

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

KIMBERLY HIVELY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 3:14-cv-01791-JD-MGG
	)	
IVY TECH COMMUNITY COLLEGE,	)	
	)	
Defendant.	)	

**DEFENDANT’S RESPONSE IN OPPOSITION TO  
PLAINTIFF’S MOTION FOR LEAVE TO AMEND THE COMPLAINT**

Defendant Ivy Tech Community College, by counsel, hereby files this Response in Opposition to Plaintiff Kimberly Hively’s Motion for Leave to Amend the Complaint (“Motion”). The deadline for amending pleadings in this case expired on August 25, 2017. Nevertheless, Plaintiff seeks to amend the Complaint – without good cause – to include a new claim of retaliation pursuant to Title VII of the Civil Rights Act of 1964. This Motion is not only untimely, but it is futile because Plaintiff has failed to exhaust her administrative remedies and it would unduly prejudice Ivy Tech who has diligently litigated his case. Finally, Plaintiff, by her own deposition testimony, does not have a good faith basis (or evidence) to support this newly alleged retaliation claim. Plaintiff’s Motion should be denied due to Plaintiff’s failure to meet the requirements for amendment under Federal Rules of Civil Procedure 15 and 16.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

1. On or about December 10, 2013, Plaintiff filed a Charge of Discrimination with the South Bend Human Rights Commission alleging *only* discrimination based on sex. [Exhibit A]. Specifically, Plaintiff’s charge alleged “I have applied for several positions at IVY TECH, fulltime, in the last 5 years. . . . I believe I am being discriminated against based on my sexual

orientation.” [Id.] Plaintiff did not check the “retaliation” box nor did she make any retaliation-based allegations.

2. On June 18, 2014, Plaintiff sent an email to the EEOC requesting a Dismissal and Notice of Right to Sue Letter for her EEOC Charge. [Ex. B].

3. On June 18, 2014, the EEOC issued a Notice of Dismissal and Right to Sue to Plaintiff per her request. [Ex. C].

4. On June 26, 2014, the President of the South Bend Ivy Tech Campus, Dr. Janet Evelyn, sent a letter to the Plaintiff in response to Plaintiff’s allegation that she was “singled out” as a result of Ivy Tech reviewing Plaintiff’s credentials to teach certain classes.<sup>1</sup> [Ex. D]. Dr. Evelyn plainly explained that faculty credentials were being reviewed as a part of an Ivy Tech restructuring and because Plaintiff applied for a job which required a review of her credentials. Specifically, the letter stated:

*Regarding your claims that you were singled out, I’d like to assure you this was not the case. Because of the recent restructuring of the Schools into Divisions and the changes in the Math sequencing across programs, all faculty credentialing is being reviewed. Ms. Waltz-Freel, as the incoming Dean of the University and Transfer Division, has been directed to review all Math faculty and instructors credentials, which is the first reason your credentials were reviewed. Secondly, you applied for the Math position and based on the selection process credentialing is required for all candidates to validate their qualifications, as such, your credentials were reviewed.* In an effort to ensure that your qualifications were correct, Ms. Waltz-Freel reached out to a Math colleague at IU South Bend regarding interpretation of specific math courses on your transcription; their discussion confirmed her interpretation was correct.

Ms. Waltz Freel has indicated that you are being considered for an Adjunct contract for Fall 2014 to teach from the above math courses you are credentialed to teach. In addition, you can be considered for tutoring sessions as well. I appreciate all that you’ve done to help students during your tenure and hope that you will consider returning as an Adjunct Instructor.

[Ex. D (emphasis added)]. At her deposition, Plaintiff testified about this letter. She testified:

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<sup>1</sup> Plaintiff acknowledged receiving this letter in her deposition taken on January 29, 2017. [Exhibit E]

Q. Anything in this letter you believe to be factually false?

A. No.

[Ex. E: p. 95-96].

5. On August 2, 2014, Plaintiff's contract expired and Plaintiff did not contact Ivy Tech to inform the College that she would like to continue teaching as an Adjunct Instructor or Tutor. As a result of Plaintiff not expressing interest in teaching the classes for which she was credentialed, Plaintiff's employment with Ivy Tech ended. It is undisputed that Plaintiff has not worked for Ivy Tech since August 2, 2014.

6. On August 15, 2014, Plaintiff filed her original Complaint in this Court alleging *only* failure-to-hire allegations based upon alleged sexual orientation discrimination. [Dkt. No. 1 at 2]. Specifically, Plaintiff alleged that she was "***Denied full time employment and promotions based on sexual orientation.***" [Dkt. No. 1 at 2].

7. On March 4, 2015, Plaintiff's Complaint was dismissed per F.R.C.P. 12(b)(6). [Dkt. No. 15].

8. On April 2, 2015, Plaintiff appealed this Court's dismissal pursuant to Rule 12(b)(6). [Dkt. No. 16]. In April 2017, the Seventh Circuit Court of Appeals, sitting *en banc*, reversed and remanded back to this Court. [Dkt. No. 23].

9. On June 28, 2017, this Court entered its first Scheduling Order which set the deadline to amend pleadings for July 26, 2017. [Dkt. No. 29 at 2].

10. On July 26, 2017, Plaintiff filed an Unopposed Motion for an Extension of Time, requesting until August 25, 2017 to amend pleadings. [Dkt. No. 30 at 1]. Ivy Tech did not oppose this motion. This Court entered a revised Scheduling Order on July 28, 2017, extending the deadline to amend pleadings to August 25, 2017. [Dkt. No. 31].

