

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

KIMBERLY A. HIVELY

Plaintiff,

v.

IVY TECH COMMUNITY COLLEGE,

Defendant.

CAUSE NO. 3:14-CV-1791-JD-MGG

**PLAINTIFF’S REPLY TO DEFENDANT IVY TECH’S OPPOSITION TO PLAINTIFF’S
MOTION FOR LEAVE TO AMEND THE COMPLAINT**

Plaintiff Kimberly Hively (“Ms. Hively”) replies to Defendant Ivy Tech Community College’s (“Ivy Tech’s”) Response in Opposition to Plaintiff’s Motion for Leave to Amend the Complaint.

I. INTRODUCTION

Ms. Hively is pursuing claims under Title VII based on sexual discrimination. As stated in her Motion for Leave to Amend, after Defendants finally produced documents near the end of 2017, Ms. Hively’s counsel found emails implying that Defendant retaliated against her for filing her EEOC complaint by revoking her credentials for courses she had been successfully teaching for several terms. These emails, combined with other direct and circumstantial evidence, lead counsel for Ms. Hively to move for leave to plead a retaliation claim. Defendant cannot show any prejudice or undue delay within the meaning of Rules 15 and 16:

- 1) Defendant cannot show prejudice since discovery does not close until May 9, 2018; its expert report is not due for several weeks; it had the motion and proposed Amended Complaint before Ms. Hively’s deposition; it questioned her on the

retaliation claim facts at her deposition; and there is substantial overlap in the factual basis for the retaliation claim and the discrimination claim as it relates to Ms.

Hively's 2014 application for full-time faculty. Furthermore, Defendant cannot claim prejudice on written discovery because Ms. Hively produced all of the documents she has about her employment, tax returns, and medical records. Moreover, the documents that prove the retaliation claim are in Defendant's control, and the main witnesses to this claim are still employed by Defendant. None of Defendant's witnesses have yet been deposed.

- 2) Defendant cannot show undue delay because the claim was not revealed until counsel pieced it together from documents Defendant produced in November and December 2017. In fact, Defendant affirmatively concealed the claim from Ms. Hively at the time by having Ivy Tech's Janet Evelyn send her a letter in June 26, 2014 ("the June 26, 2014 Letter") assuring her she was not singled out for mistreatment. Defendant's own questioning of Ms. Hively shows she did not have a reason to know Dr. Evelyn's letter was untrue. Rather, Ms. Hively's counsel discovered the June 26, 2014 Letter to be a pretext based on the discovery reviewed at the end of 2017. Indeed, Defendant persists in its pretext by now arguing in its February 5, 2018 response that Ms. Hively's failure to ask to keep her job was the cause of her contract not being renewed. Contrary to Defendant's assertion in its response that Ms. Hively walked away from her job, months after Ms. Hively's employment ended, Defendant admitted it had terminated Ms. Hively based on credentialing issues. Finally, the June 26, 2014 Letter assured Ms. Hively she was being considered for renewal of her adjunct contract and for tutoring for the lower level classes she remained credentialed

to teach (and had taught successfully for years). Ms. Hively understood that assertion to mean that Ivy Tech would contact her one way or the other regarding her 2014 fall employment. Ivy Tech never did.

3) While Defendant criticizes Ms. Hively's counsel for not serving discovery sooner, the document requests were served less than 60 days after Ms. Hively's pro bono counsel were admitted, despite the intervening destruction of Hurricane Harvey in their hometown of Houston, Texas. Hurricane Harvey caused their offices to be closed soon after their admission and caused extensive disruption in their community throughout the fall. Defendant fails to mention that even though Ms. Hively's counsel served document requests on September 22, Defendant did not first provide responsive documents until November 22. Defendant produced more documents on December 22. Plaintiff's counsel still waits for Defendant to supplement its production. **In light of the absence of any prejudice, Defendant's delay argument rings hollow.**

4) Defendant cannot show the claim is futile for failure to exhaust administrative remedies because binding Seventh Circuit law holds that Ms. Hively's original EEOC charge is sufficient to exhaust administrative remedies as to the retaliation claim.

II. ARGUMENT

A. Good Cause Exists Under Rule 16 to Grant Leave to Amend

1. Ms. Hively Took the June 26, 2014 Letter at Face Value

Ivy Tech's key argument in its Response is that Ms. Hively was aware of the factual basis of her claim in 2014 through the June 26, 2014 Letter. In the letter, Ivy Tech assured Ms. Hively

that she was being treated fairly in the re-credentialing process. [See Dkt. 53, Ex. D]. Prior to Ms. Hively's pro se filing of this lawsuit, prior to her first amended complaint through counsel, and prior to review by counsel of discovery, Ms. Hively had no way of knowing the re-credentialing was retaliation. Indeed, as of the date of her deposition Ms. Hively personally had no facts to show the letter was not true.

