**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF LOUISIANA**
**SHREVEPORT DIVISION**

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| U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION | CIVIL ACTION NO. 09-980 |
| VERSUS | JUDGE S. MAURICE HICKS, JR. |
| IESI LOUISIANA CORPORATION d/b/a IESI SOLID WASTE SERVICES | MAGISTRATE JUDGE HORNSBY |

## MEMORANDUM ORDER

Before this Court is a Motion for Partial Summary Judgment on the Issues of Precluding Computation Evidence, Failure to Mitigate, Front Pay and the Capping of Compensatory and Punitive Damages [Record Document 27] filed on behalf of the Defendant, IESI LA Corporation d/b/a IESI Solid Waste Services ("IESI"). Plaintiff opposes this motion. For the reasons discussed herein, IESI's motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

## FACTUAL BACKGROUND

On or about July 5, 2005, Ronald Harper ("Harper") began working for Defendant IESI as a Container Delivery Driver. [Record Document 30 at 1]. On August 12, 2005, Harper informed his new supervisor Lonnie Hayes[1] that he is dyslexic. That same day, Harper's employment with IESI was terminated because he allegedly "could not do 'paperwork' and was a danger while driving." [Complaint ¶ 13]. Harper submitted a Charge of Discrimination to the United States Equal Employment Opportunity Commission ("EEOC") alleging that he has been discriminated against on the basis of his dyslexia.

[1]Lonnie Hayes began working as the Operations Manager on or about August 1, 2005. [Record Document 30 at 1].

Four years later, the EEOC commenced this litigation on behalf of Harper alleging IESI violated the Americans with Disabilities Act ("ADA") by terminating Harper and by failing to provide a reasonable accommodation. Id. at ¶¶ 15-20.

In its motion for partial summary judgment, IESI asserts that "the EEOC's prayer for back pay, front pay and pecuniary compensatory damages should be dismissed due to the EEOC's deliberate refusal to provide any specific dollar amount or computation for these alleged categories of damages as required under [F]ed. R. Civ. P. Rule 26(a) despite repeated requests for the same . . . ;" "any claim for back pay after March 2006 should be dismissed due to Harper's admitted failure to mitigate his damages . . . ;" "the EEOC's prayer for front pay could also be dismissed in its entirety with prejudice because Harper has been unemployed by choice since 2007, and by choice he has not looked for any work of any kind . . .;" and "the appropriate damages cap under Section 1981a is $100,000." [Record Document 27 at ¶¶ 2-5].

**SUMMARY JUDGMENT STANDARD**

Summary judgment is proper pursuant to Rule 56 of the Federal Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id., 477 U.S. at 322, 106 S. Ct. at 2552. If the party moving for summary

judgment fails to satisfy its initial burden of demonstrating the absence of a genuine issue of material fact, the motion must be denied, regardless of the nonmovant's response. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the motion is properly made, however, Rule 56(c) requires the nonmovant to go "beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted). While the nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence, Little, 37 F.3d at 1075, Wallace, 80 F.3d at 1047, all factual controversies must be resolved in favor of the nonmovant. Cooper Tire & Rubber Co. v. Farese, 423 F.3d 446, 456 (5th Cir. 2005).

## LAW AND ANALYSIS

### I. Excluding Monetary Damages

According to FED. R. CIV. PRO. Rule 26(a)(1)(A)(iii):

> a party must, without awaiting a discovery request, provide to the other parties: . . . a computation of each category of damages claimed by the disclosing party–who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary materials, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

Rule 37(c) states that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." In determining whether the failure was harmless, this Court

weighs four factors: "(1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose." Tex. A & M Research Found. v. Magna Transp., Inc., 338 F.3d 394, 402 (5th Cir. 2003).

Rule 37 is flexible, and the Court has broad discretion to use as many and varied sanctions as necessary to balance out prejudice to the parties. Guidry v. Continental Oil Co., 640 F.2d 523, 533 (5th Cir. 1981). Extreme sanctions such as dismissal or default judgment, however, are remedies of last resort, and the Court may apply them only in extreme circumstances where failure to comply with the Court's order results from wilfulness or bad faith. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640; Butler v. Cloud, 104 Fed. Appx. 373, 374 (5th Cir. 2004); Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 514-15 (5th Cir. 1985). Further, such sanctions are proper only where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions, and they may be inappropriate in cases where neglect is attributable to an attorney rather than a client, or is due to confusion or misunderstanding. Butler, 104 Fed. Appx. at 374; Batson, 765 F.2d at 514.

In the instant case, the Defendant IESI seeks the most extreme remedy under Rule 37–dismissal. IESI contends the EEOC has failed consistently to provide them with a "computation" of their proposed damages. [Record Document 27-2 at 1-2]. This is only partly true. According to the "EEOC's Initial Disclosure Statements Regarding Damage Computation," which were provided on August 11, 2009, the estimated damages were:

1. Non-pecuniary compensatory damages for Mr. Harper: $150,000;
2. Punitive Damages for Mr. Harper: $150,000;

3. Back pay for Mr. Harper is not estimable at this time, but will be estimated in a supplemental disclosure after undersigned EEOC counsel obtains Mr. Harper's tax returns/W2 forms via IRS releases and conducts discovery regarding Defendant's wage rate increases and benefits for Defendant's position from which Mr. Harper was terminated.

4. Pecuniary compensatory damages are not estimable at this time, but will be estimated in a supplemental disclosure after proof of costs for relevant job search expenses and other expenses are provided to undersigned counsel by Mr. Harper.

5. Front pay in lieu of reinstatement, which would be determined solely by the Judge, is not estimable for disclosure purposes since discovery regarding Defendant's wage rate increases and benefits for Defendant's position from which Mr. Harper was terminated.

[Record Document 27-3 at 4-5]. The discovery deadline was June 1, 2010. At the close of discovery, the EEOC had not provided the supplemental disclosure. However, on June 24, 2010, it provided IESI with supplemental disclosure providing the estimated damages for back pay and pecuniary compensation. Furthermore, "[t]he EEOC produced all underlying wage data in its possession to Defendant in October 2009, before Defendant deposed Charging Party. Defendant took Charging Party's deposition later that month." [Record Document 30 at 3 n.5]. It does not appear to this Court that the EEOC's failure to disclose the remaining computations was the product of willfulness or bad faith. As such, exclusion of the underlying evidence which would lead to a dismissal of those claims is too harsh of a remedy. This Court finds that the EEOC's disclosure of those

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