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

CLOUDIA HILL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**NO. 03-1219 T/An**
	)	
McNAIRY COUNTY BOARD OF EDUCATION, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION TO PROHIBIT USE OF WRITTEN STATEMENTS AND TESTIMONY

Before the Court is Defendants' Joint Motion and Memorandum to Prohibit Plaintiffs' Use of Written Statements and Testimony of Certain Witnesses with Knowledge of Discoverable Matters for Failure to Cooperate in the Discovery Process filed on September 9, 2004. United States Chief District Judge James D. Todd referred this matter to the Magistrate Judge for determination. For the reasons set forth below, the Motion is **GRANTED**.

BACKGROUND

Patricia and Kerry Hill ("Hills") brought this action individually and as the parents of twenty year-old Cloudia Hill ("Cloudia"), a student in the McNairy County school system who has been diagnosed with autism and mental retardation. Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1401 *et seq.*, the Individuals with Disabilities Education Act, and Tennessee Code Annotated § 49-10-101 *et seq.* The Plaintiffs seek injunctive relief and monetary damages for alleged abuse committed by Defendants against Cloudia.

On or about February 12, 2004, Plaintiffs submitted their Rule 26 initial disclosures to Defendants. Pursuant to Federal Rule of Civil Procedure 26(a)(1), Plaintiffs identified various individuals with discoverable information. Plaintiffs also identified various persons with discoverable information in this matter during the discovery process. For example, on April 16, 2004 and April 28, 2004, Plaintiffs served Defendants with answers to interrogatories 1, 2, and 5. As part of answering these questions, Plaintiffs identified persons who (1) were eyewitnesses to the incidents alleged in the Complaint, (2) who had discoverable information for this lawsuit, and (3) who had relevant facts for this lawsuit.

On August 5, 2004 Defendants deposed Plaintiff Patricia Hill ("Ms. Hill"). In her deposition, Ms. Hill identified certain individuals that had not been disclosed in initial disclosures or during discovery. Specifically, Ms. Hill identified Michael Brown as someone who witnessed the alleged abuse of Cloudia. Ms. Hill, however, would not provide contact information for Mr. Brown. Ms. Hill also identified Ms. Rhonda Brown, Ms. Tina Smith, and Mr. Randall Nielson as witnesses, but Ms. Hill did not disclose contact information for these parties. On August 31, 2004 Defendants deposed Ms. Rose Nielson ("Ms. Neilson"), Cloudia's caregiver and teacher. During her deposition Ms. Nielson identified Michael Brown and Rhonda Brown as persons with knowledge of this case, but Ms. Nielson refused to disclose the contact information for these persons.

Defendants filed their Motion for Summary Judgment on August 3, 2004, and Plaintiffs responded to the Motion for Summary Judgment on September 4, 2004. With their Response, Plaintiffs submitted sworn affidavits from Tina Smith, Randall Nielson, Rhonda Brown, and Michael Brown, as Exhibits "Z," "AA," "BB," and "CC" respectively. Thereafter, on September

9, 2004, Defendants filed the instant Motion requesting that the Court prohibit Plaintiffs from utilizing the testimony or written statements of these individuals because Plaintiffs did not disclose them in their initial disclosures or in response to Defendants' Interrogatories and refused to provide contact information even after Ms. Hill identified them as persons with knowledge during her deposition.

In their Response to this Motion, Plaintiffs argue that Defendants can depose these persons if they chose to do so. Plaintiffs state that all four persons are willing to consent to depositions, and note that Defendants "have not asked this Court to issue a subpoena" for the persons. (Pls.'s Resp. to Mot. to Exclude, at 2). "Plaintiffs have done nothing to prohibit such depositions from taking place. Defendants have not asked for a date or time to depose these witnesses and have not asks [sic] the Court for assistance in the same." (*Id.* at 3). The Court, however, notes that the affidavits of these persons were not submitted until after the close of discovery.[1] Plaintiffs also attempted to supplement their Rule 26(a)(1) disclosures by attaching a list of Ms. Smith. Ms. Tammy Skinners, and Mr. Nielson's addresses, but this supplemental list was not provided until September 15, 2004.

ANALYSIS

Rule 37 of the Federal Rules of Civil Procedure notes that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . *is not*, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37 (emphasis added).

[1] The Court's Rule 16(b) Scheduling Order listed August 30, 2004 as the deadline for completing discovery in this case. Plaintiffs, however, did not file their Response to Defendants' Motion for Summary Judgment until September 3, 2004.

Specifically, Rule 26(a)(1) requires a party to disclose "the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information." Fed. R. Civ. P. 26(a)(1). In case a party later learns of a potential witness, after making its initial disclosures, the party is required to supplement its initial disclosures. *See* Fed. R. Civ. P. 26(e)(1).