11. On the amended deadline, August 25, 2017, Plaintiff filed an Amended Complaint which alleged the *same failure-to-hire claims based upon alleged sexual orientation discrimination* that it asserted in the original Complaint. [Dkt. No. 37].

12. On September 20, 2017, Plaintiff produced documents to Ivy Tech pursuant to her discovery responses. Within that production, Plaintiff produced the June 26, 2014 letter from Dr. Evelyn – Exhibit D referenced above – which explained that faculty credentials were being reviewed as a part of an Ivy Tech restructuring and because Plaintiff applied for a job which required a review of her credentials

13. On January 22, 2018, -- three and a half years after receiving notice of Ivy Tech’s 2014 credential review *and* nearly five months after the August 25, 2017 pleading deadline – Plaintiff now seeks leave to amend her Complaint to assert a claim for retaliation based upon Ivy Tech’s 2014 credential review. [Dkt. No. 52]. Plaintiff states “[t]he Court should grant Ms. Hively’s Motion for Leave to Amend the Complaint so that Ms. Hively can allege *a retaliation claim she learned about in discovery in late 2017. The basis for Ms. Hively’s claim came to light following the review of Ivy Tech’s November and December discovery responses.*” [Dkt. No. 52, p. 1 (emphasis added)]. Unfortunately, as explained more fully in section III.A, below, this assertion is plainly false. Plaintiff received Ivy Tech’s letter explaining the credentialing review – Plaintiff’s cited basis for the alleged retaliation claim – in June 2014 which explained the credentialing review in response to Plaintiff’s claim that she was “singled out.” [Exhibit E: p. 95-96]. Plaintiff had the document in her possession since June 2014 and actually produced this document to Ivy Tech with her discovery responses.

14. Additionally, Plaintiff’s purported “newly discovered” retaliation claim was never raised nor investigated by the EEOC.

15. In Plaintiff's deposition on January 29, 2018, Plaintiff admitted that she has no good faith basis to assert a claim of retaliation based upon the credentialing review:

Q. As you sit here today, do you know if anyone else's credentials were looked at?  
A. No.

\* \* \*

Q. Let me ask you some questions and back up before we use that document. Are you aware of a credentialing audit that took place at Ivy Tech in 2014?

A. Yes.

Q. Do you know why that credentialing audit took place?

A. No.

Q. Do you know who ordered that credentialing audit to take place?

A. No.

Q. Do you know the scope of that credentialing audit?

A. No.

Q. Do you know which campuses that credentialing audit occurred on?

A. No.

Q. Do you know what departments that credentialing audit occurred with?

A. No.

\* \* \*

Q. Do you know which employees the credentialing audit covered?

A. No.

Q. Do you know how Ivy Tech administered the credentialing audit?

A. No.

Q. Do you know if other adjunct professors were discovered to be miscredentialed as a part of this credentialing audit?

A. No.

\* \* \*

Q. What evidence do you have that this credentialing audit was instituted because of your EEOC charge?

A. None.

[Exhibit E: pp. 15; 81-84]. For the reasons and those set forth below, Plaintiff's Motion must be denied.

## II. LEGAL STANDARD

While the standard for granting leave to amend under Rule 15 is a liberal one, that standard must be reconciled with the deadlines established by the scheduling order as governed by Rule 16(b). *See Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir.2011). Under Rule 16(b), a pleading can only be amended after the expiration of the court's scheduling order deadline to amend pleadings “*for good cause.*” Fed. R. Civ. P. 16(b)(4) (emphasis added). In reconciling these two rules, the Seventh Circuit has held that it is proper for a court to first consider whether the moving party meets the heightened “good cause” standard under Rule 16(b)(4) before examining whether the party meets the requirements of Rule 15. *Alioto*, 651 F.3d at 719; *see also Riggins v. Walter*, 279 F.3d 422, 428 (7th Cir. 1995) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)) (“[The] court must first find good cause for amendment under Rule 16(b) before considering propriety of amendment under Fed. R. Civ. P. 15.”).

Thus, a movant must show “good cause” to amend its pleadings after the court's deadlines have passed. Fed R. Civ. P. 16(b)(4). It is the movant who bears the burden of showing why such “good cause” exists. *See Tschantz v. McCann*, 160 F.R.D. 568, 571 (N.D. Ind.1995). (“[A] party must show that despite their diligence the time table could not have reasonably been met.”). If the movant meets this initial burden, the moving party must then demonstrate that the requirements of Rule 15(a)(2) have been satisfied. *Alioto*, 651 F.3d at 719; *Tschantz v. McCann*, 160 F.R.D. 568, 571 (N.D. Ind. 1995). Ultimately, “the decision to grant

or deny a motion to file an amended pleading is a matter purely within the sound discretion of the district court.” *Brunt v. Serv. Employees Int’l Union*, 284 F.3d 715, 720 (7th Cir. 2002).

### III. ARGUMENT AND AUTHORITY

#### A. Plaintiff Fails to Identify, Let Alone Demonstrate, Good Cause to Amend Her Complaint Under Rule 16.

Because Plaintiff’s Motion was filed on January 22, 2018 – approximately five months after the August 25, 2017 deadline set forth in this Court’s amended Scheduling Order – Plaintiff must first meet the heightened standard of good cause. Rule 16’s “good cause” standard for leave to amend “primarily considers the diligence of the party seeking amendment.” *Trustmark Ins. Co. v. General & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005) (quoting *Johnson*, 975 F.2d at 609). Specifically, the Seventh Circuit has held that the requisite diligence is not established if delay is shown and the movant provides no reason, or no good reason, for the delay. *See Alioto*, 651 F.3d at 719; *see also Edmonson v. Desmond*, 551 F. App’x 280, 282 (7th Cir. 2014) (“[Movant] has not offered any reason, let alone a good one, why he waited more than a month after the close of discovery to file his motions to amend.”).