Ivy Tech's pretext continues even now, because in its response Ivy Tech seems to be saying Ms. Hively walked away from her job by failing to ask to teach in the fall of 2014. [Dkt. No. 53 at ¶ 5]. But the June 26, 2014 Letter specified that Ivy Tech was considering Ms. Hively for adjunct and tutoring positions. Ms. Hively understood that to mean that "they would contact me; they were considering me. So there was the implication that I would be contacted one way or another. I was not." [Ex. E: p.144; 2-15]. Later that fall, when Ms. Hively applied for unemployment, Ivy Tech told the Indiana Department of Workforce Development that Ms. Hively's discontinued employment was due to credentialing issues. [See Ex. F]:

Additional Comments: Claimant was not offered teaching
assignment for fall 2014. due to credentialing
requirements

Print Name: Deb Schmitt Title: Director HR Date: 10/21/14
Signature: Deb Schmitt Telephone #: (574) 289-7001 Ext.: 5361

Clearly, the re-credentialing process was the justification for Ivy Tech to discontinue Ms. Hively's employment. Despite being asked to do so, (*see, e.g.*, Plaintiff's First Set of Requests for Production 7-9 at Ex. G), Ivy Tech has failed to produce evidence that any other adjunct or faculty member underwent a re-credentialing in 2014—let alone lost their job as a result of such

a process—calling into question Ivy Tech’s purported explanation for Ms. Hively’s re-credentialing.

In contrast, the documents that *were* produced included glowing evaluations and letters of recommendation. [Dkt. No. 52, Ex. A, B]. Where counsel for Ms. Hively should have found documents providing a legitimate reason for her re-credentialing and non-renewal (or at least support for the claims in the June 26, 2014 Letter) pursuant to their requests, counsel instead found evidence that ran contrary to Ivy Tech’s decision not to renew her contract.

In addition, the internal emails attached as Exhibit C to the motion (produced by Ivy Tech in December) show that Ivy Tech went to great lengths to justify its conclusion that Ms. Hively was not in fact credentialed to teach the courses she had been teaching since Ivy Tech credentialed her to teach in late 2011. Ivy Tech was only able to revoke Ms. Hively’s credentials by reading into its credentialing policy requirements for grades not explicitly mentioned in the policy. The policy says that a certain number of credit hours are required. [Dkt. No. 52, Ex. C]. In 2011, Ivy Tech concluded that she had those hours. [*See* Ex. H]. But in 2014, Ivy Tech reduced her credentials by refusing to acknowledge the credits on her transcript for classes in which she received a C. [Dkt. No. 52, Ex. C]. Had Ivy Tech not injected this new unwritten requirement into its rules after her EEOC complaint, she would have had her credentials approved as they were in 2011 before she filed her EEOC complaint.

Ivy Tech, however, ultimately refused to count a “C” grade in courses in which Ms. Hively earned credits by borrowing a guideline (not a rule) from IUSB’s math department. The guideline generally states that for graduate credits count toward a math graduate degree, they must be a “B-” or better. Ivy Tech chose to ignore the IUSB Math Chair’s admonishment that grades lower than a “B-” “had been allowed under review.” [Dkt. No. 52, Ex. C]. Further, the

IUSB official that Ivy Tech contacted to aid in Ms. Hively's re-credentialing did not think the issue was clear and directed Ivy Tech to contact the department in order to interpret her transcript. [Dkt. No. 52, Ex. C]. There is no evidence that Ivy Tech followed up with the IUSB official's recommendation to contact the department.

Moreover, there were members of the review committee at Ivy Tech who took the position that Ms. Hively was in fact qualified: "I suspected that the courses were not graduate level, but because they were on the graduate transcript some of the review committee were arguing that they were therefore counted by IUSB as Graduate Credit and not as Undergraduate Classes taken when the student was a graduate student." [Dkt. No. 52, Ex. C]. Further, Ivy Tech knew Ms. Hively had been successfully teaching the classes in question for multiple terms. [Dkt. No. 52, Ex. A, B]. If anything, her proven ability would have been more than enough reason to give her the benefit of the doubt that Ivy Tech itself created.

Ivy Tech also argues that Ms. Hively testified truthfully that *she* has no evidence the credentialing audit was instituted because of the EEOC charge. But Ms. Hively testified she did not have all of the evidence her counsel collected. [See Ex. E, p.199; 4-15], Finally, Defendant asks the Court to deny Ms. Hively a fair hearing on her claim despite the evidence brought forward on her behalf by badly overstating the meaning that can be given to a lay person's answer to a leading question in a deposition.