If a party does not disclose the name of a potential witness, courts should impose sanctions against the non-disclosing party. *See Salgado v. General Motors Corp.*, 150 F.3d 735, 742 n.6 (7th Cir. 1998) (holding that Rule 37 provides for the imposition of sanctions for violating Rule 26); *Ames v. Van Dyne*, No. 95-3376, 1996 WL 662899, at *4 (6th Cir. Nov. 13, 1996) (unpublished) ("Rule 37 is written in mandatory terms and is designed to provide a strong inducement for disclosure of Rule 26(a) material.") (quoting *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995)); *cf. King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000) (affirming the district court's exclusion of expert testimony under Rule 37(c)(1)). As a sanction, courts generally hold that the non-disclosing party is not permitted to rely on the witness at trial, unless one of two conditions is present. *See Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) ("noting "the required sanction in the ordinary case is mandatory preclusion"). First, if the party had substantial justification for not disclosing the potential witness, the Court should not impose sanctions. *See Profitt v. Veneman*, No. CIV.A.5:01CV00067, 2002 WL 1758232, at *2 (W.D. Va. July 15, 2002). Second, if the party's failure to disclose was harmless, the Court should not impose sanctions. *Id.*

In this matter, there is no denying that Plaintiffs failed to disclose the names of Ms. Smith, Mr. Nielson, Ms. Brown, and Mr. Brown. Further, as Defendants state in their Motion, the statements of these four persons will not be used "solely for impeachment" but will instead be used as substantive evidence against Defendants. Plaintiffs, therefore, violated the requirements of Rule 26(a)(1) by not disclosing all persons likely to have discoverable information that the disclosing party may use to support its claims or defenses. Because they did not supplement their initial disclosures, Plaintiffs also violated Rule 26(e). As such, the Court should impose sanctions on Plaintiffs unless Plaintiffs can show their omission was either substantially justified or harmless.

Plaintiff's failure to disclose the names of these potential witnesses was not substantially justified. The United States Supreme Court has defined "substantially justified" as "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 553 (1988). In this case, Plaintiffs offer no explanation as to why they did not disclose the names of Tina Smith, Randall Nielson, Rhonda Brown, and Michael Brown. The only retort offered by Plaintiffs is that now that Defendants are aware of these persons, they are free to depose them. Plaintiffs make much of the fact that Defendants have not asked the Court for a subpoena that requires these individuals to appear at a deposition. However, the Court concludes that Plaintiffs have not shown substantial justification for their failure to properly disclose the witnesses in their initial disclosures and in their responses to interrogatories. Plaintiffs were obligated to disclose all persons with knowledge about this case, and Plaintiffs failed to do so.

Plaintiff's failure to disclose was not harmless. The advisory notes to the Federal Rules of Civil Procedure provide three examples of when the failure to disclose is harmless, including:

> (1) the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness to all parties; (2) the failure to list as a trial witness a person so listed by another party; or (3) the lack of knowledge of a pro se litigant of the requirement to make disclosures.

Profitt, 2002 WL 1758232, at *3 (quoting Fed. R. Civ. P. 37 advisory committee's note). In this matter, Plaintiffs' failure to disclose the names of potential witnesses was not "inadvertent" and it did not result from "the lack of knowledge of a pro se litigant." In addition, no other parties are involved in this lawsuit. As such, Plaintiffs' omission is not of the "harmless" variety contemplated by the Rules. Moreover, Defendants state in their Reply Memorandum that Plaintiffs' failure to disclose the names of these four individuals was actually prejudicial to the Defendants. Defendants note that "[b]y failing to provide the contact information Plaintiffs have had in their possession since the outset of this litigation, they have actively obstructed the Defendants' ability to prepare an adequate defense in this case." (Defs.'s Reply Mem. to Pl.'s Resp., at 4). The Court agrees with Defendants and finds that Plaintiffs' failure to identify Tina Smith, Randall Nielson, Rhonda Brown, and Michael Brown was not harmless.

Because Plaintiffs failed to disclose Tina Smith, Randall Nielson, Rhonda Brown, and Michael Brown and because their failure was not substantially justified and was not harmless, the Court should impose sanctions against Plaintiff. As such, Defendants' Motion is **GRANTED**. Following the general rule, the Court orders that the affidavits of Tina Smith, Randall Nielson, Rhonda Brown, and Michael Brown should be stricken from Plaintiffs' Response to Defendants' Motion for Summary Judgment. The Court also orders that Plaintiffs

should not be allowed to rely on the testimony of Tina Smith, Randall Nielson, Rhonda Brown, and Michael Brown at trial.

Pursuant to the Order of Reference, any objections to this Order shall be made in writing within ten days after service of this Order and shall set forth with particularity those portions of the Order objected to and the reasons for those objections.

IT IS SO ORDERED.

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S. THOMAS ANDERSON
UNITED STATES MAGISTRATE JUDGE

Date:_____