Plaintiff has provided no good reason for her delay. Plaintiff’s credentials were reviewed in June 2014 both as part of a restructuring *and* because she applied for a specific job which required a credential review. The undisputed evidence demonstrates that Plaintiff was aware of this credential review by way of the June 26, 2014 letter from South Bend Campus President, Dr. Evelyn, which Plaintiff testified she received and produced to Ivy Tech as a part of her discovery responses in September 2017. The Seventh Circuit is clear that denying a motion to amend is proper “when the plaintiff is aware of the factual basis of her proposed claims prior to moving to amend . . . .” *Eads v. Prudential Ins. Co. of Am.*, No. 1:13-CV-01209-TWP, 2014 WL 3405951, at \*3 (S.D. Ind. July 11, 2014) (citing *Trustmark Ins. Co.*, 424 F.3d 542, 533 (7th Cir. 2005);

*Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001)); *see Round v. Majestic Star Casino, LLC*, No. 2:15-CV-425-JVB-PRC, 2017 WL 5592856, at \*3 (N.D. Ind. Nov. 21, 2017) (finding amended complaint adding new allegations of retaliation and discrimination untimely, writing, “[a]ll of these facts have been within [plaintiff’s] personal knowledge from the outset”); *Shelton v. Ernst & Young, LLP*, 143 F.Supp.2d 982, 990 (N.D. Ill. 2001) (“Plaintiff’s termination on April 30, 1999 provided him with all the information he needed to pursue a discrimination claim.”); *Diaz v. Mobility*, No. 1:10-CV-3356-RLV-JSA, 2013 WL 12099350, at \*5 (N.D. Ga. Apr. 25, 2013), *aff’d sub nom. Diaz v. Burchette*, 585 F. App’x 968 (11th Cir. 2014) (denying plaintiff’s motion to amend the complaint to add a claim of retaliation because “plaintiff was aware of the facts she [sought] to include in her proposed amendment before she filed her original complaint”); *EEOC v. Excel Inc.*, 259 F.R.D. 652, 655 (N.D. Ga. 2008) (denying plaintiff’s motion to amend complaint to add a claim of retaliation where plaintiff argued that new evidence was adduced during deposition testimony). This Court should follow suit and likewise deny Plaintiff’s Motion.

Plaintiff attempts to avoid the undisputed fact that she was aware of her credential review back in 2014 with a bit of a smokescreen:

- J Plaintiff alleges – without any evidential support – that she “was lead to believe that the credentialing review was part of a department-wide review of all adjunct instructors pursuant to a mandated reduction in force.” [Dkt. No. 52, p. 2].
- J Plaintiff then states that “Ivy Tech did not produce any documents regarding a 2014 reduction in force.” [Dkt. No. 52, p. 3].
- J Therefore, Plaintiff asserts that she was singled out in the credential review: “[I]t now appears that in June of 2014, six months after Hively filed her EEOC charge, Ivy Tech administrators singled out Ms. Hively for a rigorous credentialing review.” [Dkt. No. 52, p. 3].

This simply does not track.

First, there is no evidence that Ivy Tech told the Plaintiff that there was a reduction in force in 2014. Rather, the June 26, 2014 letter clearly informed Plaintiff that the credentialing was being done as part of a restructuring and because she applied for a specific job which required a credential review. Moreover, “restructuring” and “reductions in force” *are legally distinct terms with different meanings*. While Ivy Tech did undergo a restructuring which prompted the review of faculty credentials as explained in the June 26, 2014 letter, it did not administer a reduction in force. Therefore, Ivy Tech not producing documents relating to a reduction in force at the South Bend campus is probative of nothing.<sup>2</sup> And this is certainly is not evidence of the Plaintiff being “singled out.”<sup>3</sup> Put simply, Plaintiff knew the entire basis of her alleged retaliation claim in 2014, yet chose not to make such an allegation to the EEOC or the Court. Plaintiff cannot (and should not be permitted to) attempt to contort the record to make up for her lack of proper diligence in asserting this alleged claim.

Second, Plaintiff does not actually identify to the Court the purported “evidence” that it learned in Ivy Tech’s discovery responses which would support the new allegation that Plaintiff was singled out in her credential review. Specifically, Plaintiff asserts that “[o]nly when Ms. Hively’s counsel review the Ivy Tech documents showing that its administrators singled out Ms. Hively to zealously (and unfairly) scrutinize her credentials . . . did she have the basis for

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<sup>2</sup> And, again, no such documents exist because there was not a reduction in force on the South Bend campus in 2014.

<sup>3</sup> Plaintiff relies on *Lauer v. Patriot Paint Co.*, No. 1:06-CV-0244, 2007 WL 2068595 (N.D. Ind. July 17, 2007). Plaintiff’s reliance is misplaced. In *Lauer*, defendant moved to amend its counterclaim to add claims of fraud, breach of fiduciary duty, and tortious interference after tax returns received in discovery revealed that plaintiff earned substantial income from another company during the years he worked for defendant. *Id.* at \*1. According to defendant, the evidence revealed for the first time that plaintiff was servicing defendant’s former customers in contravention of an agreement between the two parties. *Id.* The court held that good cause was shown because the alleged facts giving rise to the amendments were not revealed until after the pleading deadline lapsed. *Id.* at \*2. Here, in contrast, Plaintiff already knew of the core factual allegations of her proposed retaliation claim *before* she filed her Complaint, and *well before* the August 25, 2017 deadline.

alleging a retaliation claim.” [Dkt. No. 52, p. 5]. While a colorful assertion, Plaintiff fails to identify any actual document which Plaintiff purportedly reviewed in Ivy Tech’s discovery responses to support this allegation.

