

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

| | | |
|--------------------------------|---|---------------------------|
| LYNNETTE MAYHEW, |) | |
| Individually and on behalf of |) | |
| all others similarly situated, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No.: 18-2365-JWL-KGG |
| |) | |
| ANGMAR MEDICAL HOLDINGS, INC., |) | |
| d/b/a ANGELS CARE HOME HEALTH, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

MEMORANDUM & ORDER

Now before the Court is Plaintiff’s Motion to Show Cause. (Doc. 69.) After reviewing the submissions of the parties, Plaintiff’s motion is **GRANTED in part** as more fully set forth herein.

FACTUAL BACKGROUND

A. Plaintiff’s Claims and Allegations.

Plaintiff brings this action for allegedly unpaid and improper wages pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* A summary of Plaintiff’s claims and Defendant’s responses thereto is included in the Court’s Order on the underlying motion to compel. (*See* Doc. 59, at 1-4.) The summary is incorporated herein by reference. Plaintiff has plead her case as a collective action. The District

Court recently granted in part Plaintiff's request for conditional certification of the class. (Doc. 63.)

At issue in the present motion is Plaintiff's request that the Court require Defendant to show cause, within ten (10) days of the Court deciding the present motion, why Defendant should not be held in contempt for failing to comply with the Court's October 25, 2019, Order (Doc. 59) which granted, in part, Plaintiff's underlying Motion to Compel (Doc. 40).

B. Defendant's Non-Compliance with the Court's Order.

In the present motion, Plaintiff alleges that Defendant failed to comply with the Court's discovery Order in three ways:

- a. Provide 'an actual verified, supplemental response to Interrogatory No. 3.' (Order at 22);
- b. Provide an amended response to Plaintiff's document request that identifies which documents are responsive to which requests (see Order at 19); and
- c. Produce all documents and ESI responsive to Requests 8, 12, 13 and 16 (Order at 7, 18). Most significantly here is Request No. 16 which seeks 'each record of access to Defendant's computer system, by Plaintiff,' in native format, 'such as log file, network access record, windows event log, or other similar type file, including information as to date and time of access.' Order at 18.

(Doc. 69, at 2.) The Order instructed Defendant to comply within 30 days, which would have been no later than November 25, 2019. (*Id.*)

Plaintiff contends that Defendant produced 200 pages of documents on November 25, 2019. (*Id.*) Plaintiff continues, however, that Defendant did not provide supplemental interrogatory responses or amended responses to Plaintiff's document requests identifying which documents were responsive to which requests. (*Id.*) The Court will address each of these three categories in turn.

1. Interrogatory No. 3.

Interrogatory No. 3 asked Defendant to “[i]dentify all persons employed by Defendant or related entities in the position of LPN” and, as to each person, provide their name, last known address and telephone number and dates of employment. (Doc. 40-2, at 4.) Defendant was also instructed to identify who it “contends was the employer of the individual, and why” and indicate “whether such person was paid any overtime compensation for hours worked in excess of 40 per week.” (*Id.*) If such individual was not paid overtime for all hours worked in excess of 40 per week, Defendant was instructed to “state the reason why overtime compensation was not paid to such person.” (*Id.*) Finally, Defendant was instructed to “[i]dentify which person worked in the State of Kansas.” (*Id.*, at 5.)

This Court overruled Defendant's objections and found that Defendant had not provided all of the information requested by Interrogatory No. 3. Defendant was instructed to provide an actual verified, supplemental response to the Interrogatory. (Doc. 59, at 22.)

Plaintiff acknowledges receipt of additional responsive documents on the November 25, 2019, deadline, but indicates Defendant did not provide a supplemental response to Interrogatory No. 3. (Doc. 69, at 2.) Defendant subsequently sent Plaintiff an unverified, supplemental response to Interrogatory No. 3 on December 18, 2019 – more than three weeks after the Court’s deadline. (Doc. 74-2.)

