

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING/O'SULLIVAN

EMMA YAIZA DIAZ; JOHN LANMAN;
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS; AMERICAN FEDERATION OF
STATE, COUNTY AND LOCAL EMPLOYEES,
AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL
79, AFSCME, AFL-CIO; AND SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of Florida,

Defendant.

SECRETARY OF STATE'S REPLY
MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION
IN LIMINE TO EXCLUDE TESTIMONY OF WITNESSES NOT TIMELY DISCLOSED

Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida (the "Secretary") respectfully submits this Reply Memorandum of Law in Support of his Motion in Limine to Exclude Testimony of Witnesses Not Timely Disclosed (the "Motion") (doc. 284).

1. At approximately 10:30 p.m. on the last day of the discovery period, Plaintiffs amended their Interrogatory responses to disclose numerous witnesses for the first time. In their response to the Motion, the Plaintiffs unashamedly defend this litigation tactic and insist it could in no way prejudice the Secretary.

2. Plaintiffs do not explain why they bothered to supplement their Interrogatory responses at all. They apparently argue that they had no obligation to do so and that the Secretary should have already been aware of everything that was disclosed. On the contrary, the Secretary

relied on the Rule 26(a)(1) disclosures the Plaintiffs *did* make, which listed only one of the numerous witnesses disclosed at the eleventh hour. (They listed only Richard Carlberg.) (Motion at 3.)

3. Plaintiffs argue that they provided the Secretary with notice of their injured union members one month before the close of discovery. (Resp. at 4.) But that “notice” was a list of fifty-eight individuals, whom the Plaintiffs said *might* have been injured. Only later did they list Patricia Anne Benvenuto, Deval Brown, Jr., Bladamir Hernandez, Marie Olive Gayle Kirlew, Hubert Elie, and Joan Stephenson-Coke as potential witnesses. There is no way the Secretary could have identified the witnesses the Plaintiffs intended to call from this list. And deposing all fifty-eight (when the Plaintiffs had not identified which were actually injured and which were only potentially injured) was not a practical option.

4. Plaintiffs next argue that because their list of thousands of additional potentially harmed individuals was derived from data the Secretary provided from its database, the Secretary was on adequate notice. Again, it would make no sense for the Secretary to depose thousands of individuals hoping to find those the Plaintiffs intended to use. Instead, the prudent course was to ask the Plaintiffs through an Interrogatory which witnesses they intended to call. The Secretary did just that. The Plaintiffs then supplemented their response ninety minutes before discovery closed, guaranteeing that the Secretary could not use discovery to examine the Plaintiffs’ witnesses.

5. The Plaintiffs purport to rely on case law that is actually contrary to their position. In *Cooley v. Great Southern Wood Preserving*, 138 Fed. Appx. 149, 162 (11th Cir. 2005), the court affirmed the district court’s order “striking discovery that either was from witnesses that were undisclosed previously, or was produced after the discovery deadline.” And in *Lamothe v. Bal Harbour 101 Condo. Ass’n*, 2007 U.S. Dist. LEXIS 17477 (S.D. Fla. 2007), the court concluded that even though one witness had been mentioned in passing during the Plaintiff’s deposition, he should have been excluded from trial because of “Plaintiff’s failure to identify him in the pretrial

disclosures.” *Id.* at *5. The court permitted testimony of another undisclosed witness, but only because “Defendant was clearly on notice” as to the other witness’s knowledge. *Id.* at *4. But even in that instance, the court noted the Plaintiff’s failure to timely disclose, and it ordered the newly disclosed witness to be available for deposition before trial.

6. Plaintiffs note that the Eleventh Circuit requires a consideration of “the reasons for the failure to disclose the witness earlier.” (Resp. at 6) (citing *Cooley v. Great Southern Wood Preserving*, No. 04-15912, 2005 U.S. App. LEXIS 8932, at *32 (11th Cir. May 18, 2005)). But any explanation for the Plaintiffs’ eleventh-hour disclosure is conspicuously absent from their response. Indeed, this case is not unlike *Cooley*: “Here, the plaintiffs neither listed the [witnesses] in their initial disclosures under Rule 26(a), nor attempted to supplement their disclosures with this information under Rule 26(e). The plaintiffs also failed to give a reason for these failures” *Id.* at *33.

7. Plaintiffs should not be rewarded for their unfair litigation tactic. Any witness who was not timely disclosed should not be permitted to testify at trial.

CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that this Court grant the Motion.

Respectfully submitted, this fifth day of November, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 5, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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