In sum, Ivy Tech assured Ms. Hively in the June 26, 2014 Letter that she was not being singled out for review, and as Ivy Tech intended, Ms. Hively took the letter as true. Yet the direct and circumstantial evidence show there is a claim for retaliation and Ms. Hively should have a chance to pursue it.

2. Ms. Hively's Brief Delay in Serving Discovery Is Not a Failure to Diligently Prosecute

Ms. Hively's short delay in serving discovery after remand from the Seventh Circuit is not a failure to diligently prosecute her case. Ivy Tech claims Ms. Hively should not be entitled to amend her claims because, by serving discovery requests a mere five weeks after the deadline to submit initial disclosures and amend pleadings, she failed to diligently prosecute her case. Ivy Tech cites two cases which are distinguishable. In *Paoli v. Stetsler*, the Court noted that Plaintiff did not serve discovery requests until "months after the deadline to amend pleadings, and very near the close of the revised fact discovery deadline." No. 12-66-GMS-CJB, 2013 WL 2154393, at *5 (D. Del., May 16, 2013). In *Beneficial Living Systems, Inc. v. Am. Cas. Co. of Reading, Pa.*, the Plaintiff waited four months to serve discovery on Defendant. No. 08-cv-01980-LTD-MJW, 2009 WL 2588862, at *2 (D. Colo., Aug. 17, 2009).

Here, Ms. Hively obtained pro bono counsel in the trial court after remand, mid-summer 2017. [Dkt. No. 30]. Pro bono counsel was not admitted pro hac vice until August 10, 2017. [Dkt. Nos. 35, 36, 42]. Ms. Hively filed, pro se, a request for extension to submit initial disclosures and amend pleadings to August 25, 2017. Later that day, Hurricane Harvey hit the city of Houston, where pro bono counsel is located. As noted in Plaintiff's Unopposed Motion to Modify the Scheduling Order, counsel's office was closed for over a week. [Dkt. No. 43]. In fact, as noted in the Motion, the Texas Supreme Court adopted temporary guidance to deal with the disruption. [Dkt. No. 43]. Counsel served its First Requests for Production on September 22, 2017, shortly after its offices reopened and while the community was still in shock and dealing with the crisis. Counsel then served its First Set of Interrogatories ten days later on October 2, 2017. A five-week delay with an intervening national disaster is certainly distinct from an unjustified, four-month long delay.

In complaining about Plaintiff's delay, Ivy Tech fails to mention that it sought one extension and joined Plaintiff in seeking a second extension to respond to discovery requests. (Dkt. Nos. 45, 49). Ultimately, Ivy Tech served its responses to Ms. Hively's Requests for Production and Interrogatories on November 22, 2017, eight and a half and seven and a half weeks (respectively) after Ms. Hively served them. Even if Ms. Hively had served her first discovery requests on the same day Ivy Tech served its discovery requests (August 2, 2017), she would not have received a response until, at the earliest, September 25th – a month after the deadline to amend.

B. Ms. Hively Meets the Required Showing under Rule 15

Ms. Hively's Motion for Leave to Amend the Complaint should be granted because Ms. Hively meets the required showing under Rule 15. Allowing Ms. Hively to amend her complaint will not cause undue delay or prejudice to Ivy Tech. Additionally, Ms. Hively's claim is not futile because the Seventh Circuit does not require Ms. Hively to file an additional EEOC charge in order to assert retaliation in this case. *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014 (7th Cir. 2013).

1. Amending Will Not Cause Undue Delay or Prejudice Ivy Tech

Allowing Ms. Hively to amend her Complaint will not cause undue delay or prejudice Ivy Tech. In response to Ivy Tech's claim that Ms. Hively waited three years to pursue a retaliation claim, Ms. Hively raises these two points: 1) Ms. Hively was assured by Ivy Tech at the time that she was *not* singled out as a result of her decision to file the EEOC charge; and 2) she was not permitted to go forward at all on the merits until remand of her case in the summer of 2017 by the en banc Seventh Circuit.

Until production by Ivy Tech at the end of 2017 of internal emails which cast doubt on Ivy Tech's original justification for Ms. Hively's re-credentialing, Ms. Hively relied, as Ivy Tech

intended, on the June 26, 2014 Letter. Ivy Tech also claimed that Ms. Hively has given no justification for waiting until after the deadline for amending her Complaint to serve discovery. However, it is clear from the explanation above that counsel was diligent after its admission pro hac vice and during the aftermath of Hurricane Harvey to serve its First Set of Requests for Production and Interrogatories. Further, Ivy Tech fails to mention its own delay in responding to Ms. Hively's discovery requests—a delay that partially contributed to weeks of additional delay.