Defendant responds that it provided an amended, supplemental response to the Interrogatory, but does not address the issue of verification. (Doc. 74, at 2.)

Plaintiff replies that

[t]he truth remains that this Court ordered Defendant to provide ‘an actual verified, supplemental response to Interrogatory No. 3’ (Order at 22) ... on or before November 25, 2019. Defendant did not do [so]. Defendant has still not done [so].

(Doc. 75, at 1-2; *see also* Doc. 59, at 19.)

Defendant clearly did not comply with the Court’s Order as to Interrogatory No. 3, which was specific and unambiguous. Plaintiff argues that she “is entitled to actual amended and supplemental responses, including verified interrogatory responses that actually respond to the interrogatory propounded” and “should not have to beg for responses entitled to by Court order.” (Doc. 69, at 4.) The Court agrees and thus **GRANTS** Plaintiff’s motion as to Issue a., *supra*. Defendant shall

provide a verified response to Interrogatory No. 3 within ten (10) days of the date of this Order.

Plaintiff also contends the response did not provide all of the information sought as it “only identifies persons who worked in Kansas” while “[t]he interrogatory is not so limited.” (Doc. 69, at 2-3; Doc. 69-2, at 2.) The Court clearly indicated in its Order, however, that it is requiring production of “this information **only for LPNs in Kansas.**” (Doc. 59, at 21 (emphasis added).)

Plaintiff continues that “the referenced document by the interrogatory response does not ‘identify whom you contend was the employer of the individual, and why’ as required by subpart (c)” of the Interrogatory. (Doc. 69, at 3.) In its response to Plaintiff’s motion, Defendant states that “[a]s defendant has made clear from the time it filed its answer, and at every opportunity since, defendant contends that the LPNs were not employees, but rather worked for the corporate entity from which they received their pay, W-2s, and supervisory instruction.” (Doc. 74, at 7-8.) While this may be true, this statement in a motion response does not, however, constitute a verified, supplemental response to Interrogatory No. 3 as Defendant was ordered by the Court to provide. Defendant is instructed to provide such a verified response, including an answer as to both “who” and “why,” **within ten (10) days of the date of this Order.**

Plaintiff also complains that “while the referenced document does contain dates of employment, that does not respond to the interrogatory, which asks for dates the individual was in the position,” as sought by subsection (b) of Interrogatory 3. (Doc. 69, at 3; *see also* Doc. 40-2, at 4.) The Court acknowledges that overall dates of employment for individuals may not accurately indicate when such individuals held certain positions within that employment. Defendant is also instructed to provide this clarification in its verified, supplemental response.

2. Identification of which documents are responsive to which requests.

Plaintiff had also asked the Court to order Defendant “to amend its responses to ... identify which documents respond to which requests.” (Doc. 40, at 12.) Defendant failed to address this issue in its response to Plaintiff’s underlying motion to compel, thus the issue was granted as uncontested. (*See generally* Doc. 48; Doc. 59, at 19.) Defendant was instructed to provide an amended response to Plaintiff’s document requests identifying which documents are responsive to which requests. (Doc. 59, at 19.)

In the present motion, Plaintiff contends that although “Defendant produced 200 pages of documents to Plaintiff” on November 25, 2019, “Defendant did not provide ... amended responses to Plaintiff’s requests for documents.” (Doc. 69, at 2.) Defendant responds that

[a]lthough the nature of the documents is fairly self-evident, when plaintiff complained that she was unable to ascertain which documents responded to which request, defendant provided an amended supplemental response to plaintiff's Interrogatory No. 3, as well as a supplemental table which identifies the requests to which documents pertained.

(Doc. 74, at 2.) Plaintiff replies that

[t]he truth remains that this Court ordered Defendant to provide ... an amended response to Plaintiff's document request that identifies which documents are responsive to which requests (*see* Order at 19) on or before November 25, 2019. Defendant did not do [so]. Defendant has still not done [so].

