at issue.

received Plaintiffs' Responses on June 28, 2010.[5] (Exs. A - D). Plaintiff John Freshwater's responses to Defendants' interrogatories received on June 28, 2010, were non-responsive. Nearly every interrogatory elicited the following statement:

> Plaintiff relies upon the voluminous amount of information detailed in the exhibits and transcripts produced at the state hearing to provide specific acts and omissions taken by the Defendant. Plaintiff in good faith believes Defendant has in its possession all of the exhibits and transcripts from the state hearing and will soon receive a brief as a result of the state hearing detailing with further specificity.

(Ex. A). Plaintiffs suggest that the information provided in the state administrative hearing is somehow a full and complete response that adequately responds to all of the requests and interrogatories propounded on Plaintiffs by Defendants. Plaintiffs assume that Defendants in this case have in their possession all of the exhibits and transcripts from the state hearing. Defendants do not. Even if all of the state hearing information was responsive to Defendants' requests, Defendants are certainly permitted to ask for, and have asked for, information beyond that which was presented at the state administrative hearing.

Similarly non-responsive were Plaintiff John Freshwater's responses to the Board's requests for the production of documents received on June 28, 2010. Nearly every document request elicited the following statement: "Plaintiff identifies documents to include all exhibits and transcripts produced at the state hearing involving John Freshwater. Plaintiff in good faith believe Defendant has it its possession all of the exhibits and transcripts from the state hearing." (Ex. B). As stated above, Defendants do not have all of the exhibits from the state hearing, and even if they did, those exhibits and transcripts from the state hearing are insufficient responses because Defendants request more information than that which was provided at the state hearing.

Plaintiff Nancy Freshwater adequately responded to some interrogatories and requests for production of documents in her responses received on June 28, 2010, but several were inadequate. (*See* Ex. E, at 2-3). Plaintiff Nancy Freshwater failed to provide full and complete answers to interrogatories 6,

[5] The June 28, 2010, responses provided by Plaintiff included two copies of responses to Defendant Steve Short but failed to include any responses to Defendant Jody Goetzman's interrogatories and requests for the production of documents.

7, 8, 9, 10, 11, 12(b), 12(c) and 12(d). (Ex. C). She also failed to provide information requested in requests for production of documents numbers 4 - 13. (Ex. D; *see* Ex. E., at 2-3).

iii. Plaintiffs' Failures to Produce and Respond

Defendants' counsel addressed Plaintiffs' June 28, 2010, responses in a 16-page letter dated July 6, 2010, showing Attorney Hamilton each instance in which his clients' responses were inadequate or unresponsive. (*See* Ex. E).

Plaintiff Nancy Freshwater did not attach responsive documents where her response stated "see attached" and she did not execute the requested medical authorizations for each healthcare professional where records exist (including failing to provide her social security number). (Ex. D, at ¶¶ 5-6; *see* Ex. E, at 2). Plaintiffs have failed to produce audio or tape recordings of witnesses to the matters alleged in the Complaint. (Ex. E, at 2). None of these recordings has been produced in response to the discovery despite several references to such recordings during the state administrative hearing. *Id.* Plaintiffs also failed to provide any responses to Defendant Jody Goetzman's discovery requests. *Id.* Similar to the *Doe*[6] case, Plaintiffs have failed to produce all billing records concerning this matter, failed to produce the "five armloads of documents" that are allegedly in the possession of Plaintiffs' counsel and have not made the Colin Powell/George Bush poster available for Defendants' review. Additionally, Plaintiffs claim that they "believe in good faith" that Defendants have all of the exhibits and transcripts from the state administrative hearing, even though Board counsel in the state hearing has yet to receive Employee Exhibits 182 and 183 from Attorney Hamilton. (Affidavit of David Millstone, attached at Exhibit F).

Plaintiff John Freshwater identifies and references certain documents within his responses to Defendant Board's requests for the production of documents that were received on June 28, 2010, but several of those documents referenced and identified were not provided by Mr. Freshwater. For instance, in request for production of documents ("RPD") number 28, Plaintiff John Freshwater identifies news articles that were responsive to the request, yet no such news articles were provided. (Ex. B; *see* Ex. E at 12). Mr. Freshwater's responses are rife with such examples of identifying documents but not producing

[6] Case No. 2:08-cv-575.

them. (*See e.g.*, Ex. B, at RPD 21, 22, 28, 30, 33, 34 and 35). Furthermore, Plaintiffs failed to respond to Defendants' request for metadata of all of the hearing exhibits and documents presented as much of what is identified is in a form of electronically stored information. *See* Ex. E. Hard copies are not sufficient.