Even if Ms. Hively's delay was undue, denial under Rule 15 requires an additional showing of prejudice to Ivy Tech. *J.P. Morgan Chase Bank, N.A. v. Drywall Service & Supply Co., Inc.*, 265 F.R.D. 341, 347 (N.D. Ind. 2010) (“[u]ndue delay alone is insufficient to support a denial of leave to amend.”). Ivy Tech's attempt to make this showing falls short. Specifically, Ivy Tech claims that allowing Ms. Hively to amend her complaint would be unduly prejudicial because Ivy Tech has already completed written discovery, and Ms. Hively's deposition would need to be reopened. Ivy Tech relies on *Round v. Majestic Start Casino, LLC* for support; however, its reliance on *Round* is misleading. No. 2:15-CV-425-JVB-PRC, 2017 WL 5592856, at *3 (N.D. Ind., Nov. 21, 2017). First, the pro se Plaintiff in *Round* failed to file a Motion for Leave to Amend the Complaint and simply filed the Second Amended Complaint, and the Court struck the Second Amended Complaint because it had not granted the Plaintiff leave to amend. *Id.* at *1. Second, the Plaintiff in *Round* filed her Second Amended Complaint nearly a year after the discovery deadline. *Id.* The Motion to Strike Plaintiff's Second Amended Complaint at Law was granted because Plaintiff was never granted leave in the first place, and doing so would require the Court to reopen discovery. *Id.* at *5. This case is nothing like *Round*.

Here, Ms. Hively filed her Motion well ahead of the discovery cut-off of May 9, 2018, before any one was deposed in the case, and weeks before Defendant would have to serve an

expert report. Ivy Tech claims prejudice by saying it would have to re-open Ms. Hively's deposition. Ivy Tech fails to mention that it purported to keep Ms. Hively's deposition open, asserting that it needed more medical records than those produced by Ms. Hively. So Ivy Tech's statement at the deposition about keeping it open contradicts any burden it claims from having to re-open it. [See Ex. E; p.163; 13-18].

It is undisputed that Ms. Hively gave Ivy Tech notice of her motion and amended pleading before the deposition. Ivy Tech describes Ms. Hively's assertion that she provided notice well in advance of the deposition as "inaccurate." [Dkt. No. 53]. Not only did Ms. Hively file this motion and her proposed amended complaint a week before the scheduled date of her deposition, Ivy Tech prepared for and asked questions regarding her retaliation claim. Not only did Ivy Tech ask those questions, it *relied* on the answers in support of its response to Ms. Hively's motion, and in defense of its contention that Ms. Hively does not have good cause to amend her complaint. [Dkt. No. 53, at 2, 3, 4, 5, 6, 16]. Ivy Tech cannot, on the one hand, claim it is prejudiced by having to re-open Ms. Hively's deposition (which it claims is not, in any event, closed) and, on the other hand, use the answers it elicited during Ms. Hively's deposition based on questions it clearly prepared to address the retaliation claim.

2. Ms. Hively's Retaliation Claim Is Not Futile

Ms. Hively's retaliation claim is not futile. Ivy Tech relied on *Nat'l R.R. Passenger Corp. v. Morgan* to support its argument that Ms. Hively has failed to exhaust her administrative remedies. 536 U.S. 101 (2002). However, *Nat'l R.R.* addresses a different situation than the one posed today. In *Nat'l R.R.*, Plaintiff Abner J. Morgan filed a charge of discrimination and retaliation against Amtrak with the EEOC. *Id* at 105. While some of the allegedly discriminatory acts about which Morgan complained occurred within 300 days of the EEOC filing, many took place prior to that time period. *Id* at 107. The Supreme Court addressed the

timeliness of the claims that occurred *prior* to the 300-day window which was defined by the filing date of the EEOC charge. *Id.* at 106-08. The Supreme Court held that “only incidents that took place within the timely filing period are actionable.” *Id.* at 114. Morgan’s claim of retaliation in *Nat’l R.R.* was not at issue, nor were any acts which took place *after* the filing of the EEOC charge. *Id.* *Nat’l R.R.* does not address, as in this case, a situation where an individual is subject to discrimination, files an EEOC charge, and is then subject to a retaliatory adverse employment decision. For this reason, *Nat’l R.R.* should be read in conjunction (rather than in conflict) with *Luevano*.

