

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>MICHAEL MORISSETTE,</b>	)	
	)	
<i>Plaintiff</i>	)	
v.	)	<b>No. 2:14-cv-452-JDL</b>
	)	
<b>THE COTE CORPORATION,</b>	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM DECISION AND ORDER ON  
PLAINTIFF’S MOTION TO AMEND EXPERT WITNESS DESIGNATION**

The plaintiff moves for leave to make a belated designation of one of his treating nurse practitioners, Elizabeth Herdrich, as an expert witness in this case and to reopen discovery for a three-week period to address the late disclosure. See Plaintiff’s Motion for Leave To Amend Expert Witness Designation and Extension of Discovery (“Motion”) (ECF No. 26) at 5-12. The defendant objects that the plaintiff articulates no compelling reason to allow the late designation and that its allowance would be prejudicial. See Defendant’s Objection to Plaintiff’s Motion for Leave To Amend Expert Witness Designation and Extension of Discovery (“Objection”) (ECF No. 28) at 4-12. I agree and, accordingly, deny the Motion.<sup>1</sup>

**I. Applicable Legal Standards**

Federal Rule of Civil Procedure 26 provides, in relevant part, that “a party must disclose to the other parties the identity of any [expert] witness it may use at trial to present evidence[.]”

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<sup>1</sup> The plaintiff “contends that, at the very least, N.P. Herdrich’s opinions in the medical records are admissible, and that she may testify as a lay witness as disclosed, distinct from the issue of her designation as an expert witness.” Plaintiff’s Reply to Defendant’s Objection Regarding Expert Witness Designation (“Reply”) (ECF No. 29) at 1. Those issues are not before me. I rule solely on the question of whether the plaintiff should be permitted to designate Herdrich as an expert witness.

Fed. R. Civ. P. 26(a)(2)(A). “A party must make these disclosures at the times and in the sequence that the court orders.” *Id.* at (a)(2)(D).

If a party’s expert disclosure is untimely, “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.” Fed. R. Civ. P. 37(c)(1). The movant bears the burden of demonstrating that a late expert designation is either substantially justified or harmless. *See, e.g., United States Bank Nat’l Ass’n v. James*, Civil No. 09-84-P-JHR, 2010 WL 1416126, at \*6 (D. Me. Apr. 5, 2010).

“The baseline rule is that the required sanction in the ordinary case is mandatory preclusion.” *Harriman v. Hancock County*, 627 F.3d 22, 29 (1st Cir. 2010) (citations and internal punctuation omitted). However, the court retains discretion to impose other sanctions in lieu of, or in addition to, mandatory preclusion. *See* Fed. R. Civ. P. 37(c)(1); *see also, e.g., Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 77-78 (1st Cir. 2009) (“Preclusion . . . is not a strictly mechanical exercise. And, in its discretion, the district court may choose a less severe sanction. Where a district court does opt in favor of preclusion, we review that decision with reference to a host of factors, including: (1) the history of the litigation; (2) the sanctioned party’s need for the precluded evidence; (3) the sanctioned party’s justification (or lack of one) for its late disclosure; (4) the opponent-party’s ability to overcome the late disclosure’s adverse effects – e.g., the surprise and prejudice associated with the late disclosure; and (5) the late disclosure’s impact on the district court’s docket.”) (citations and some internal quotation marks omitted).

## **II. Factual Background**

The plaintiff filed his complaint on November 10, 2014. *See* Plaintiff’s Complaint and Demand for Jury Trial (“Complaint”) (ECF No. 1). He alleged that the defendant hired him as a shop mechanic on May 20, 2013, *see id.* ¶ 19, that, during a job interview prior to his hiring, he

informed the defendant's chief executive officer and vice president that he had had a stroke two years earlier and that his doctors had approved his return to work, *see id.* ¶ 18, that, on May 20, 2013, he underwent a physical examination as required by the defendant in which the examiner asked for medical information about his stroke and related health conditions, and he arranged to provide that information, *see id.* ¶¶ 20-21, that, after he was hired, the chief executive officer inquired several times whether he had yet received his medical card, *see id.* ¶¶ 23-24, 28-29, 32, that, on or about May 31, 2013, the defendant received a medical card and medical information concerning the plaintiff, *see id.* ¶ 33, and that, on or about May 31, 2013, the defendant terminated the plaintiff's employment, falsely stating that it no longer needed his services and that he had been creating too much animosity in the shop, *see id.* ¶ 34.