(Doc. 75, at 1-2; *see also* Doc. 59, at 19.)

The Court acknowledges Defendant's provision of a table identifying the requests to which previously produced documents pertained. That stated, it is uncontroverted that the table was not provided by the November 25, 2019, deadline. Rather, it appears to the Court that the table was provided more than three weeks after this deadline. (Doc. 69, at 3.) Further, although the chart has been submitted, Defendant technically has yet to provide actual supplemental responses to the document requests as ordered by the Court.

Defendant clearly did not comply with the Court's Order, which was specific and unambiguous. Plaintiff argues that she "should not have to beg for responses entitled to by Court order." (Doc. 69, at 4.) The Court agrees and thus **GRANTS** Plaintiff's motion as to Issue b., *supra*. Defendant is instructed to

provide supplemental responses to Plaintiff's document requests **within ten (10) days of the date of this Order.**

3. Responses to Requests Nos. 8, 12, 13, and 16.

Finally is the issue of whether Defendant complied with the Court's ruling for it to produce all documents responsive to Requests 8, 12, 13, and 16 within 30 days of the underlying Order, which would have been November 25, 2019. (*See* Doc. 59, at 7, 18). According to Plaintiff,

[m]ost significantly here is Request No. 16 which seeks 'each record of access to Defendant's computer system, by Plaintiff,' in native format, 'such as log file, network access record, windows event log, or other similar type file, including information as to date and time of access.'

(Doc. 69, at 2.) Plaintiff stated that "[t]he purpose" of Request No. 16 "is to illustrate when Plaintiff accessed Defendant's computer system and how long she was logged into the system for purposes of comparison to the hours for which she was paid." (Doc. 40, at 11.) The Court found this Request to be relevant and proportional to the needs of the case, granted that portion Plaintiff's motion to compel, and instructed Defendant to provide any responsive information.¹ (Doc. 59, at 18.)

¹ As to Requests Nos. 8, 12, and 13, the Court overruled Defendant's objection to Plaintiff's three year temporal limitation. Because this was the only objection Defendant raised in response to these document requests, Defendant was instructed to produce any and all responsive documents within the three year time frame within 30 days. (Doc. 59, at 6-7.)

As to Request No. 16, Plaintiff contends that Defendant merely

provided a spreadsheet with a single column with dates and times (there is second column that only includes Plaintiff's name) and the spreadsheet is titled 'Agent Visit Login Time Report.' In other words, the produced document does not fully respond to the document request, which seeks documents that illustrate the 'date and time of access.' Defendant still need [sic] to produce a Logout Time Report so Plaintiff can calculate the time she was logged into Defendant's computer system.

(Doc. 69, at 4.)

Defendant responds that

[o]n November 25, 2019, defendant provided, in native format, the sixty-five page Agent Visit Login Time Report and the three-page Agent Visit Drive Time Mileage Report. (See Agent Visit Login Time Report, attached hereto as Exhibit 13; Agent Visit Drive Time Mileage Report, attached hereto as Exhibit 14). Defendant believes that it has complied with the Court's order regarding information about plaintiff's access to defendant's computer system.

(Doc. 74, at 8.) Defendant does not make any reference to Plaintiff's contention that it has failed to produce "a Logout Time Report so Plaintiff can calculate the time she was logged into Defendant's computer system." (*See generally* Doc. 74.) Tellingly to the Court, Defendant also fails to indicate whether such a report exists.

While the Court's prior Order does not specifically instruct Defendant to produce a "Logout Time Report," the Order does acknowledge that Plaintiff is seeking documentation of "how long [Plaintiff] was logged into the system for

purposes of comparison to the hours for which she was paid.” (Doc. 59, at 18.) Further, Request No. 16 asks for “each record of access to Defendant’s computer system, by Plaintiff, such as ...network access record, windows events log, or other similar type file, including information as to date and time of access.” (Doc. 40-1, at 20-21.) The information provided by Defendant, which apparently includes only an “Agent Visit Login Time Report” and an “Agent Visit Drive Time Mileage Report,” without providing log out times, does not provide Plaintiff with a full representation of a record of Plaintiff’s access to Defendant’s computer system. As such, the Court finds that Defendant’s response is insufficient and thus **GRANTS** Plaintiff’s motion as to Issue c., *supra*.