Finally, even if the Court were to accept Plaintiff’s flawed premise that she did not learn about the basis for her retaliation claim until Ivy Tech’s discovery responses in November 2017, the Court can still deny Plaintiff’s Motion because she did not diligently serve discovery in this matter. This Court’s Order setting the deadline for amendments to the pleadings without leave was the exact date specified by Plaintiff in her prior motion for extension of the amendment deadline (which Ivy Tech did not oppose and the Court granted). [See Dkt. No. 30 at 1 (“The undersigned respectfully requests until August 25, 2017 as the new deadline to submit initial disclosures and amend pleadings.”)]. Furthermore, it was Plaintiff’s choice not to serve discovery until over a month after the amendment deadline had passed. Even though Plaintiff already knew of the core factual allegations of her retaliation claim from the June 26, 2014 letter, Plaintiff nonetheless took no affirmative action to obtain any additional evidence until serving interrogatories on October 2, 2017, and Requests for Production on September 22, 2017. This hardly constitutes diligence in the prosecution of the case. See *Paoli v. Stetser No. CIV.A. 12-66-GMS-CJB*, 2013 WL 2154393, at \*5 (D. Del. May 16, 2013), *report and recommendation adopted*, (D. Del. June 10, 2013) (plaintiff failed to show good cause where plaintiff discovered new evidence from defendant’s discovery responses, writing, “plaintiff’s delay in *servicing* discovery requests [was] at least partially responsible for the lateness of the motion”); *Beneficial Living Systems, Inc. v. Am. Cas. Co. of Reading, Pa.*, No. 08-CV-01980-LTB-MJW, 2009 WL 2588862, at \*2 (D. Colo. Aug. 17, 2009) (denying plaintiff’s motion for leave where plaintiff argued that the late production of certain documents necessitated the late amendment, but waited

to serve discovery). Therefore, even if the “new evidence” was necessary to properly allege retaliation, Plaintiff failed to establish that she made a diligent effort to secure such evidence

In sum, Plaintiff cannot establish good cause because: (1) she has been aware of the facts underlying her purported retaliation claim since *before* her original Complaint was filed;<sup>4</sup> (2) she has failed to actually identify any purported new evidence to support a retaliation claim; and (3) she failed to diligently prosecute her case by serving discovery long after the amendment deadline had passed. Because Plaintiff cannot establish good cause, her Motion for Leave to Amend must be denied.

**B. Plaintiff Likewise Cannot Meet the Requirements for Amendment Under Rule 15.**

Even if Plaintiff could show good cause, which she cannot, Plaintiff cannot meet the requirements of Federal Rule of Civil Procedure 15. “Even though Rule 15(a) provides that ‘leave shall be freely given when justice so requires,’ a district court may deny leave to amend for undue delay, bad faith, dilatory motive, prejudice, or futility.” *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997) (quoting Fed. R. Civ. P. 15(a)).

**1. Plaintiff’s Motion is the Result of Undue Delay and Will Cause Prejudice to the College.**

“Denial of a motion to amend [] ‘is particularly warranted’ if the movant does not explain the reason for the delay and the amendment would cause further delay in the litigation and prejudice to the non-movant.” *Miles v. S.C. Johnson & Son, Inc.*, No. 00 C 3278, 2002 WL 1303131, at \*3 (N.D. Ill. June 12, 2002) (citing *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996) (holding that, where the amendment is filed long after the original complaint and

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<sup>4</sup> Indeed, Plaintiff alleges that to establish a prima facie case for retaliation, “an employee need not present proof of a ‘causal link’ between the protected expression in which the plaintiff engaged . . . and the adverse employment action of which he is complaining.” [Dkt. No. 52 at 7]. Thus, by Plaintiff’s own account, the only facts necessary to allege a plausible claim for retaliation under the minimal pleading standards were already in Plaintiff’s possession long before she filed her Motion for Leave: she was surely aware of the fact that she filed an EEOC Charge on December 10, 2013, and she was also aware that her credentials were reviewed and her contract not renewed in the summer of 2014.

is based on facts the plaintiff knew for a year, “the court is entitled to demand reasons for thinking that the denial of the motion would work a serious injustice.”)). As set forth above, Plaintiff was aware of the alleged facts underlying her retaliation claim for *over three years* and chose not to serve discovery until well after the amendment deadline had passed. While Plaintiff bears the burden of showing that there has been no undue delay, she offers no explanation at all as to why she: choose not to pursue a retaliation claim with the EEOC; did not raise the retaliation claim before January 2018 (despite knowing about the basis for such a claim since August 2014); or waited until after the cut-off for amending her Complaint to serve discovery.

Further, Plaintiff’s contention that her amendment would cause no prejudice to Defendant ignores the fact that Defendant has already completed paper discovery and taken Plaintiff’s deposition on the existing failure-to-hire claims. Therefore, the addition of the retaliation claim would require additional written discovery and Plaintiff’s deposition would need to be re-opened, causing undue prejudice to Defendant who exercised diligence in defending this case.<sup>5</sup> *See Round v. Majestic Star Casino, LLC*, No. 2:15-CV-425-JVB-PRC, 2017 WL 5592856, at \*3 (N.D. Ind. Nov. 21, 2017) (holding defendant would be unduly prejudiced by plaintiff’s amendment where defendant had already conducted written discovery and taken plaintiff’s deposition).