The plaintiff claims that, in violation of the Americans with Disabilities Act ("ADA") (Count I) and the Maine Human Rights Act ("MHRA") (Count II), the defendant discriminated against him based on his disability, his record of disability, and its perception that he had a disability, failed to accommodate his disability, and retaliated against him because he requested accommodation and opposed discriminatory treatment, and that, in violation of the Maine Whistleblowers' Protection Act (Count III), the defendant terminated his employment because he reported conditions and practices that he reasonably believed violated laws and rules and put his health and safety and those of other employees at risk. *See id.* ¶¶ 48-67.

On January 12, 2015, this court issued a scheduling order setting deadlines of February 9, 2015, for initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1), March 30, 2015, for the plaintiff's designation of experts, including treating physicians, pursuant to Federal Rule of Civil Procedure 26(a)(2)(A), June 15, 2015, for discovery, and June 22, 2015, for the filing of

a notice of intent to file a motion for summary judgment pursuant to Local Rule 56(h). *See* ECF No. 8.

On February 9, 2015, the plaintiff served initial disclosures identifying three witnesses with respect to his medical conditions and communications about them, including Herdrich and Nurse Practitioner Leane Sprague. *See* Motion at 2; Objection at 1-2. With respect to both, he stated: “The subjects of information possessed by this witness may include the medical condition of Plaintiff Morissette, his medical history, and communications with his medical providers, medical examiners and defendant.” Motion at 2; Objection at 2.

On March 30, 2015, the plaintiff designated Sprague as an expert witness who was expected to testify about his “disability, [and] his ability to perform essential job functions, with or without accommodation.” Plaintiff’s Expert Witness Designation (ECF No. 26-1), attached to Motion, at 1. He elaborated that Sprague was expected to testify that his carotid artery disease, stroke history, and related conditions “constituted a substantial disability within the meaning of the Maine Human Rights Act and the Americans with Disabilities Act[,]” that these conditions “substantially limited him in major life activities, including but not limited to operation of major bodily functions[,]” and that his “disability was mitigated by medical treatment.” *Id.* at 1-2.

On June 8, 2015, the court granted the plaintiff’s unopposed motion to extend the discovery deadline to July 15, 2015, and the Local Rule 56(h) notice deadline to July 22, 2015. *See* ECF No. 11. On July 7, 2015, the court granted the plaintiff’s unopposed oral motion for a further extension of the discovery deadline to July 22, 2015, and the Local Rule 56(h) notice deadline to July 29, 2015. *See* ECF No. 15 at 2.

On July 28, 2015, following the close of discovery, the defendant deposed Sprague. *See* Motion at 3. Sprague testified, *inter alia*, that (i) she did not believe that the plaintiff was limited

in any major life activities, (ii) she had never had any discussions with the plaintiff's counsel regarding her disclosure or potential testimony, and (iii) she could not answer a question as to whether the plaintiff's carotid artery occlusion was significantly different from the condition of the general population or met the legal definition of disability. *See id.* at 3-4; Objection at 3; Deposition of Leane Sprague, FNP-C (ECF No. 28-1), attached to Objection, at 19, 21, 34-36, 41-42.

On July 29, 2015, the plaintiff's counsel emailed the defendant's counsel, stating, "In light of Nurse Practitioner Sprague[']s deposition, I will be obtaining evidence from Nurse Practitioner Elizabeth Herdrich at Vascular Care of Maine to address questions pertaining to [the plaintiff's] stroke and related conditions." ECF No. 28-2, attached to Objection, at 2. She added that Herdrich "has been identified as a treating medical provider since Plaintiff's Initial Disclosures." *Id.* On the same day, the defendant filed notice of an intent to file for summary judgment, as a result of which all pending scheduling order deadlines were stayed. *See* ECF Nos. 18-20.