Indeed, the Seventh Circuit’s opinion in *Luevano* is binding precedent. The Seventh Circuit addressed the issue of whether an individual must file an additional EEOC charge when an employer engages in a retaliatory adverse employment decision as a result of the first EEOC charge. *Id.* at 1030. While the facts of *Luevano* are not squarely on “all fours” with the facts of Ms. Hively’s case, *Luevano* clearly states the rule of law: “for practical reasons, to avoid futile procedural technicalities and endless loops of charge/retaliation/charge/retaliation, etc., that a plaintiff who alleges retaliation for having filed a charge with the EEOC need not file a second EEOC charge to sue for that retaliation.” *Id.* In fact, this has been the Seventh Circuit’s holding for some time. *McKenzie v. Illinois Dep’t of Transp.*, 92 F.3d 473, 482-83 (7th Cir. 1996) (holding that those retaliatory incidents that occurred after the EEOC filing “may be considered as evidence of [Plaintiff’s] retaliation claim, despite the fact that “retaliation” was not alleged in her administrative filings.”); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (superseded by statute on other grounds) (“[W]e join the other circuits that have spoken to the question in adopting the rule that a separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge.”). District courts have recently relied on

the *Leuvano* rule as well. See, e.g., *Quarles v. Merrillville Cmty. Sch. Corp.*, No. 2:16 CV 467, 2017 WL 6555445, at *2 (Dec. 22, 2017, N.D. Ind.); *Daniel v. Advocate Health Care Network*, No. 15-cv-11660, 2017 WL 4339815, at *6 (Sept. 30, 2017, N.D. Ill.).

Ivy Tech attempts to address this argument in footnote six. Indeed, Ivy Tech admits that “*Morgan* concerned discrete acts of an employer that occurred prior to filing of an EEOC charge.” However, the Seventh Circuit authority is binding precedent regardless of Eighth Circuit law. While the Eighth Circuit may hold that timing of the alleged unlawful acts is irrelevant and a plaintiff must file a separate EEOC charge for subsequent retaliatory acts, this rule is clearly not the same as the Seventh Circuit rule. Ms. Hively’s claim for retaliation arose after the charge of discrimination was filed. Ivy Tech provides no reason why the Seventh Circuit’s opinion should not apply to this court, or to Ms. Hively’s case.

III. Conclusion

For at least the foregoing reasons, Ms. Hively respectfully requests that the Court grant her Motion for Leave to Amend the Complaint.

Date: February 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document is being served to all counsel of record by first class mail, postage prepaid and electronically filing the same with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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/s/ Danielle J. Healey

Danielle J. Healey

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KIMBERLY A. HIVELY
 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF INDIANA
 SOUTH BEND DIVISION

KIMBERLY HIVELY,)
)
 Plaintiff,)
)
 vs.) CAUSE NO.
) 3:14-cv-01792-JD-HGG

IVY TECH COMMUNITY)
 COLLEGE,)
)
 Defendant.)

DEPOSITION OF KIMBERLY HIVELY
 South Bend, Indiana
 Monday, January 29, 2018

Reported by:
 JANET L. ROBBINS, CSR, RPR
 JOB NO. 135268

1 KIMBERLY A. HIVELY
 2 Q. Have you produced that document to
 3 your counsel?
 4 A. Yes, I have.
 5 Q. What else would Mr. Ledsome know
 6 about your allegations in this lawsuit?
 7 A. I don't know what else he might
 8 know.
 9 Q. You've listed him. What else do you
 10 believe he knows?
 11 A. I don't know what else he knows.
 12 Q. What about Ms. Cassidy? What do you
 13 believe Ms. Cassidy knows about your
 14 allegations in this lawsuit?
 15 A. Well, she certainly knows about the
 16 kiss incident. And, again, I don't know what
 17 else she knows.
 18 Q. Have you discussed this lawsuit with
 19 her?
 20 A. No.
 21 Q. Where does Ms. Cassidy live now?
 22 A. I have absolutely no idea.
 23 Q. When did your relationship with
 24 Ms. Cassidy end?
 25 A. 2011.

1 KIMBERLY A. HIVELY
 2 Q. I'm on Page 4 now. We've got
 3 categories of documents listed. The first one
 4 is documents regarding your employment.
 5 Have you produced all of the
 6 documents regarding your employment to your
 7 counsel?
 8 A. For the last 15 years or so.
 9 Q. So yes?
 10 A. Yes.
 11 Q. The next says, "Documents regarding
 12 Plaintiff's termination."
 13 Do you see that?
 14 A. Uh-huh.
 15 Q. How were you terminated?
 16 A. Wasn't put back on the schedule. I
 17 was never officially notified of anything,
 18 whether I was staying or going.
 19 Q. Did you inquire with Ivy Tech?
 20 A. There was dead silence.
 21 Q. Did you inquire with Ivy Tech?
 22 A. I did not. There's a lot of
 23 e-mails and the things that were being
 24 forwarded to me. I was waiting to see what
 25 they were going to do.