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<sup>5</sup> Plaintiff alleges that “Ivy Tech had notice of the retaliation claim well in advance of Ms. Hively’s deposition currently scheduled for January 29, 2018.” Not only is it inaccurate to say the College had notice of the possibility of another amendment to the complaint “well in advance” of Plaintiff’s deposition, it is also beside the point. Plaintiff alone created a situation in which her deposition – which Ivy Tech had been seeking for an extended period of time – occurred at a time when the contents of the complaint were (again) clouded with uncertainty. Furthermore, re-opening Plaintiff’s deposition is likely to be particularly challenging as Plaintiff’s counsel is located in Houston, TX and has already rescheduled Plaintiff’s deposition on multiple occasions. Plaintiff further alleges that “Ms. Hively has already produced all relevant documents in her possession.” Defendant’s previous discovery requests did not focus on obtaining evidence relevant to defending against a retaliation claim. Defendant is not required to simply take Plaintiff’s word that in her opinion there are no relevant documents in her possession related to the newly proposed claim without serving additional written discovery.

2. **Plaintiff’s Motion is Futile Because Plaintiff Failed to Exhaust Her Administrative Remedies as Required by *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).**

The law is clear that a plaintiff alleging violations of Title VII “must first file a charge with the EEOC within a specified period of time after the challenged employment action occurs.” *Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014); *see also* *Rush v. McDonald’s Corp.*, 966 F.2d 1104, 110 (7th Cir. 1992) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 783 (1973); *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1240 (7th Cir. 1980)). The purpose of this limitation is to give “the employer some warning of the conduct about which the employee is aggrieved, and it affords the agency an opportunity to attempt conciliation without resort to the courts.” *Id.* (citing *Babrocky v. Jewel Food Co.* 773 F.2d 857, 863 (7th Cir. 1985)). Thus, “only those claims that are fairly encompassed within an EEOC charge can be the subject of a resulting lawsuit.” *Chambers v. Am. Trans. Air, Inc.*, 17 F.3d 998, 1003 (7th Cir. 1994). “Normally, retaliation, sex discrimination, and sexual harassment charges are not ‘like or reasonably related’ to one another to permit an EEOC charge of one type of wrong to support a subsequent civil suit for another.” *Sitar v. Indiana Dept. of Transp.*, 344 F.3d 720, 726 (7th Cir. 2003).

Plaintiff argues that she was not required to file a charge with the EEOC because “retaliation is encompassed by the earlier EEOC complaint that precipitated the punitive action.” [Dkt. #52 at 6]. In *Nat’l R.R. Passenger Corp. v. Morgan*, however, the Supreme Court unequivocally clarified that “[e]ach incident of discrimination **and each retaliatory adverse employment decision** constitutes a separate actionable ‘unlawful employment practice’” for which a plaintiff must file an administrative charge “within 180 or 300 days of the date of each discrete act or lose the ability to recover for it.” *National Railroad Passenger Corp. v. Morgan*,

536 U.S. 101, 110, 114 (2002) (emphasis added). Discrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire, “are not actionable if time barred, *even when* they are related to acts alleged in timely filed charges.” *Id.* at 113<sup>6</sup>; *see Morgan v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003) (“*Morgan* abrogates the continuing violation doctrine as previously applied to claims of discriminatory or retaliatory actions by employers, and replaces it with the teaching that each discrete incident of such treatment constitutes its own unlawful employment practice for which administrative remedies must be exhausted.”); *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851 (8th Cir. 2012) (“We reject [plaintiff’s] contention that retaliation claims arising from a charge filed with the EEOC are excepted from the statutory exhaustion requirement. Title VII requires that a complainant must file a charge with the EEOC within 180 days ‘after the alleged unlawful employment practice.’ The use of the definite article shows that the complainant must file a charge with respect to each alleged unlawful employment practice.”).

Plaintiff relies on *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1030 (7th Cir. 2013), however such reliance is misguided as the facts in *Luevano* are distinguishable.<sup>7</sup> In *Luevano*, plaintiff complained to her supervisor that a co-worker was repeatedly harassing her in a hostile and disruptive way. *Id.* at 1018. When the supervisor refused to act, plaintiff escalated her complaints to the district manager of human resources. *Id.* Subsequently, plaintiff’s working

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<sup>6</sup> Although *Morgan* concerned discrete acts of an employer that occurred prior to the filing of an EEOC charge, “the meaning of the phrase ‘unlawful employment practice’ does not vary based on the timing of the alleged unlawful acts. The term ‘practice’ no more subsumes multiple discrete acts when one of those acts occurs after the filing of an EEOC charge than it does when all acts occur before the charge is filed.” *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 852 (8th Cir. 2012).