On July 30, 2015, there was an exchange of four emails between counsel on the subject of Herdrich. The defendant's counsel stated: "I don't know what you mean by obtaining evidence from Ms. Herdrich. We will object to any new disclosures or new information as she was not disclosed as an expert and can only testify according to the medical records previously provided." ECF No. 28-2 at 1. The plaintiff's counsel responded, "as a courtesy I wanted to let you know I plan to introduce [Herdrich's] testimony on the matter of [the plaintiff's] health conditions, as disclosed from the outset of this litigation[.]" *Id.* The defendant's counsel replied: "I guess I am a little confused. Is she going [to be] offering an opinion? If so, she should have been disclosed as an expert. We will oppose any effort to try and designate an expert at this late date." ECF No. 28-3, attached to Objection, at 1. The plaintiff's counsel responded, "She is going to testify as to

what [the plaintiff's] conditions are. It is a factual question.” ECF No. 29-1, attached to Reply, at 1.

On August 6, 2015, the defendant filed a Rule 56(h) pre-conference memorandum indicating its intent to seek summary judgment as to two counts of the complaint on the basis that the plaintiff had failed to adduce evidence that he had an actual disability or a record of disability or that the defendant perceived him as disabled. *See* ECF No. 21.

On August 28, 2015, the plaintiff served the defendant a designation of Herdrich as an expert witness. *See* Plaintiff's Supplemental Expert Witness Designation (ECF No. 26-2), attached to Motion. The designation states, in relevant part:

Nurse Practitioner Herdrich is expected to testify that Mr. Morissette suffered a stroke in 2011 secondary to occlusion of his right internal carotid artery. She is expected to explain how a stroke occurs and the function of the carotid arteries. [She] is expected to testify that the carotid artery disease and occlusion substantially limited the operation of his neurovascular and circulatory functions, as compared to the circulatory functions of most people in the general population. She is further expected to testify that Mr. Morissette's carotid artery disease is a type of vascular disease. In addition, [she] is expected to testify that Mr. Morissette's carotid artery disease has been the subject of ongoing monitoring by vascular specialists since 2011 and was and is mitigated by medical treatment. [She] is expected to testify that as of May 2013 and thereafter, Mr. Morissette was capable of performing the essential functions of the shop mechanic position without limitations on his work activities.

*Id.* at 3.

On September 3, 2015, Judge Levy presided at a Local Rule 56(h) pre-filing conference during which he ordered that the instant motion be filed no later than September 18, 2015, and the defendant's motion for summary judgment be filed within 21 days from the completion of a judicially-assisted settlement conference as determined by the judge conducting that conference. *See* ECF No. 24 at 2. All other scheduling order deadlines remained stayed pending the disposition of the anticipated summary judgment motion. *See id.* Magistrate Judge Nivison conducted a

judicially-assisted settlement conference on November 2, 2015, following which he reported that settlement was not achieved. *See* ECF No. 30. Hence, the defendant's summary judgment motion was due on November 23, 2015. However, on November 17, 2015, Judge Levy granted the defendant's unopposed motion to extend that deadline to either 30 days after the completion of any discovery allowed by the court or 30 days after the denial of the instant motion. *See* ECF Nos. 31-32.

### **III. Discussion**

The parties focus on the five factors identified by the First Circuit as bearing on the appropriateness of the exclusion of expert testimony, reaching opposite conclusions as to whether consideration of those factors tips the balance for, or against, the preclusion of Herdrich as an expert witness. *See* Motion at 5-11; Objection at 4-11; Reply at 2-7. I conclude that the factors weigh in favor of her preclusion.

#### **A. History of the Litigation**

The defendant concedes that the plaintiff has no history of violating this court's scheduling orders and that his untimely disclosure of Herdrich as an expert witness does not appear to have been strategic. *See* Objection at 5. Yet, the defendant asserts that, despite knowing from the commencement of this litigation that his claim of disability was at issue, the plaintiff made no effort to identify anyone other than Sprague and apparently did not corroborate her expected testimony. *See id.* at 5-6. Thus, the defendant reasons, this factor does not favor either side. *See id.* at 6.

