

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**ABDELA TUM, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 v. ) **Docket No. 00-371-P-C**  
 )  
 **BARBER FOODS, INC.,** )  
 )  
 **Defendant** )

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR SANCTIONS**

The defendant in this action brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, seeks dismissal of eighteen of the remaining 41 named plaintiffs, Barber Foods’ Motion for Sanctions, etc. (“Motion”) (Docket No. 37), as a sanction for their failure to comply with my order dated December 6, 2001 that they respond to interrogatories propounded by the defendant on September 11, 2001 no later than December 21, 2001 or to show cause by that date why they should not be sanctioned for their failure to do so, Report of Final Pretrial Conference and Order (Docket No. 32) at 2. In that order I advised these plaintiffs that the sanction of dismissal of all of their claims was possible if they failed to comply with my order. *Id.*

Two of the plaintiffs involved subsequently served answers to the interrogatories. The remaining sixteen plaintiffs failed to respond to the interrogatories or to show cause in writing by December 21, 2001 and have made no effort to do so as of the date of this order. The defendant’s motion, filed January 3, 2002, seeks dismissal of all these plaintiffs or, in the alternative, an order

barring these plaintiffs from testifying at trial and precluding them from pursuing claims that they were required to visit the employer defendant's medical office during unpaid lunch breaks. Motion at 6.

The plaintiffs filed an opposition to the motion in which they agree to dismissal of eight of the sixteen plaintiffs "who have explicitly and unequivocally indicated to Plaintiffs' counsel that they do not wish to participate further in this case," specifically Mark W. Aitkenhead, Erlinda A. Carter, William Devine, Angela Dumont, Diane C. Keraghan, Lee Lacroix, Lisa Morgan and Tatyana Novikova. Plaintiffs' Memorandum in Partial Opposition to Defendant's Motion for Sanctions ("Plaintiffs' Opposition") (Docket No. 38) at 2-3. Those plaintiffs should accordingly be dismissed.

With respect to the remaining eight plaintiffs, the plaintiffs (i) contend that they should not be dismissed because representative testimony should be allowed in the trial of this collective action, rendering unnecessary their individual testimony, and represent that they agree not to testify; (ii) agree to waive any claims regarding medical visits by these eight plaintiffs; (iii) argue that requiring these plaintiffs to respond to the discovery would present only redundant and cumulative evidence while imposing substantial cost and burden on them; and (iv) posit that the use of "voluminous" discovery requests by the defendant may be a tactic to reduce the number of plaintiffs. *Id.* at 4-11. The defendant quite properly points out in its response, Barber Foods' Reply Memorandum in Support of Motion for Sanctions (Docket No. 39) at 2-3, that the latter two arguments could and should have been raised within 30 days of service of the interrogatories and are untimely when first presented almost four months later. *See, e.g., Pilcher v. Direct Equity Lending*, 2000 WL 33170865 (D. Kan. Dec. 22, 2000) at \*2; *Allen v. Interstate Brands Corp.*, 186 F.R.D. 512, 524 (S.D. Ind. 1999). I note as well that the interrogatories propounded are neither voluminous nor unduly burdensome under the circumstances of this case. The plaintiffs' contention that the defendant "already has all the impeachment evidence it could use" if these eight plaintiffs are barred from testifying, Plaintiffs'

Opposition at 10, is simply incorrect. The defendant would be entitled to demonstrate at trial that individual plaintiffs who do not testify have made claims that cannot be substantiated, in whole or in part. The use of representative testimony would not bar the use of such impeachment evidence.

The fact that representative testimony may be permitted at trial in this case by the trial judge does not, standing alone, justify the imposition of a sanction less severe than dismissal for these plaintiffs' failure to respond to interrogatories or to comply with this court's discovery order. The plaintiffs cite no case law in support of this necessary corollary to their extensive argument concerning the potential use of representative testimony in cases presenting claims like theirs. Plaintiffs' Opposition at 3-6. Regardless of the type of evidence to be offered at trial, this court has the power to dismiss the claims of those who fail to comply with its order concerning discovery and to dismiss the claims of those who fail to respond to interrogatories, even in the absence of an order compelling them to do so. Fed. R. Civ. P. 37(b)(2) & (d).

In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640-41, 643 (1976), the Supreme Court upheld a district court's dismissal of an action as a sanction for the failure of the plaintiffs to answer interrogatories "when after being expressly directed to perform an act by a date certain . . . they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed. R. Civ. P. 37." That is the situation presented here.

When plaintiffs persist in failing to respond to interrogatories even after the court has ordered them to respond, it is "clear that their conduct . . . was deliberate rather than accidental" and their conduct "is the type . . . for which the extreme sanction of dismissal . . . is appropriate." *Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (8th Cir. 1997). The plaintiffs involved here have

offered no explanation for their failure to comply with the court's order. Accordingly, the court can only conclude that the failure to comply was not a result of inability but rather due to "wilfull disregard of the court's order." *Booker v. Anderson*, 83 F.R.D. 284, 290 (N.D. Miss. 1979). Dismissal of these plaintiffs is an appropriate sanction under the circumstances. *Id.*; *Pierzynowski v. Police Dep't City of Detroit*, 941 F.Supp. 633, 646 (E.D. Mich. 1996).

For the foregoing reasons, I recommend that the defendant's motion for sanctions be **GRANTED**. If the court adopts my recommendation, the following plaintiffs will be dismissed from this action: Mark Aitkenhead, Shaun Albair, Erlinda Carter, Sandra Chadbourne, Cory Chase, Toan Dang, William Devine, Angela Dumont, Mohammed Habibzai, Peter Hamilton, Diane Keraghan, Lee Lacroix, Gordon Lemire, Lisa Morgan, Tatyana Novikova and Robert Ouellette.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 11th day of January 2002.

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David M. Cohen  
United States Magistrate Judge

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