

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

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U.S. DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
CLERK OF COURT JACKSON

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
and)
)
JOE CARLTON,)
)
Intervenor,)
)
VS)
)
HARBERT-YEARGIN, INC.,)
)
Defendant.)

No. 97-1112

ORDER DENYING DEFENDANT'S MOTION TO DISMISS
FOR FAILURE OF PLAINTIFF TO PROVIDE COMPUTATION
OF DAMAGES AND FOR FAILURE OF EEOC TO
DEFER CHARGE TO TENNESSEE HUMAN RIGHTS COMMISSION

Defendant Harbert-Yeargin, Inc., has moved to dismiss this action because plaintiffs failed to provide defendant with a computation of damages as required by the Federal Rules of Civil Procedure. Alternatively, defendant moved for an order precluding plaintiffs from relying upon information or documents at trial which were not produced to defendant pursuant to Fed. R. Civ. P. 26. Plaintiffs oppose the motion upon the basis that all damages sought, with the exception of back pay for plaintiff Joe Carlton, are intangible, such as

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with Rule 58 and/or 79 (a) FRCP on 4-21-99

mental anguish, humiliation, embarrassment, and punitive damages, which are incapable of calculation. Concerning the back pay claim of plaintiff Joe Carlton, plaintiff contends that defendant has plaintiff's salary records and can easily calculate the amount of plaintiff's lost wages.

Fed. R. Civ. P. 26(a)(1) requires a party in a lawsuit to provide to other parties:

a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered;

If a party fails to comply with this requirement, Fed. R. Civ. P. 37(c)(1) provides:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

The court finds that plaintiffs' failure to disclose its computation of damages is harmless because all items of damage sought except plaintiff Carlton's back pay are intangible and are incapable of computation. Because the amount of back pay sought by plaintiff Joe Carlton can be calculated by defendant from defendant's own payroll records,

failure of plaintiff to provide that computation is also harmless.

Therefore, plaintiffs' motion to dismiss or to preclude plaintiff from using evidence concerning damages is denied.

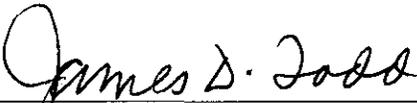
Defendant also seeks dismissal upon the basis that the EEOC never deferred Joe Carlton's charge to the Tennessee Human Rights Commission as required by Title VII. Plaintiff contends that deferral of the charge to the Tennessee Human Rights Commission is not required in this case.

Section 706 of Title VII requires that, before a charge may be filed with the EEOC, it must first be filed with the state or local fair employment practices agency, if any, where the alleged discrimination occurred. 42 U.S.C. § 2000e-5. However, the EEOC and the Tennessee Human Rights Commission have entered into a worksharing agreement providing that a filing with one agency is a filing with the other agency.

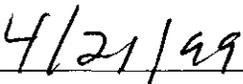
Because this motion was filed on April 19, 1999, and plaintiff EEOC has not had an opportunity to respond to the motion, the court accepted the statement of counsel for the EEOC that such an agreement exists. Pending the filing of a copy of that agreement, the motion to dismiss for failure of the EEOC to defer this charge to the Tennessee Human Rights Commission is denied. Upon the filing of that worksharing agreement, defendant may renew this motion if defendant continues to maintain that the charge has not been

deferred to the Tennessee Human Rights Commission as required by Title VII.

IT IS SO ORDERED.



JAMES D. TODD
UNITED STATES DISTRICT JUDGE



DATE