iv. Potentially Privileged Information

Plaintiff John Freshwater and Mr. Hamilton have referred to handwritten notes taken in response to questions from Mr. Hamilton used to prepare affidavits. (Transcript of Motion Hearing, July 29, 2010, pp. 42-43, attached at Exhibit G). Even if privileged, Plaintiffs had an obligation under the Federal Rules to identify these notes. *See* FED. R. CIV. P. 26 (b)(5). Defendants are left to wonder if there is other evidence Plaintiffs have not produced, and, more importantly, not identified on the basis they are privileged. Plaintiffs must be compelled to produce all non-privileged evidence requested by Defendants. If Plaintiffs withhold any evidence on the basis of privilege, they must follow the rules and properly identify it on a privilege log.

C. Plaintiffs Concede That Their Responses Were Inadequate and Non-responsive.

Even after receiving an extension of time until August 3, 2010, Plaintiffs failed to respond to the arguments in the motion to compel and instead responded with an excuse. (*See* Doc. 60). This Court granted Plaintiffs an extraordinary opportunity to explain themselves, but Plaintiffs declined the invitation. They do not dispute their responses were inadequate. They do no refute the assertion that their responses were non-responsive. Plaintiffs chose not to dispute Defendants' assertions because they cannot do so in good faith. In fact, Attorney Hamilton explains in the brief in opposition that the reason his clients' responses were inadequate and nonresponsive was because Attorney Hamilton, himself, did not have the time to provide adequate and responsive discovery due to his involvement in the state administrative hearing.

D. Plaintiffs' Pattern of Behavior Warrants Denial of Additional Time to Respond

Attorney Hamilton's inability to handle both cases contemporaneously is no justification to delay the discovery process even further, especially considering Mr. Hamilton's pattern of behavior. From failing to provide their initial disclosures in a timely fashion, to all of the instances mentioned above and

in Defendants' motion to compel, Plaintiffs have not been forthright during the discovery phase of this lawsuit. Defendants cannot, in good faith, expect that more time will do anything but further delay this case. Plaintiffs only request "more time to respond." (Doc. 60, at 2). This crafted language is vague in that it does not state that Plaintiffs will fully and adequately respond within the additional time. Defendants have no reason to believe that more time will actually result in the production of the requested information and documents. Defendants expect that if more time is granted, Plaintiffs will only delay further to the prejudice of Defendants.

E. Sanctions

Federal Rule 37(a)(5) "mandates payment of the moving party's reasonable expenses, including attorney's fees, in the event the motion is granted." *J4 Promotions, Inc. v. Splash Dogs, L.L.C.*, Case No. 2:09-CV-136, 2010 U.S. Dist. LEXIS 60590, at *2 (S.D. Ohio 2010). The party whose conduct necessitated the motion and/or the attorney advising the conduct are liable for such fees and expenses unless… the opposing party's failure to respond to the discovery requests was substantially justified or other circumstances make an award unjust." *Id.* Here, Plaintiffs' and Attorney Hamilton's conduct necessitated the motion to compel. They concede the allegations in the motion to compel and instead offer excuses for why they provided inadequate and evasive responses. Plaintiffs and Attorney Hamilton have given this Court no substantial justification for their failure to respond and offer no reason why their circumstances would make an award unjust. As a result, Defendants are entitled to their reasonable expenses and attorney's fees if this Court grants their motion.

Further, this Court should order Attorney Hamilton to pay the expenses incurred by Defendants. "Rule 37 permits a court to order the attorney who advised the conduct necessitating a motion to compel to pay the expenses thereby incurred… when it is clear that discovery was unjustifiably opposed principally at his instigation." *Id.* at *19-20 *citing Humphreys Extermination Co. v. Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974). For the foregoing reasons, it is clear that Attorney Hamilton controlled the disposition of his clients' discovery responses. Attorney Hamilton chose not to call Defendants' counsel to

notify them that responses were in the mail and chose not to file for an extension of time. It was Attorney Hamilton who did not work with Defendants' counsel to provide adequate discovery in a timely fashion.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to compel and request for sanctions should be granted. Further, Defendants' motion for extension of time for primary expert deadline should be granted as Plaintiffs stipulate and consent to that motion. (Doc. 60, at 1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August 2010, the foregoing *Defendants' Reply to Plaintiffs Freshwater's Memorandum in Opposition to Defendants' Motion to Compel and Stipulation to Defendants' Request for Extension of Time* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Sarah J. Moore
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