1 KIMBERLY A. HIVELY
 2 Q. You agree that you were informed by
 3 the campus president in June of 2014 that you
 4 were still eligible to teach ASA Math,
 5 Math 100, Math 122, and tutor, correct?
 6 A. We covered that. And my answer was
 7 yes then and it's yes now.
 8 Q. But you never reached out to
 9 Ms. Waltz-Freel or the campus president in
 10 regard to those classes?
 11 A. No. If you read that, it said
 12 that -- I mean, they implied that they would
 13 contact me; they were considering me. So there
 14 was the implication that I would be contacted
 15 one way or another. I was not.
 16 Q. Do you have any document that says
 17 you were non-renewed by Ivy Tech?
 18 A. Again, there was complete silence.
 19 There was no "yes" or no "no."
 20 Q. So no, you don't have any document?
 21 A. Correct.
 22 Q. Have you produced all documents
 23 which you allege regard your termination?
 24 A. Yes.
 25 Q. As you look through the rest of

1 KIMBERLY A. HIVELY
 2 these categories of documents, have you
 3 produced all documents in your possession or
 4 control to your counsel in regard to these
 5 subjects?
 6 A. Yes.
 7 Q. If you flip to the next section, it
 8 has to do with damages. I just want to make
 9 sure I'm understanding.
 10 You don't have a damage number,
 11 right?
 12 A. Correct.
 13 Q. That's being determined by your
 14 expert?
 15 A. Yes.
 16 MR. BARTROM: This next one is 35.
 17 (Exhibit 35 was marked for
 18 identification.)
 19 MR. BARTROM: Why don't we take a
 20 break so she can get some water.
 21 (Whereupon, a recess was had
 22 from 2:59 p.m. to 3:18 p.m.)
 23 BY MR. BARTROM:
 24 Q. Ms. Hively, we're back on the
 25 record.

1 KIMBERLY A. HIVELY
 2 A. That's correct.
 3 Q. Does that mean that they existed at
 4 one time and they no longer exist?
 5 A. No. It means I don't keep them.
 6 Q. Okay. Request No. 13 on Page 9, it
 7 seeks documents that support your mental and
 8 psychological, anguish damages and allegation.
 9 And you say that you have been to medical
 10 providers.
 11 Which medical providers?
 12 A. Let's see. Dr. Husband, Dr. Miller,
 13 Dr. Dave Patel. I had an MRI at the MRI
 14 Center. I provided a list of all the doctors.
 15 Q. So Dr. Husband?
 16 A. Yes.
 17 Q. What was the second doctor?
 18 A. Miller.
 19 Q. What was the third doctor?
 20 A. Dave Patel.
 21 Q. And you went to the MRI Center?
 22 A. Yes. Also Dr. Farabaugh.
 23 Q. How do you spell that?
 24 A. F-A-R-A-B-A-U-G-H, I think.
 25 Q. Have you gone to Dr. Husband and

1 KIMBERLY A. HIVELY
 2 requested your medical documents?
 3 A. My attorneys have, yes.
 4 Q. Have you gone to Dr. Miller and
 5 requested your medical documents?
 6 A. My attorneys have, yes.
 7 Q. Have you gone to Dr. Patel and
 8 requested your medical documents?
 9 A. My attorneys have, yes.
 10 Q. Have you gone to the MRI Center and
 11 requested your medical documents?
 12 A. My attorneys have, yes.
 13 Q. Have you gone to Dr. Farabaugh and
 14 requested your medical documents?
 15 A. My attorneys have, I believe.
 16 Q. Just to the extent we don't have
 17 those documents, we need to keep the deposition
 18 open as to those.
 19 So Request No. 14 asks you to
 20 provide all documents that support your
 21 allegations of discrimination.
 22 Have you given your counsel all
 23 documents that you claim support your
 24 allegations in this case?
 25 A. Yes.

1 KIMBERLY A. HIVELY
 2 MR. BARTROM: The next one is 37.
 3 (Exhibit 37 was marked for
 4 identification.)
 5 BY MR. BARTROM:
 6 Q. I'm not sure if you've seen this
 7 document. As you can see from the top, this is
 8 from your counsel to me and my co-counsel. And
 9 these are supplemental responses via e-mail to
 10 your initial RFP, request for production, of
 11 documents.
 12 My questions are in regard to
 13 Interrogatory No. 10 near the bottom. You are
 14 alleging mental and emotional distress in this
 15 case, correct?
 16 A. Yes.
 17 Q. Other than your alleged frequent
 18 severe migraines, are you alleging -- go ahead.
 19 Sorry.
 20 Other than your alleged frequent
 21 severe migraines, are you alleging any other
 22 physical ailments as a result of your
 23 separation of employment with Ivy Tech?
 24 A. Neck and shoulder pain. That's
 25 about it --