The plaintiff protests that this factor is supposed to focus on whether he engaged in multiple discovery violations. *See* Reply at 2. In any event, he asserts, the defendant incorrectly concludes that he failed to corroborate Sprague's testimony, which in any event is not a discovery violation or a basis for imposing sanctions. *See id.*

The defendant is correct that, even if a party making a late designation of an expert has no history of violating court orders and does not appear to have made the late designation as a strategic choice, the fact that the party missed an opportunity to make the designation earlier is relevant to consideration of the history of the litigation.

In a case in which, as here, a plaintiff had no history of “serial violations” or “obvious and repeated dereliction” and his failure to disclose his experts did not appear to be strategic, this court found that this factor weighed equally for and against preclusion when the plaintiff had “failed to take advantage of opportunities to make the required disclosures” of his experts. *Samaan v. St. Joseph Hosp.*, 274 F.R.D. 41, 48 (D. Me. 2011), *aff’d*, 670 F.3d 21 (1st Cir. 2012) (citations and internal quotation marks omitted).<sup>2</sup>

The facts of this case are not as egregious as those in *Samaan*, in which the plaintiff still had not made the required disclosures for new causation experts more than eight months after the defendants had filed motions to exclude his sole designated causation expert and for summary judgment on the basis of that exclusion. *See Samaan*, 274 F.R.D. at 48.

Nonetheless, in this case as well, the plaintiff could have designated Herdrich months sooner – specifically, by the deadline of March 30, 2015. The plaintiff denies that he failed to corroborate Sprague’s testimony, pointing to an *errata* sheet in which Sprague corrects her deposition testimony to reflect that she did speak with the plaintiff’s counsel prior to her designation. *See Reply* at 2; ECF No. 29-2, attached thereto. Yet, speaking with Sprague is not necessarily the same thing as corroborating her testimony. The plaintiff bears the burden of

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<sup>2</sup> In addition, in *Kirouac v. Donahoe*, Civil No. 2:11-cv-00423-NT, 2013 WL 5729532 (D. Me. Oct. 22, 2013), in precluding the testimony of six fact witnesses whose identities the plaintiff failed to disclose until the filing of her pretrial memorandum, the court noted with respect to the “history of the litigation” factor that, although the plaintiff did not have history of violating scheduling orders and had not dragged her feet to gain an unfair tactical advantage, she had “missed a long window of opportunity to make the required disclosures[.]” *Kirouac*, 2013 WL 5729532, at \*2.

demonstrating that the late designation is either substantially justified or harmless. *See, e.g., James*, 2010 WL 1416126, at \*6. In the absence of any explanation for the disconnect between Sprague’s expected testimony as described in her designation and her actual testimony four months later, it is difficult to avoid the conclusion that the plaintiff failed to corroborate at least some of Sprague’s testimony and that, had he done so, he would have perceived the need for Herdrich’s designation. As a result, this factor favors neither side.<sup>3</sup>

### **B. Need for the Evidence**

In circumstances in which “the sanction carri[e]s the force of a dismissal, the justification for it must be comparatively more robust.” *Esposito*, 590 F.3d at 79. That is not the case here.

The plaintiff argues that the need for Herdrich’s expert testimony should be evaluated through the prism of the defendant’s view that the preclusion of that testimony could result in the dismissal of his claim for discrimination on the basis of actual disability. *See Reply at 2; see also Objection at 6.* Yet, he takes the position that Herdrich’s expert testimony is helpful, not essential. *See Motion at 8-9.*

At best, even adopting the defendant’s view that the lack of the testimony at issue could result in summary judgment in its favor as to claims predicated on actual disability, the preclusion of that testimony might or might not result in the dismissal of that portion of Counts I and II. Regardless, it would not result in the dismissal of this case or even the dismissal of any of the three counts of the complaint. This factor, accordingly, weighs in favor of the defendant.

