

4. An opinion from the U.S. District Court for the Southern District of Texas refusing to exclude supplements to the Plaintiff's initial disclosures served after the close of discovery, finding that the late disclosures were "harmless" under Rule 37.

In *Dickerson v. U.S. Department of Veterans Affairs*, 2024 WL 23552 (S.D. Tex. Jan. 2, 2024), U.S. District Judge Lee H. Rosenthal addressed the standards for determining whether a discovery violation in the form of late disclosure was "harmless" under Federal Rule of Civil Procedure 37(c)(1).

In this employment discrimination case, Plaintiff alleged that his former employer, the Department of Veterans Affairs, discriminated against him on the basis of disability and terminated his employment in retaliation for engaging in protected activity. *Id.* at \*1. Although the discovery cutoff in the case was January 23, 2023, Plaintiff supplemented his initial disclosures three separate times thereafter, on September 27, December 15, and December 17, 2023. These supplements disclosed five new witnesses and 167 pages of documents, including medical records, employment records, witness statements, and records of Plaintiff's request for a reasonable accommodation. Defendant moved to exclude the supplemental disclosures on the ground that they violated Federal Rule of Civil Procedure 26.

Judge Rosenthal began his analysis with a description of the relevant standards under Rule 26, which provides that "a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; [and] (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[.]"

Judge Rosenthal added that Rule 37(c)(1) provides 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 evaluating whether a discovery violation is harmless, Judge Rosenthal explained that courts look to 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."

Judge Rosenthal noted that the parties agreed that the evidence in Plaintiff's disclosure supplements was important, which Judge Rosenthal found weighed against the exclusion of the evidence.

With respect to the potential prejudice of including the evidence, Defendant argued that it would be "greatly prejudiced" if the records and witnesses disclosed in the supplements were not excluded because the untimeliness of their disclosure prevented Defendant "from conducting any

discovery regarding these issues, such as deposing the doctors or the additional witnesses.” Defendant claimed that allowing Plaintiff to use this evidence now would be “a trial by ambush.”

In response, Plaintiff argued that there would be no prejudice to Defendant from the disclosed witnesses because “[t]he individuals identified in the disclosures have been known to [Defendant] since the beginning of this lawsuit,” including because each newly disclosed witness “made statements as part of [an Equal Employment Opportunity Commission] Investigation,” the statements by certain witnesses were disclosed in exhibits to Plaintiff’s complaint, and the witnesses are Defendant’s employees and subject to Defendant’s control. *Id.* at \*2. Plaintiff also argued that the newly disclosed documents “were previously produced by [Defendant] in its discovery responses.”

Ultimately, Judge Rosenthal held that any prejudice to Defendant from the supplemental disclosures made after the close of discovery could be cured by granting a continuance of the case schedule for one month. Defendant argued that a continuance would not cure the prejudice because the court had already ruled on Defendant’s motion for summary judgment, and Plaintiff argued that a continuance was unnecessary because the information was known to Defendant “since well before the end of the discovery period.” However, Judge Rosenthal disagreed with both parties, finding that a continuance would resolve Defendant’s concern of a “trial by ambush” due to a lack of discovery by permitting Defendant to conduct any discovery it needs to avoid ambush. Judge Rosenthal also noted that Plaintiff’s argument about the continuance being unnecessary “misses the mark, because the standard is whether a continuance would cure the prejudice, not whether it would be necessary.”