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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission,
Plaintiff,
v.
Alamo Rent-A-Car LLC, ANC Rental Corporation,
Defendant.

No. CV 02-1908-PHX-ROS

ORDER

Pending before the Court are Defendant' s Motion in Limine RE: Plaintiff' s Lost Wages (Doc. #72), Plaintiff' s Motion in Limine RE: Work Perform ance (Doc. #81), Plaintiff' s Motion in Limine RE: Back Pay (Doc. #82), Plaintiff' s Motion in Limine RE: Bankruptcy (Doc. #83), and Plaintiffs Motion in Limine RE: Not Revisiting Liability (Doc. #85).

I. Defendant's Motion in Limine RE: Plaintiff's Lost Wages and Compensatory Damages

Defendant seeks to exclude any witness testim ony or documents not disclosed in Plaintiff's Rule 26(a) disclosure statements, including evidence of Ms. Nur's lost wages, lost benefits, and compensatory damages. Defendant argues that while Plaintiff set forth Ms. Nur's estimated back pay in its initial disclosur e statement (\$26,800), Plaintiff failed to

1 provide any calculation for this total or any documents that detail the basis for this amount.
2 Further, Defendant argues that no information about lost benefits or compensatory damages
3 was provided in Plaintiff's Initial Disclosure Statement, other than the fact that Plaintiff was
4 seeking such damages.

5 Defendant states that it was not until Plaintiff's 4th supplemental disclosure, received
6 on August 17, 2006, over two years after the close of discovery, that information as to how
7 Plaintiff's lost wages were calculated was provided to them. Defendant further argues that
8 no calculation or dollar amount has ever been provided for lost benefits and compensatory
9 damages.

10 However, it is Plaintiff's position, supported by the record, that several documents
11 were disclosed to Defendant that explained how Ms. Nur's back pay was calculated. Plaintiff
12 states that Ms. Nur's hourly rate, her monthly salary, and the amount she has earned since her
13 employment with Defendant was terminated have all been disclosed to Defendant.

14 Additionally, while it is true that Plaintiff did not timely disclose Plaintiff's W-2 form, this
15 form was prepared by Defendant and copies of it should still be in Defendant's possession.

16 Plaintiff cites Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1158 (9th
17 Cir. 1999), holding that back pay damages "are determined by 'measuring the difference
18 between actual earnings for the period and those which she would have earned absent the
19 discrimination by defendant." Plaintiff states that this method of calculating back pay
20 damages is commonplace, and Defendant was in possession of all the information necessary
21 to explain the \$26,800 figure that Plaintiffs are seeking. Plaintiff also states that
22 mathematical certainty is not necessary in calculating back pay awards, an approximation
23 will do. Real v. Continental Group, Inc., 627 F.Supp. 434, 451 (N.D.Cal. 1986) (while
24 Plaintiff's testimony, by itself, that his lost compensation was about \$25,000 will not support
25 a lost back pay award of \$132,000, it is specific enough evidence to justify a reamendment). The
26 Court agrees.

27 Additionally, Plaintiff argues, Defendant bears the burden of proving any mitigation
28 to back pay, i.e. interim earnings or lack of diligence. Alfred M. Lewis Inc. v. N.L.R.B. 681

1 F.2d 1154, 1156 (C.A.9, 1982) (stating "once the amount of back pay due to the discharged
2 employee [is established], the burden is on the employer to come forward with evidence to
3 mitigate its liability). The record supports Plaintiff's position that Defendant never sought
4 disclosure of any information about Ms. Nur's mitigation efforts or her interim earnings. It
5 follows that Defendant cannot fail to conduct discovery and object to Plaintiff's disclosures
6 and now move to exclude evidence based on non-disclosure.

7 Plaintiff also makes clear that the only compensatory damage award that they are
8 seeking is for Plaintiff's emotional damages. They will not be seeking medical expenses,
9 undisclosed benefits, job search or medical expenses.

10 A calculation of damages generally requires more than setting forth the amount
11 demanded. City and County of San Francisco v. Tutor-Saliba Corp., 218 F.R.D. 219, 221
12 (N.D.Cal. 2003); Medhekar v. U.S. Dist. Court for the Northern Dist. of California, 99 F.3d
13 325, 327 (9th Cir. 1996). The defendant is entitled to a "specific computation" of damages
14 under Rule 26. Id. A party that without substantial justification fails to disclose information
15 required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by
16 Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial,
17 at a hearing, or on a motion any witness or information not so disclosed. Fed.R.Civ.P.
18 37(c)(1). Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir.
19 2001).

20 The Court concludes that the disclosures and computations provided by Plaintiff are
21 sufficient for Rule 26 purposes. Further, even if the Court were to find that the disclosures
22 and computations were insufficient, Defendant has not shown how it was prejudiced in order
23 to justify the severe sanction of exclusion of evidence, as required by Rule 37. See Fed. R.
24 Civ. P. 37(c)(1). Accordingly, Defendant's Motion in Limine is denied and Plaintiff may
25 present evidence of Ms. Nur's lost wages, lost benefits, and compensatory damages.

26 **II. Plaintiff's Motion in Limine RE: Work Performance**

27 Plaintiff argues that any evidence that Ms. Nur received a written warning regarding
28 a personal email sent from her work computer and a verbal warning in response to an

1 argument with a co-worker is inadmissible as irrelevant and prejudicial, claiming that this
2 evidence has no bearing on a trial for damages.