1 KIMBERLY A. HIVELY
 2 Q. Okay.
 3 A. -- that I can think of.
 4 Q. Other than the alleged frequent and
 5 severe migraines, are you alleging anything
 6 else what's caused by the discrimination in --
 7 in the alleged discrimination in you not
 8 getting the jobs that you applied for?
 9 A. Not that I can recall.
 10 Q. And you would agree that you've had
 11 neck and shoulder pain before you separated
 12 employment with Ivy Tech, right?
 13 A. Yes, however, not in the same way.
 14 Q. How is it different?
 15 A. More frequent, more severe.
 16 Q. So when you say it was more
 17 frequent, how?
 18 A. In prior years I would see the
 19 chiropractor for at most six times a year.
 20 Q. Okay.
 21 A. And that would be probably a lot for
 22 one year. I have an every-other-week
 23 appointment with him now.
 24 Q. Why do you believe that the
 25 frequency of your chiropractor visits is

1 KIMBERLY A. HIVELY
 2 Q. Okay. What did you wear to that
 3 interview?
 4 A. A polo and khakis.
 5 Q. And the comment reported to you was
 6 that it would have been preferable if you had
 7 worn a skirt?
 8 A. Yes.
 9 Q. Any other comments reported to you?
 10 A. Not that I can recall.
 11 MS. WHEATLEY: Can I have just one
 12 more minute and we'll be back?
 13 MR. BARTROM: Sure.
 14 (Whereupon, a recess was had
 15 from 4:57 p.m. to 5:00 p.m.)
 16 BY MS. WHEATLEY:
 17 Q. Ms. Hively, today you were presented
 18 with exhibits that were tens and twenty -- some
 19 of them were over 100 pages?
 20 A. Yes.
 21 Q. To be sure about whether -- the
 22 documents regarding your medical claims, to be
 23 certain that each one or each line item related
 24 to this case, you would have to review it more
 25 carefully line by line?

1 KIMBERLY A. HIVELY
 2 A. That is correct. I saw Dr. Miller
 3 for more than just migraines.
 4 Q. And to clarify, you don't know all
 5 of the evidence that your attorneys have
 6 collected with respect to your retaliation
 7 claim?
 8 MR. BARTROM: Objection, leading.
 9 BY MS. WHEATLEY:
 10 Q. Is that correct?
 11 A. That is correct.
 12 Q. Do you know all of the evidence that
 13 your attorneys have collected with respect to
 14 the recredentialing process?
 15 A. No.
 16 Q. To be able to come to a decision
 17 about a potential settlement, you would need to
 18 discuss in-depth with your attorneys the
 19 contours of what that potential settlement may
 20 look like, correct?
 21 MR. BARTROM: Objection, leading.
 22 THE WITNESS: That is correct.
 23 MS. WHEATLEY: I'll pass the
 24 witness.
 25 MR. BARTROM: Just a couple of

1 KIMBERLY A. HIVELY
 2 questions.
 3 FURTHER EXAMINATION
 4 BY MR. BARTROM:
 5 Q. Just a moment ago you testified
 6 about an interview that you had in 2013 or '14,
 7 is that right?
 8 A. Right.
 9 Q. For an administrative position, is
 10 that right?
 11 A. Yes.
 12 Q. And following that interview, you
 13 learned from a third party -- a third party
 14 reported to you that someone else said
 15 something about your appearance in the
 16 interview?
 17 A. Yes.
 18 Q. Is that right?
 19 A. Yes.
 20 Q. Who's the third party?
 21 A. Beth Green.
 22 Q. And who was the alleged speaker?
 23 A. That I don't know who told her.
 24 Q. I want to make sure I understand the
 25 testimony here. Beth spoke to an unknown third

1 KIMBERLY A. HIVELY
 2 person, right?
 3 A. Yep.
 4 Q. And then Beth's story after speaking
 5 to that unknown third person was --
 6 A. The information that I got.
 7 Q. You have no independent way of
 8 knowing whether that's true or not, right?
 9 A. I do not.
 10 MR. BARTROM: That's all I have.
 11 THE WITNESS: Beth might know,
 12 however.
 13 MR. BARTROM: Okay.
 14 THE COURT REPORTER: Signature?
 15 MS. HEALEY: We will read and sign.
 16 (Whereupon, at 5:03 p.m. the
 17 deposition was concluded.)
 18
 19
 20
 21
 22
 23
 24
 25

KIMBERLY A. HIVELY

Subscribed and sworn to before me
 this day of 2018.

Exhibit F



INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
State Form 52928 (07-08)
10 N. SENATE AVE
INDIANAPOLIS, IN 46204-2277
CONFIDENTIAL - RECORD PURSUANT TO IC 4-1-6, IC 22-4-15 B



052928011



10/15/2014

IVY TECH COMMUNITY COLLEGE OF INDIANA
C/O TALX UCXEXPRESS
3455 MILL RUN DR
HILLIARD OH 43026

RE: KIMBERLY A HIVELY
SSN: XXX-XX-5997
Issue: 47527919
BYE: 09/05/2015
EmployerAcct #: 73357



Dear IVY TECH COMMUNITY COLLEGE OF INDIANA Representative:

The former employee named above has filed a claim for unemployment benefits. We are requesting information regarding an issue of eligibility in order to make a decision about the claimant's eligibility for unemployment benefits.