### **C. Justification for Late Disclosure**

The plaintiff argues that his tardy designation of Herdrich as an expert is justified because, (i) given the low threshold set by the ADA on disability analysis, he did not believe it was

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<sup>3</sup> Even if I concluded that this factor favored the plaintiff, I would still find that the five factors tip in favor of precluding the use of Herdrich as an expert witness.

necessary to designate multiple experts on the question of whether he was disabled, (ii) to avoid imposing on treating practitioners, the plaintiff's counsel's practice has been to obtain their consent before designating them as experts, (iii) the plaintiff's counsel believed that the identification of Herdrich in the initial disclosures provided the requisite notice that she might be called as a witness to the plaintiff's medical conditions and other listed subjects, and (iv) the plaintiff's counsel now believes that Herdrich's testimony will constitute opinion as well as factual testimony. *See* Motion at 9.

None of these reasons constitutes a substantial justification for the late designation. The plaintiff argues that it is "self-evident" from the initial disclosures that Herdrich would provide both factual and opinion testimony, asserting that medical providers are allowed to testify as to opinions in the medical records without designation as expert witnesses. Reply at 3. As the defendant notes, *see* Objection at 7, however, the plaintiff understood, as illustrated by his timely designation of Sprague as an expert witness, that he needed to designate a treating practitioner as an expert to offer certain opinions, notably, an opinion as to whether his conditions were disabling for purposes of the ADA and the MHRA. The terse descriptions provided in his initial disclosures did not suffice to convey that either Sprague or Herdrich would offer such an opinion. *See, e.g., Santiago-Díaz v. Laboratorio Clínico Y De Referencia del Este*, 456 F.3d 272, 276 (1st Cir. 2006) (plaintiff's expert disclosures, one consisting of one line, the other of one page, were not only belated but also did "not come within a country mile of satisfying the requirements of either the case-management order or the Civil Rules[.]" which "called for the parties to make explicit and detailed expert disclosures").

That the plaintiff's counsel believed that it was not necessary to designate multiple experts on the issue of disability and then decided it was necessary to designate Herdrich to testify on that

issue begs the question of whether the plaintiff was substantially justified in reaching that conclusion five months after his deadline to designate experts had expired. That the plaintiff's counsel has a practice of seeking treating practitioners' consent before designating them as experts does not explain why counsel did not seek Herdrich's consent in time to designate her as an expert.

In short, as the defendant contends, *see* Objection at 9, the plaintiff made a choice to rely solely on Sprague. "A party who knowingly chooses to put all his eggs in one basket is hard-pressed to complain when the basket proves inadequate and the trial court refuses to allow him to substitute a new and previously undisclosed basket for it." *Samaan*, 670 F.3d at 37.

This factor, accordingly, cuts in favor of the defendant.

#### **D. Harm to Defendant**

The plaintiff posits that any prejudice to the defendant by the late designation of Herdrich would be mitigated by his offer to make her available for deposition and his request for a discovery deadline extension of up to three weeks for that limited purpose. *See* Motion at 9-10. He reasons that, because the defendant did not designate an expert on the question of disability, there will be no required additional discovery or review. *See id.* at 10. He notes that, because scheduling order deadlines are stayed, the defendant will have an opportunity to depose Herdrich prior to filing a motion for summary judgment on the issue of disability. *See id.* Finally, he asserts that the defendant was not surprised by the designation of Herdrich as a witness because it knew from the outset of the litigation that she was an important witness with multiple opinions in the medical record on his conditions and his capacity to perform his job as a mechanic, and the plaintiff has not changed the theory of her case. *See id.*

The defendant counters that the allowance of the late designation would cause it harm while effectively rewarding the plaintiff for his failure to comply with scheduling order deadlines. *See*