<sup>7</sup> Plaintiff’s reliance on *Ajayi v. Aramark Bus. Servs. Inc.*, 336 F.3d 520 (7th Cir. 2003) is also unavailing. If anything, *Ajayi* is contrary to Plaintiff’s position. There, plaintiff filed an EEOC charge alleging she was discriminated against on account of her national origin. *Id.* at 526. After filing her charge, plaintiff was terminated. *Id.* Plaintiff did not file a subsequent EEOC charge and alleged in her complaint that her termination was in retaliation for filing a charge of discrimination with the EEOC. *Id.* The court explained, “that plaintiff’s retaliation claim *would likely be barred procedurally because it would fall outside the scope of her EEOC charge* (which was filed before she was fired),” but construed her filings as advancing a claim under a different statute and thus agreed to consider the claim. *Id.* at 530-31 (emphasis added).

hours were cut. *Id.* Plaintiff then filed a charge with the EEOC, alleging “I have been subjected to harassment. I complained to [defendant] to no avail. I believe I have been discriminated against because of my sex, female, *and retaliated against* [in violation of Title VII].” *Id.* at \*1 (N.D. Ill. Mar. 24, 2011) (emphasis added), *rev'd and remanded*, 722 F.3d 1014 (7th Cir. 2013). Plaintiff then filed a second charge of discrimination with the EEOC alleging retaliation against her for filing the first EEOC charge. *Leuvano*, 722 F.3d at 1019. Thus, most notably, the plaintiff in *Luevano* did in fact file a second EEOC charge. Notwithstanding, *Leuvano* involved ongoing retaliation raised in plaintiff’s first EEOC charge which continued after the claim was filed.

Here, in contrast, Plaintiff’s retaliation claim is premised upon *discrete acts* (*i.e.*, the supposed singling out of her credentials and the decision not to renew her contract) which occurred after she filed her original EEOC Charge, which alleged only sex discrimination. That is, Plaintiff’s proffered Second Amended Complaint alleges a discrete act of discrimination unrelated to the scope of her EEOC charge. Under *Morgan*, Plaintiff was required to exhaust her administrative remedies by filing an EEOC charge alleging retaliation and identifying those discrete acts which form the basis of her retaliation claim. Because Plaintiff concedes that she never filed a charge with the EEOC alleging retaliation. [Dkt. #52 at 6], Plaintiff’s retaliation claim is untimely and her Motion to Amend futile. *See General Elec.*, 128 F.3d at 1085 (“The opportunity to amend a complaint is futile if the complaint, as amended, would fail to state a claim upon which relief could be granted.”).

C. **Plaintiff's Deposition Testimony Demonstrates that She Does Not Have a Good Faith Basis for Bringing a Retaliation Claim Based Upon the Credentialing Review.**

In her deposition, Plaintiff confirmed that she does not have a “good faith” basis to bring a retaliation claim alleging that the credentialing review was in retaliation for filing an EEOC Charge. Specifically, Plaintiff testified as follows:

- ) She was aware that a credentialing audit took place in 2014;
- ) She has no personal knowledge if any other faculty member's credentials were reviewed;
- ) She has no personal knowledge why the credentialing audit took place;
- ) She has no personal knowledge of who ordered the credentialing audit;
- ) She has no personal knowledge as to the scope of the credentialing audit;
- ) She has no personal knowledge as to which campuses were involved in the credentialing audit;
- ) She has no personal knowledge as to which departments were involved in the credentialing audit;
- ) She has no personal knowledge of which employees were reviewed in the credentialing audit;
- ) She has no personal knowledge of how Ivy Tech conducted the credentialing audit; and
- ) *She has no evidence that the credentialing audit was instituted because of her EEOC Charge.*

[Exhibit E; pp. 95-96 (emphasis added)]. Put simply, Plaintiff's own testimony has confirmed that she does not have a good faith basis to bring the retaliation claim which she seeks to add to this lawsuit. On this basis alone, Plaintiff's Motion can be denied.

D. **Plaintiff's Unsupported Factual Allegations Must Be Disregarded.**

It deserves mention that Plaintiff's Motion contains numerous accusatory statements and factual assertions unsupported by any evidence. Not only are these assertions scurrilous without any citation to any evidence, these assertions also fail to identify any *new* evidence to support Plaintiff's need to amend her Complaint for a second time to include an alleged retaliation claim which she has known about since 2014.. Such statements which are “unsupported by documentary evidence, are *not* evidence” and should be disregarded. *U.S. v. Stevens*, 500 F.3d

625, 628-29 (7th Cir. 2007) (citing *Campania Mgmt. Co. v. Rooks, Pitts, & Poust*, 290 F.3d 843, 853 (7th Cir. 2002) (“[I]t is universally known that statements of attorneys are not evidence.”)). Accordingly, this Court must disregard the unsupported factual allegations made by Plaintiff. See *Flomo v. Bridestone Americas Holding, Inc.*, No. 1:06-CV-00627-WTLJMS, 2009 WL 5200541, at \*2 (S.D. Ind. Dec. 22, 2009) (“Because Plaintiffs haven’t supported their current undue burden claim with any evidence, the Court won’t credit them.”); *Medallion Prod., Inc. v. McAlister*, No. 06 C 2597, 2008 WL 4542997, at \*2 (N.D. Ill. Oct. 9, 2008) (“As it must, the court has disregarded any unsupported factual statements made by any party.”).

#### IV. CONCLUSION

Plaintiff is asking the Court to add an entirely new claim of retaliation to her Complaint despite knowing of the facts underlying her proposed claim for nearly three and a half years. Plaintiff’s Motion must be denied because: (1) she fails to identify, let alone establish, “good cause” or any evidence at all to justify this late-in-the-game amendment; (2) her amendment is futile and would cause undue prejudice and delay to Ivy Tech who has diligently litigated this case; and (3) she, by her own admission in her deposition, has no evidence or good faith basis to prosecute a retaliation claim. Accordingly, Defendant respectfully requests that the Court deny Plaintiff’s Motion for Leave to Amend the Complaint.

Respectfully submitted,

*s/ Adam L. Bartrom*

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(jason.clagg@btlaw.com)  
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(adam.bartrom@btlaw.com)  
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Facsimile: (260) 424-8316

ATTORNEYS FOR IVY TECH  
IVY TECH COMMUNITY COLLEGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served this 5th day of February, 2018, by electronically filing the same with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Danielle J. Healey – healey@fr.com  
Karrie H. Wheatley – wheatley@fr.com  
Raisa Ahmad – ahmad@fr.com  
FISH & RICHARDSON P.C.  
1221 McKinney Street, Suite 2800  
Houston, TX 77010

Daniel H. Pfeifer – dpfeifer@pilawyers.com  
PFEIFER MORGAN & STESIAK  
53600 North Ironwood Road  
South Bend, IN 46635

*s/ Adam L. Bartrom*

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Adam L. Bartrom

# **Exhibit A**



# **Exhibit B**

**CHRISTOPHER HOLLINGS - right to sue letter**

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**From:** Khively66 <khively66@aol.com>  
**To:** <Christopher.Hollings@eeoc.gov>  
**Date:** 6/18/2014 11:43 AM  
**Subject:** right to sue letter

---

I, Kimberly A Hively, am requesting a right to sue letter for case number 24M-2014-00073.

Thank You,

Kimberly A Hively

# Exhibit C

EEOC Form 161-B (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: Kimberly A. Hively  
1112 S. 25th Street  
South Bend, IN 46615

From: Indianapolis District Office  
101 West Ohio St  
Suite 1900  
Indianapolis, IN 46204

On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
24M-2014-00073	Michelle D. Ware, Enforcement Supervisor	(317) 226-5161

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Genetic Information Nondiscrimination Act (GINA): This is your Notice of Right to Sue, issued under Title VII, the ADA or GINA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII, the ADA or GINA must be filed in a federal or state court **WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

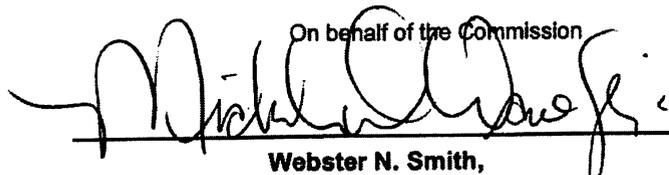
- More than 180 days have passed since the filing of this charge.
- Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.
- The EEOC is terminating its processing of this charge.
- The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

- The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court **WITHIN 90 DAYS** of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.
- The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred **more than 2 years (3 years)** before you file suit may not be collectible.

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission  
  
Webster N. Smith,  
Director

JUN 18 2014  
(Date Mailed)

Enclosures(s)

cc: Jim Clark  
Assistant General Counsel  
IVY TECH COMMUNITY COLLEGE  
50 W. Fall Creek Parkway North Drive  
Indianapolis, IN 46208

FILE COPY

# Exhibit D



June 26, 2014

Kimberly Hively  
1112 S 26<sup>th</sup> S  
South Bend, IN 46615

Dear Ms. Hively:

Upon receiving your email outlining why you feel your credentials are valid and that you are being singled out, I asked for a copy of the Status Compliance: Faculty Credential Evaluation, which is attached. The second requirement: "an earned master's degree or higher in the subject from a regionally accredited institution". Although several courses are at the 300/400 levels, only 15 credits of said courses are grade B or better and therefore can be considered. As a result, you are credentialed to teach ASA Math, Math 100 and Math 122 courses only. An independent Dean was asked to review Ms. Waltz-Freel's assessment and has confirmed that the evaluation is correct.

Regarding your claims that you were singled out, I'd like to assure you this was not the case. Because of the recent restructuring of the Schools into Divisions and the changes in the Math sequencing across programs, all faculty credentialing is being reviewed. Ms. Waltz-Freel, as the incoming Dean of the University and Transfer Division, has been directed to review all Math faculty and instructors credentials, which is the first reason your credentials were reviewed. Secondly, you applied for the Math position and based on the selection process credentialing is required for all candidates to validate their qualifications, as such, your credentials were reviewed. In an effort to ensure that your qualifications were correct, Ms. Waltz-Freel reached out to a Math colleague at IU South Bend regarding interpretation of specific math courses on your transcript; their discussion confirmed her interpretation was correct.

Ms. Waltz-Freel has indicated that you are being considered for an Adjunct contract for Fall 2014 to teach from the above math courses you are credentialed to teach. In addition, you can be considered for tutoring sessions as well. I appreciate all that you've done to help students during your tenure and hope that you will consider returning as an Adjunct Instructor.

Once again thanks for your email and giving us a chance to respond and resolve this issue. If you have questions or would like to meet, please let me know.

Sincerely

A handwritten signature in black ink, appearing to read 'Dr. Jarret J. Evelyn'.

Dr. Jarret J. Evelyn, Campds President

Cc: Karen Vargo, Interim Executive Director Human Resources  
Dr. Margaret Semmer, Vice Chancellor of Academic Affairs & Student Affairs

220 DEAN JOHNSON BOULEVARD  
SOUTH BEND, INDIANA 46601-3415  
574-289-7001

# **Exhibit E**

1 KIMBERLY A. HIVELY

2 believe you were qualified for the job, but you  
3 weren't selected?

4 A. Correct.

5 Q. And that's your evidence of  
6 discrimination?

7 A. Yes.

8 Q. What other evidence do you have of  
9 discrimination that Ivy Tech treated you  
10 differently because you love women?