3 In its response, Defendant argues that a motion in limine is premature at this point and
4 that this evidence may be used for impeachment or for some other purpose.

5 Plaintiff is correct at this time. In a trial for damages, evidence of Plaintiff's work
6 performance is irrelevant and prejudicial. See Fed. R. Evid. 402. But the Court will
7 reconsider the ruling if issues surface at trial to allow its admission. Accordingly, Plaintiff's
8 Motion is granted.

9 **III. Plaintiff's Motion in Limine RE: Back Pay**

10 Plaintiff argues that Defendant should be precluded from introducing evidence of
11 mitigation of back pay and any offer of reinstatement. Plaintiff argues that this is a matter
12 that should be decided by the Court and should not be presented to the jury.

13 Defendant argues that Plaintiff's position is incorrect, that the law states that
14 mitigation and whether or not an offer of reinstatement would be accepted is a matter of fact
15 for the jury to decide. See Ninth Circuit Model Jury Instruction 7.3; Smith v. World Ins. Co.,
16 38 F.3d 1456 (9th Cir. 1994).

17 Defendant is correct. In order to reduce the damage award, it is Defendant's burden
18 to show that the Plaintiff failed to mitigate damages, including the amount by which damages
19 would have been mitigated. This includes whether or not an offer of reinstatement was
20 made. Alfred M. Lewis Inc. v. N.L.R.B., 681 F.2d 1154, 1156 (9th Cir. 1982) (stating that
21 once the amount of back pay due to the employee has been established, the burden is on the
22 employer to come forward with evidence to mitigate its liability). An offer of reinstatement
23 is relevant and admissible evidence to mitigate Defendant's liability. See Fed. R. Evid. 402.

24 Further, Plaintiff argues that Back Pay is an equitable remedy that should be decided
25 by a Court and not a jury. Plaintiff cites Lutz v. Glendale Union High School, 403 F.3d
26 1061, 1069 (9th Cir. 2005), which states that "there is no right to have a jury determine the
27 appropriate amount of back pay under Title VII [and] back pay remains an equitable remedy
28 to be awarded by the district court in its discretion." The Court agrees, however, will use the

1 jury in an advisory capacity to determine the issue of back pay. See e.g. In re Aircrash
2 Disaster Near Roselawn, Indiana on October 31, 1994 909 F.Supp. 1083, 1113-14 (N.D.Ill.
3 1995) (empaneling a jury for all issues but treating the jury verdict concerning one of issues
4 as advisory).

5 **IV. Evidence and Testimony Regarding Defendant's Bankruptcy**

6 For the reasons discussed at the Final Pretrial Conference, Plaintiff's Motion in
7 Limine will be granted. Defendant is not allowed to introduce evidence of its bankruptcy at
8 trial.

9 **V. Evidence Disputing Liability**

10 Plaintiff argues that Defendant should be barred from introducing evidence that would
11 challenge the Court's legal finding that Ms. Nur was discriminated against by Defendants
12 under Title VII.

13 Defendant responds by arguing that Court statements in the context of summary
14 judgment rulings are limited for the purpose of determining whether summary judgment is
15 appropriate and not for the purpose of finding facts or making legal conclusions. Coca-Cola
16 Bottling Co. v. Coca-Cola Co., 769 F. Supp. 599, 614 (D. Del 1991). Defendant misstates
17 the law. Coca-Cola states:

18 The denial of a motion for summary judgment is an
19 interlocutory ruling which establishes no more than that on the
20 summary judgment record there are fact issues which should be
21 submitted to the trier of fact. Since the record at a trial may be
22 different, such a preliminary ruling does not determine what
23 issues should be submitted to the jury.

24 This ruling stands for the proposition that when a motion for summary judgment is
25 *denied* on an issue, the issue is generally one for the jury. In cases when summary judgment
26 is *granted*, however, the issue may not be relitigated later at trial.

27 Further, Defendant argues that the Court cannot decide issues of credibility in a
28 motion for summary judgment context. The Court, however, did not decide the issues before
it in summary judgment by weighing the credibility of witnesses. The decision was made
by the application of law to undisputed facts.

1 Also, the Court agrees with Plaintiff that the issue of liability has been decided. The
2 scope of the trial before the jury will only cover damages. Accordingly, Defendant may not
3 present evidence that would dispute their liability for discrimination and Plaintiff's Motion
4 in Limine is granted.

5 **VI. Conclusion**

6 Accordingly,

7 **IT IS ORDERED THAT** Defendant's Motion in Limine RE: Plaintiff's Lost Wages
8 (Doc. #72) is **DENIED**.

9 **IT IS FURTHER ORDERED THAT** Plaintiff's Motion in Limine RE: Work
10 Performance (Doc. #81) is **GRANTED**.


11 **IT IS FURTHER ORDERED THAT** Plaintiff's Motion in Limine RE: Back Pay
12 (Doc. #82) is **DENIED**.

13 **IT IS FURTHER ORDERED THAT** Plaintiff's Motion in Limine RE: Bankruptcy
14 (Doc. #83) is **DENIED**.

15 **IT IS FURTHER ORDERED THAT** Plaintiff's Motion in Limine RE: Not
16 Revisiting Liability (Doc. #85) is **GRANTED**.

17 DATED this 17th day of May, 2007.

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Roslyn O. Silver
United States District Judge