Objection at 10-11. It notes that, even if it were permitted to depose Herdrich, it would be obliged to expend additional time and resources to conduct that discovery. *See id.* at 10. It adds that, although it has not written its summary judgment motion, it has conducted research and outlined issues based on the plaintiff's timely disclosures. *See id.* It cites *Primus v. United States*, 389 F.3d 231 (1st Cir. 2004), for the proposition that this is the sort of tangible harm that is properly taken into account in assessing whether a tardy expert designation prejudices a party. *See id.*; *Primus*, 389 F.3d at 236 (noting, in affirming denial of appellant's motion to allow late designation of an additional expert, that district court properly considered the fact that appellee had prepared a summary judgment motion in reliance on appellant's earlier disclosure of her expert evidence; noting, "contrary to appellant's contention, what occurred here was not simply a matter of 'inconvenience' or timing; real resources were expended on legal work that was premised on the expert evidence submitted before the deadline[,]” and the work was “relevant not only for the summary judgment motion, but for trial preparation as well”). *See also, e.g., Genereux v. Raytheon Co.*, 754 F.3d 51, 60 (1st Cir. 2014) (party's need to redo discovery, incurring additional expense, in response to a tardy supplementation of an expert designation was properly weighed as part of prejudice calculus).

The plaintiff rejoins that the defendant would suffer no material prejudice as a result of the allowance of the Herdrich designation because, even if the Herdrich designation is *not* allowed, the plaintiff will be able to adduce evidence, including medical records, testimony, and a supplementation of Sprague's expert designation, sufficient to defeat any bid for summary judgment on the basis of the plaintiff's failure to prove actual disability. *See Reply* at 5-6.

This is not the type of prejudice that the defendant claims, however. Rather, it notes that it has expended time and effort outlining and researching a summary judgment motion based on

the state of the record as of the close of discovery and would have to expend additional time and effort to depose Herdrich and revise its work accordingly. While the defendant had not, as of the time of the filing of its Objection, expended the degree of effort described in *Primus*, it nonetheless makes a persuasive case that it will suffer some lesser quantum of tangible prejudice. Consideration of this factor, hence, cuts in the defendant's favor as well.

#### **E. Effect on Court's Docket**

As to the final factor, the plaintiff argues that the allowance of the late expert designation of Herdrich will not impact the court's docket negatively because scheduling order deadlines have been stayed. *See* Motion at 10. By contrast, the defendant analogizes this case to *Samaan*, *see* Objection at 11, in which this court stated:

If in the circumstances of this case, the Court is prevented from imposing the automatic exclusion sanction of Rule 37(c)(1), the Court fears its authority to enforce its own scheduling orders will be severely undercut. Parties will be encouraged to hide opinion experts in fact witness clothing to avoid essential disclosure obligations and when the opponent complains, even at the eve of trial, the Court will be powerless to prevent the harm to the Court's docket and to the aggrieved opponent. This factor favors preclusion.

*Samaan*, 274 F.R.D. at 50.

As the plaintiff points out, *see* Reply at 6-7, *Samaan* is distinguishable. In that case, the deadline for the plaintiff's designation for expert witnesses had expired a year prior to the decision, the discovery deadline had expired more than eight months prior thereto, jury selection was scheduled for four days later, and the plaintiff still had not supplemented his disclosures or presented any argument that his failure to do so was justified, instead apparently deciding that the defendants should have known that his treating physicians would offer opinions beyond those they were expressly designated to provide. *See Samaan*, 274 F.R.D. at 49-50.

Moreover, as noted above, Judge Levy has granted the defendant's unopposed motion to enlarge its deadline to file its motion for summary judgment to 30 days after the completion of any

discovery allowed by the court or 30 days after the denial of the instant motion. *See* ECF Nos. 31-32.

The court having made allowances for any discovery occasioned by the grant of the Motion, this factor favors the plaintiff.

#### **F. Consideration of Factors as a Whole**

Stepping back from the detail of the individual factors, I conclude that consideration of the five factors, on the whole, tilts in favor of the denial of the plaintiff's motion to make a belated designation of Herdrich as an expert witness. The plaintiff fails to demonstrate that the late designation is either substantially justified or harmless to the defendant. In addition, he makes no showing that the expert testimony in question is essential to his case.

#### **IV. Conclusion**

For the foregoing reasons, the Motion is **DENIED**.

#### **NOTICE**

*In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.*

*Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.*

Dated this 30<sup>th</sup> day of December, 2015.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge