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## ORDER

Before the Court is Defendants' Motion to Dismiss (ECF No. 70). Plaintiff filed a Response (ECF No. 75) and Defendants subsequently filed a Reply (ECF No. 76).

Defendant's Motion to Dismiss is DENIED.

This case involves an employment discrimination claim brought under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the corresponding Nevada Revised Statute 613.330 et seq. by Plaintiff, Eghomware Igbiovvia, against Defendants, St. Rose Dominican Hospitals-Siena Campus (“St. Rose”), a hospital owned by Catholic Healthcare West (“Healthcare”), and Jason Glick (“Glick”), Plaintiff’s supervisor. Plaintiff was a pharmacist employed by St. Rose and was the only African-American employed at all three of St. Rose’s Las Vegas locations. (Complaint pg. 2, ECF No. 1). In the Complaint, Plaintiff alleges that his white colleagues were given preferential assignments to the ICU unit and promotions to pharmacy supervisor positions. (*Id.* at pp.

1 2-3). On February 7, 2007, Plaintiff filed a formal charge of discrimination with the  
2 Equal Employment Opportunity Commission (“EEOC”). (*Id.* at pg. 3). Almost three (3)  
3 weeks later, on February 27, 2007, Plaintiff was terminated, allegedly for his internet  
4 usage and a decline in his productivity. (*Id.*).

5 After filing a formal charge of discrimination with the EEOC, Plaintiff received a  
6 right-to-sue notice on June 25, 2007. On August 30, 2007, Plaintiff filed his initial  
7 Complaint in the U.S. District Court for the District of Nevada. (ECF No. 1). This initial  
8 Complaint asserted three (3) causes of action against Healthcare and St. Rose:  
9 (1) unlawful discriminatory employment action; (2) retaliation; and (3) wrongful  
10 termination. (*Id.*). The 90-day limitations period for bringing a Title VII action after the  
11 issuance of a right-to-sue notice expired September 26, 2007. The initial Complaint was  
12 never served on Healthcare or St. Rose. However, before the 120-day time period to  
13 serve process on the initial Complaint pursuant to Fed. R. Civ. P. 4(m) expired, on  
14 December 30, 2007, Plaintiff filed an Amended Complaint adding Glick as a defendant to  
15 the three original causes of action. (ECF No. 6). Plaintiff then timely served all  
16 Defendants with the Amended Complaint. (ECF No. 12).

17 This case was previously assigned to the Honorable Brian E. Sandoval, District  
18 Judge, and the Honorable Robert C. Jones, District Judge. On July 16, 2008, Judge  
19 Sandoval dismissed Plaintiff’s Title VII and N.R.S. 613.330 claims against Glick. (ECF  
20 No. 28) Additionally, Judge Sandoval granted Plaintiff’s Counter-Motion for Leave to  
21 Amend, permitting Plaintiff to file a Second Amended Complaint to add claims of  
22 intentional and negligent infliction of emotional distress and to join Glick as a defendant  
23 to those claims. (*Id.*). At the close of discovery, Defendants filed a motion seeking  
24 partial summary judgment on Plaintiff’s claims for (1) intentional inflictions of emotional  
25 distress; (2) negligent infliction of emotional distress; and (3) full front/back pay. (ECF

1 No. 48). Judge Jones granted Defendants' motion. (ECF No. 61, pg 7.)

2 Defendants also filed two (2) motions in limine to exclude undisclosed evidence of  
3 damages and exclude all documents and witnesses produced untimely. (ECF No. 46 &  
4 47). Judge Jones found that Plaintiff did not properly disclose evidence of damages as  
5 required by Federal Rule of Evidence 26. (Order pp. 4-5, ECF No. 61). Accordingly,  
6 Judge Jones held that the sanction of Rule 37(c)(1) applies to Plaintiff's failure to  
7 disclose evidence of damages, rendering any evidence of damages excluded from trial.  
8 (*Id.*). In addition, this Court held that because Plaintiff did not demonstrate substantial  
9 justification for his failure to provide initial disclosures for over 13 months after the first  
10 disclosure deadline or that these untimely disclosures were harmless, all witnesses and  
11 documents produced in Plaintiff's initial disclosure statement would be excluded. (*Id.* at  
12 5-7).

## 13 **DISCUSSION**

### 14 **A. Motion to Dismiss**

15 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement  
16 of the claim showing that the pleader is entitled to relief" in order to "give the defendant  
17 fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v.*  
18 *Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that  
19 a court dismiss a cause of action that fails to state a claim upon which relief can be  
20 granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See*  
21 *North Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When  
22 considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal  
23 is appropriate only when the complaint does not give the defendant fair notice of a legally  
24 cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550  
25 U.S. 544, 554, 127 S.Ct. 1955, 1964 (2007). However, facts must be sufficient to edge a

1 complaint from the conceivable to the plausible in order to state a claim. *Id.* In  
2 considering whether the complaint is sufficient to state a claim, the court will take all  
3 material allegations as true and construe them in the light most favorable to the plaintiff.  
4 *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is  
5 not required to accept as true allegations that are merely conclusory, unwarranted  
6 deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*,  
7 266 F.3d 979, 988 (9th Cir. 2001).

8 The Supreme Court recently clarified that, in order to avoid a motion to dismiss,  
9 the complaint must contain “factual content that allows the court to draw the reasonable  
10 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, ---  
11 U.S. ---, 129 S.Ct. 1937, 1949 (2009). The Court in *Ashcroft* further stated “[w]here a  
12 complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops  
13 short of the line between possibility and plausibility of entitlement to relief.”” *Id.*  
14 Therefore, merely making an allegation is not enough to survive a motion to dismiss;  
15 facts that a particular defendant may plausibly be liable for the alleged conduct must be  
16 pled.

17 “Generally, a district court may not consider any material beyond the pleadings in  
18 ruling on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as  
19 part of the complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc.*  
20 *v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted).  
21 Similarly, “documents whose contents are alleged in a complaint and whose authenticity  
22 no party questions, but which are not physically attached to the pleading, may be  
23 considered in ruling on a Rule 12(b)(6) motion to dismiss” without converting the motion  
24 to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th  
25 Cir. 1994). Moreover, under Fed. R. Evid. 201, a court may take judicial notice of

1 “matters of public record.” *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th  
2 Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings,  
3 the motion to dismiss is converted into a motion for summary judgment. *See Arpin v.*  
4 *Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

5 This court has dismissed all of Plaintiff’s claims for actual damages. Plaintiff did  
6 not provide a computation of damages in support of a claim for front pay and back pay  
7 and thus Judge Jones ruled to grant Defendants’ Motion in Limine to exclude evidence of  
8 damages and to grant Defendants’ Motion for Partial Summary Judgment. Plaintiff failed  
9 to testify as to any actual emotional distress at the time of his deposition. Accordingly,  
10 Judge Jones ruled in favor of Defendants in granting their Partial Summary Judgment  
11 motion for Plaintiff’s claims of non-economic damages for Intentional Infliction of  
12 Emotional Distress and Negligent Infliction of Emotional Distress. Plaintiff has no proof  
13 of damages to present to this Court. The only remaining claim before this Court is for  
14 punitive damages for a violation of Title VII.

### 15 **1. Punitive Damages**

16 The statutory standard for awarding punitive damages under §1981 is whether the  
17 defendant acted “with malice or with reckless indifference to the federally protected  
18 rights of an aggrieved individual.” 42 U.S.C. §1981a(b)(1). “An award of punitive  
19 damages under Title VII is proper where the acts of discrimination giving rise to liability  
20 are willful and egregious, or display reckless indifference to the plaintiff’s federal rights.”  
21 *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998). Punitive damages  
22 may not be awarded, however, where a defendant’s conduct is merely negligent. *Id.* If  
23 compensatory damages are not awarded in a Title VII action, punitive damages are not  
24 precluded because nominal damages can still be awarded. *See Wilson v. Brinker Intern.,*  
25 *Inc.*, 248 F.Supp.2d 856 (D. Minn. 2003)(holding that even if jury awarded no

1 compensatory damages Plaintiff was entitled to at least nominal damages which is  
2 enough to support punitive damages award); *Hennessy v. Penril Datacomm Networks,*  
3 *Inc.*, 69 F.3d 1344, 1352 (7th Cir.1995) (holding that award of compensatory damages is  
4 not necessary to support award of punitive damages under § 1981); *Timm v. Progressive*  
5 *Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir.1998) (holding, post- Gore, no  
6 requirement of compensatory damages to support punitive damage award in Title VII sex  
7 discrimination suit).

8       The Defendants argue that it is impossible for Plaintiff to demonstrate entitlement  
9 to punitive damages because he has not submitted a witness list or any other evidence to  
10 sustain an award of punitive damages. Plaintiff argues that all the witnesses necessary to  
11 prove his punitive damages claim are disclosed in Defendants' proposed witness and  
12 exhibit list. Plaintiff further argues that he should not be precluded from calling or  
13 utilizing any of Defendants' witnesses or exhibits because there would be no prejudice to  
14 the Defendants since Defendants obviously have notice of the disclosed list.

15       Defendants counter that Plaintiff has the ultimate burden of proof, and that  
16 Plaintiff cannot meet his burden by utilizing Defendants' witness and exhibit list.  
17 Defendants argue that Plaintiff has failed to create an issue of fact as to whether Plaintiff  
18 may somehow be entitled to a punitive damages award.

19       Defendants appear to be confusing the summary judgment standard with the  
20 motion to dismiss standard. Plaintiff need only allege facts that state a claim upon which  
21 relief can be granted to survive a motion to dismiss. Plaintiff's Amended Complaint does  
22 state sufficient facts upon which Defendants can be liable and upon which relief can be  
23 granted. Plaintiff alleges Defendants willfully, wantonly, recklessly and maliciously  
24 violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-et  
25 seq., by discriminating against Plaintiff and terminating Plaintiff in retaliation for his

1 having filed a formal charge of discrimination with the EEOC. (Complaint ¶ 26, pg. 4-5,  
2 ECF No. 6).

3 Accordingly, Defendants appear to actually be arguing that at this stage in trial  
4 preparation, Plaintiff has not yet and (because discovery is closed) will not be able to in  
5 the future submit any evidence that his claim of punitive damages can be sustained. In  
6 other words, Plaintiff has stated a proper claim, however, no relief can be granted  
7 because Plaintiff has the burden of proof in a Title VII claim. Defendants are focusing  
8 upon the fact that Plaintiff has not produced any evidence to support his claims, but that  
9 is not the proper standard for a motion to dismiss. Defendants should have more properly  
10 filed a motion for summary judgment to assert a claim that insufficient evidence exists to  
11 justify proceeding to trial.

12 ***a. FRCP 26***

13 The broad purpose of the discovery rules is to enable parties to prepare for trial,  
14 and it is not their purpose to give one party strategic advantage over other. *Cooper v.*  
15 *Stender*, 30 F.R.D. 389, 393 (E.D.Tenn.1962). “A trial is not a sporting event, and  
16 discovery is founded upon policy that search for truth should be aided.” *Tiedman v.*  
17 *American Pigment Corp.*, 253 F.2d 803 (4th Cir. 1958). “Generally, the purpose of  
18 discovery in civil actions is to remove surprise from trial preparation so the parties can  
19 obtain evidence necessary to evaluate and resolve their dispute.” *U.S. ex rel. Schwartz v.*  
20 *TRW, Inc.*, 211 F.R.D. 388 (C.D.Cal.2002). Finally, “[r]ules governing discovery  
21 provide for judicial intervention to settle disputes about scope of discovery and to enforce  
22 a legitimate request by one party for information or documents from other party, but they  
23 do not give district courts authority to compel a litigant to engage in discovery in first  
24 instance.” *Indentiseal Corp. of Wisconsin v. Positive Identification Systems, Inc.*, 560  
25 F.2d 298 (7th Cir. 1977).

1 Accordingly, a party is not required to list itself (assuming it is an individual and  
2 not an entity) as a witness. Failure to do so would not preclude the party from testifying.  
3 However, if a party fails to provide information or identify any other witness as required  
4 by Federal Rule of Civil Procedure 26 (a) or (e), then Rule 37(c) provides for sanctions.  
5 These sanctions include: “the party is not allowed to use that information or witness to  
6 supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially  
7 justified or is harmless”; an order to pay the “reasonable attorney’s fees, caused by the  
8 failure”; informing the jury of the failure; or other appropriate sanctions, including  
9 dismissal. Fed. R. Civ. P. 37(c).

10 In this case, Plaintiff failed to provide the initial disclosures required by Rule  
11 26(a). Therefore, plaintiff is not allowed to use any witness he failed to disclose in his  
12 case in chief.

13 ***b. FRCP 37(c)***

14 However, there is nothing in the rules that would preclude Plaintiff from using  
15 witnesses from Defendant’s witness list in its case-in-chief. The duty to disclose imposed  
16 by Rule 26(a) was meant as a way to facilitate discovery without having to await formal  
17 discovery requests so that parties can prepare for trial or make an informed decision  
18 about settlement. (*See* Adv. Comm. Notes on 1993 Amendments to Fed. R. Civ. P.  
19 26(a)). The sanction to preclude the party that failed to disclose potential witnesses or  
20 evidence is meant to prevent unfair play between parties, i.e. litigation by surprise.

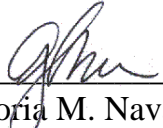
21 Rule 37(c) allows an untimely disclosure if the disclosure is harmless. In the  
22 Advisory Committee Notes on the 1993 Amendments the commentators discuss that  
23 although listing a witness does not obligate the party to secure the attendance of the  
24 person at trial it should preclude the party from objecting if the person is called to testify  
25 by another party who did not list the person as a witness. This is the scenario presented



1 in this case. Plaintiff will be unable to call any witnesses or present evidence that he did  
2 not disclose, but he will not be precluded from using Defendants' witness list. There is  
3 no prejudice to Defendants by allowing Plaintiff to call witnesses from Defendants' list  
4 because Defendants are aware of all the individuals listed and had the opportunity to  
5 dispose witnesses on their list.

6 Since a Plaintiff can recover punitive damages without having suffered actual  
7 damages, *see Wilson v. Brinker Intern., Inc.*, 248 F.Supp.2d 856 (D. Minn. 2003) Plaintiff  
8 does still have a claim. Defendants' motion to dismiss is therefore, DENIED.

9 DATED this 7th day of December, 2010.

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13 Gloria M. Navarro  
14 United States District Judge  
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