

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

BETHA THUMMEL,	)	
	)	
Plaintiff,	)	Case No. 14-1299-EFM-KGG
vs.	)	
	)	
PSI TRANSPORT, L.L.C.,	)	
	)	
Defendants.	)	
_____	)	

**ORDER GRANTING MOTION TO STRIKE  
PLAINTIFF’S EXPERT REPORT**

Before the Court is Defendant’s Motion to Strike Plaintiff’s Expert Disclosure. (Doc. 101.) After reviewing the parties’ submissions, including Plaintiff’s expert designation, Defendant’s motion is **GRANTED**.

**FACTUAL BACKGROUND**

This action arises out of the employment and discharge of Plaintiff by Defendant PSI. The actions currently plead under the Amended Complaint (Doc. 16) are violations of the fair labor standards act, a failure to pay overtime wages, sexual harassment in violation of Title VII (42 U.S.C. §§2000e), retaliatory discharge (whistleblowing), defamation, and violations of the Family and Medical Leave Act.

Defendant asserts a counter-claim against Plaintiff alleging misappropriation of company funds. (Doc. 18.) Causes of action in the Counterclaim include unjust

enrichment for money had and received, conversion, breach of fiduciary duty, misrepresentation, mail fraud and civil conspiracy.

Collateral to this case, a criminal action was filed against Plaintiff by the State of Kansas based on PSI's claims of embezzlement. That case proceeded to trial in October of 2017. Part of the defense at that trial included a claim by Plaintiff, supported by expert testimony, that data on a computer hard drive which was destroyed by PSI would have established a defense to the criminal claims. Plaintiff was found guilty at trial on several counts. Plaintiff appealed the conviction.

On February 21, 2018, Plaintiff filed a "Notice of Service of Disclosure of Expert Testimony," identifying Daniel A. FitzGerald as an expert. (Doc. 97.) Included with the disclosure was a document regarding Mr. FitzGerald with sections labeled "Prior Testimony" and "Fees and Expenses" (*id.*, at 3); Mr. FitzGerald's résumé (*id.*, at 4-8); a transcript of Mr. FitzGerald's testimony in the underlying criminal case (from an April 7, 2017, hearing on a Motion to Dismiss filed) (*id.*, at 9-24); and an unsigned, undated 7-page document entitled "Email Discrepancies Issues" (*id.*, at 25-31).

Defendant brings the current motion arguing that the expert disclosure should be stricken for failure to comply with Fed.R.Civ.P. 26(a). (Doc. 101, at 2.)

Plaintiff contends that she has “substantially complied with the intent and purpose of the rule.” (Doc. 102, at 2.)

### ANALYSIS

Expert witness disclosures are governed by Fed.R.Civ.P. 26(a)(2). That rule states, in relevant part:

A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – **prepared and signed by the witness** – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report **must** contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(Emphasis added.)

Defendant argues that Plaintiff's expert "report," which was not written and signed by the expert but rather consists of pages of the expert's sworn witness testimony in related legal proceedings, does not satisfy Fed.R.Civ.P. 26.

The 7-page document entitled 'Email Discrepancies Issues' is not dated, does not indicated [sic] who prepared it, and contains no signature. (Dkt. 97, pgs. 25-31.) Further, it does not contain the information required in subsections (i), (ii), or (iii). (Dkt. 97, pgs. 25-31.) Rather, [Defendant] is left to speculate as to Mr. FitzGerald's opinions by wading through his testimony in another case and by reviewing an unsigned document that does not list any opinions in any orderly manner.

(Doc. 101, at 3.)

Plaintiff responds that the Court should allow the sworn testimony of Mr. FitzGerald to serve as an expert report because it

meets and actually exceeds the formality of a signed report and contains all of Mr. FitzGerald's opinions regarding this case. Because the transcript contains both direct and cross-examination, it is more informative and helpful to [Defendant] than a written, signed report. Accordingly, [Plaintiff] respectfully suggests that [Defendant's] objection on this basis should be overruled and that she has substantially complied with the intent and purpose of the rule.

(Doc. 102, at 2.)

Defendant is correct that "[t]he requirements of Rule 26(a) are mandatory" as to retained experts. (Doc. 101, at 4 (citing *Nguyen v. IPB, Inc.*, 162 F.R.D.

675, 681 (D. Kan. 1995).) Defendant is also correct that the expert submission provided by Plaintiff does not satisfy the requirements of Rule 26. Defendant's motion (Doc. 101) is, therefore, **GRANTED**. Plaintiff's expert disclosure is hereby stricken.

**IT IS ORDERED.**

Dated this 14<sup>th</sup> day of May, 2018, at Wichita, Kansas.

S/ KENNETH G. GALE  
Kenneth G. Gale  
United States Magistrate Judge