RELIEF

Having granted Plaintiff’s motion, the Court now turns to the issue of requested relief. Plaintiff seeks an Order

finding Defendant in contempt for failing to comply with its Order, requiring Defendant to comply with the Order within ten (10) days and awarding Plaintiff attorney fees in the amount of \$1,185 for the time expended since November 25, 2019, to obtain the information that should have been provided on or before that date pursuant to the Order. While Plaintiff’s counsel has incurred more time, that sum represents three hours at \$395 per hour for communications with Defendant’s counsel attempting to avoid the motion, drafting the motion and this reply brief.

(Doc. 75, at 3.)

The Court finds that Plaintiff has supplied justification for the requested relief. Defendant clearly did not comply with the unambiguous directives of the Court's underlying Order, resulting in frustration, prejudice, and additional, unnecessary work for Plaintiff's counsel. Defendant's actions have resulted in undue and unreasonable delay of this litigation.

Even so, the Court does not find a sufficient basis for a finding of contempt in this instance. That stated, the Court does find a sufficient basis for awarding fees pursuant to Fed.R.Civ.P. 37. That rule states, in relevant part that

[i]f the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(*Id.* (emphasis added).) *See also Torres v. Bodycote Intern., Inc.*, No. 13-1245-EFM-KGG, 2014 WL 559070, * 1–2 (D.Kan. Feb.13, 2014); *Kear v. Kohl's Dept.*

Stores, Inc., No. 12-1235-JAR-KGG, 2013 W 3088922, *6 (D.Kan. June 18, 2013).

The purpose of sanctions is not merely to reimburse the wronged party or penalize the offending party, but to deter others from engaging in similar conduct.

Everlast World's Boxing Headquarters Corp. v. Ringside, Inc., No. 13-2150-CM-KGG, 2014 WL 4386147, *4-5 (D. Kan. Sept. 5, 2014) (citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)). “[T]he limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer.” *White v. GMC*, 908 F.2d 675, 685 (10th Cir.1990).

Based on the foregoing analysis, the Court finds that Defendant’s continuing position in regard to these discovery disputes – as well as its woefully inadequate attempt to comply with the Court’s prior discovery order – is not only unreasonable, but in disregard of the rules and spirit of discovery. In its responsive brief, Defendant ignores or makes no attempt to respond to several of Plaintiff’s contentions regarding Defendant’s failures. Simply stated, Defendants have wholly failed to provide the Court with any – let alone substantial -- justification for their inaction in regard to the discovery and underlying discovery order at issue. See *Everlast*, 2014 WL 4386147 at *4.

As such, the parties are hereby **ORDERED** to confer regarding Plaintiff's request for \$1,185 in attorney's fees. This conference should occur **within ten days of the date of the Order**. The Court notes that Plaintiff did not set forth the amount of fees sought until her reply brief, which denied Defendant the opportunity to respond to the amount of the demand. If the parties fail to reach an agreement on the amount of fees, Plaintiff may file an appropriate motion. Within this context, the Court finds that the amount of time Plaintiff claims to have spent in regard to these issues is reasonable. Defendant is further instructed to comply with this Order and provide the supplemental discovery responses discussed herein **within ten (10) days of the date of this Order**.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Show Cause (Doc. 69) is **GRANTED in part** as more fully set forth above.

IT IS SO ORDERED.

Dated this 4th day of March, 2020, at Wichita, Kansas.

S/ KENNETH G. GALE
HON. KENNETH G. GALE
U.S. MAGISTRATE JUDGE