11 A. A recredentialing process.

12 Q. Can you elaborate on that, please?

13 A. Yes. The last job that I applied  
14 for, they decided to look at my credentials  
15 again.

16 Q. What was that last job you applied  
17 for?

18 A. A mathematics position.

19 Q. And your testimony is that by Ivy  
20 Tech looking at your credentials, that was  
21 discrimination?

22 A. Signaling me out to do so, yes.

23 Q. As you sit here today, do you know  
24 if anyone else's credentials were looked at?

25 A. No.

1 KIMBERLY A. HIVELEY

2 Q. Let me ask you some questions and  
3 back up before we use that document.

4 Are you aware of a credentialing  
5 audit that took place at Ivy Tech in 2014?

6 A. Yes.

7 Q. Do you know why that credentialing  
8 audit took place?

9 A. No.

10 Q. Do you know who ordered that  
11 credentialing audit to take place?

12 A. No.

13 Q. Do you know the scope of that  
14 credentialing audit?

15 A. No.

16 Q. Do you know which campuses that  
17 credentialing audit occurred on?

18 A. No.

19 Q. Do you know what departments that  
20 credentialing audit occurred with?

21 A. No.

22 Q. Do you know who was in charge of  
23 that credentialing audit?

24 A. From these e-mails, I would have to  
25 say Morag Fulton.

1 KIMBERLY A. HIVELY

2 Q. Before you looked at this document  
3 today, did you know who was in charge of the  
4 credentialing audit?

5 A. No.

6 Q. And I want to make sure I  
7 understand. Your testimony is, based upon  
8 reviewing Exhibit 22, you believe Morag Fulton  
9 to be in charge of the credentialing audit?

10 A. It looks that way.

11 Q. Do you know which employees the  
12 credentialing audit covered?

13 A. No.

14 MS. WHEATLEY: Objection, form.

15 THE COURT REPORTER: Could you  
16 repeat that question?

17 BY MR. BARTROM:

18 Q. Do you know which employees the  
19 credentialing audit covered?

20 MS. WHEATLEY: Objection, form.

21 THE WITNESS: No.

22 BY MR. BARTROM:

23 Q. Do you know how Ivy Tech  
24 administered the credentialing audit?

25 A. No.

1 KIMBERLY A. HIVELY

2 Q. Are you aware that it was discovered  
3 in this credentialing audit that you were  
4 miscredentialed?

5 MS. WHEATLEY: Objection, form.

6 THE WITNESS: From an e-mail that I  
7 had received, yes.

8 BY MR. BARTROM:

9 Q. Which e-mail was that?

10 A. The one that I provided, not this  
11 one.

12 Q. The one you provided to your  
13 counsel --

14 A. Yes.

15 Q. -- during the course of this case?

16 A. Yes.

17 Q. Do you know who was responsible for  
18 miscredentiating you in the years prior to the  
19 credentialing audit?

20 MS. WHEATLEY: Objection, form.

21 THE WITNESS: No.

22 BY MR. BARTROM:

23 Q. Do you know if other adjunct  
24 professors were discovered to be  
25 miscredentialed as a part of this credentialing

1 KIMBERLY A. HIVELY

2 audit?

3 A. No.

4 Q. What evidence do you have that this  
5 credentialing audit was instituted because of  
6 your sexual orientation?

7 A. None.

8 Q. What evidence do you have that this  
9 credentialing audit was instituted because  
10 you're a woman who loves women?

11 A. None.

12 Q. What evidence do you have that this  
13 credentialing audit was instituted because of  
14 your EEOC charge?

15 A. None.

16 Q. Let's turn to Exhibit 22 here. You  
17 testified that you have not seen this document  
18 before today.

19 Do you believe any portion -- you've  
20 reviewed this document, right?

21 A. (Nodding.)

22 THE COURT REPORTER: Verbal.

23 THE WITNESS: Yes.

24 BY MR. BARTROM:

25 Q. Do you believe anything in this

1 KIMBERLY A. HIVELY

2 Ms. Waltz-Freel has indicated that you are  
3 being considered for an Adjunct contract for  
4 Fall 2014 to teach from the above main [sic]  
5 courses you are credentialed to teach. In  
6 addition, you will be considered for tutoring  
7 sessions as well. I appreciate all that you've  
8 done to help students during your tenure and  
9 hope that you will consider returning as an  
10 Adjunct Instructor.

11 Nobody from the department ever said  
12 a word.

13 Q. A word about what?

14 A. About teaching any of those courses  
15 or coming back to tutor.

16 Q. Well, this is the president of the  
17 campus who's informed you that you were still  
18 eligible to teach three classes, right?

19 A. Yes.

20 Q. And this is the president of the  
21 campus telling you you were still eligible to  
22 tutor, correct?

23 A. Yes.

24 Q. Anything in this letter you believe  
25 to be factually false?

1 KIMBERLY A. HIVELY

2 A. No.

3 Q. What's your middle name, Ms. Hively?

4 A. Anne.

5 Q. Date of birth?

6 A. 4/10/66.

7 Q. Marital status?

8 A. Single.

9 Q. Have you ever been married?

10 A. I have not.

11 Q. What's your current address?

12 A. 1112 South 25th Street.

13 Q. How long have you lived there?

14 A. 20 years.

15 Q. Anyone live there with you?

16 A. No.

17 Q. Where did you go to high school?

18 A. Actually, my niece lives there with

19 me.

20 Q. How old is your niece?

21 A. 20.

22 Q. Are you responsible for your niece  
23 financially?

24 A. I am.

25 Q. How long has your niece lived with