Failure to provide information regarding this issue by 10/22/2014 will result in a decision being made with the available information. For the best customer service, upon completion fax to (317) 633-7206.

IF YOU WILL NOT PROVIDE INFORMATION REGARDING THIS ISSUES, PLEASE PUT AN "X" HERE

The following questions pertain to week ending 10/18/2014.

First day worked: 12/12/00 Last day worked: 08/10/14

Date next season/term begins: 01/12/15

Did the claimant have reasonable assurance of employment for the next school year or term? YES NO
If yes, explain in detail.

After closer review of claimant's credentials it was determined that claimant is credentialed to teach fewer classes than previously
Did the claimant work during the previous school year or term? YES NO

Name and job title of person who made the job offer.
Provide a description of type of work and duties.

Adjunct instructor

Weekly work schedule: Days and hours: varies Starting wage: \$ 32.90 per hour

If the work offer was made in writing, a copy must be attached.



72246579 ACFUFUBQ0 UI 09/05/2015 (1)



052928012

If the position offered to the claimant was not similar to the work performed during the previous season/term, explain in detail.

Was the individual offering the position to the claimant authorized to do so? YES NO

Did the claimant accept the offered position? YES NO

If the claimant refused an offer of employment, what reason did the claimant provide for refusing the offer?

NO

Additional Comments: Claimant was not offered teaching assignment for Fall 2014. due to credentialing requirements

Print Name: Deb Schmitt Title: Director HR Date: 10/21/14

Signature: D. Schmitt Telephone #: (574) 289-7001 Ext.: 5361

Thank you for providing this information.
Sincerely,

DWD Adjudication Center
800-891-6499

For the best customer service, fax response to (317) 633-7206; otherwise mail to:
INDIANA DWD - CLAIMS ADJUDICATION CENTER
10 N SENATE AVE
INDIANAPOLIS IN 46204-2277



72246579 ACFUFWBQ2 UI 09/05/2015 (2)

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

KIMBERLY A. HIVELY

Plaintiff,

v.

CAUSE NO. 3:14-CV-1791-JD-MGG

IVY TECH COMMUNITY COLLEGE,

Defendant.

PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of Indiana (the "Local Rules"), Plaintiff Kimberly Hively hereby requests that Defendant Ivy Tech Community College ("Ivy Tech") produce the following Documents and things that are in its possession, custody, or control. Production shall take place within thirty (30) days of service at the offices of Fish & Richardson P.C., located at 1221 McKinney Street, Suite 2800, Houston, TX 77010.

DEFINITIONS

1. "Plaintiff" means Kimberly A. Hively ("Kim Hively").
2. "Defendant," "Ivy Tech," "you," or "your," means Ivy Tech Community College of Indiana, predecessor and successor entities, including past and present officers, administrators, directors, professors, deans, employees, agents, consultants.
3. The term "Documents" is defined to mean all original writings of any kind and all non-identical copies thereof in the actual or constructive possession, custody, or control of the Defendant, Ivy Tech, regardless of where located. The term "Documents" also includes, but is not limited to, writings, contracts, records, reports, files, tape recordings, correspondence, Communications, summaries, notes (including summaries or notes of conversations), diaries, letters, telegrams, memoranda, drawings, graphs, charts, photographs, phono-records, information stored electronically and other data compilations from which information can be obtained, and all other Documents contemplated by the Federal Rules of Civil Procedure, of every kind and description, in Ivy Tech's actual or constructive possession, care, custody, or control. In any case where the original or non-identical copy is not available, the term "Documents" includes an

identical copy of an original or a copy of a non-identical copy. Any document bearing notations, markings, or writings of any kind different from the original shall be treated as an original document.

4. “Communication” means the transmittal of information in the form of facts, ideas, inquiries, or otherwise.

5. “Person” means natural Persons, partnerships, corporations, associations, and any other legal entities and units thereof.

6. “Concerning,” “relate,” “relating to,” “refer,” and “referring to” mean mentioning, describing, discussing, memorializing, concerning, consisting of, containing, evidencing, comprising, analyzing, reflecting, depicting in any way, directly or indirectly, the subject matter of the request, including Documents and things alluding to, responding to, concerning, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, reflecting, analyzing or constituting, directly or indirectly, the subject matter of the request.

7. “Thing(s)” means any tangible item, and shall be construed as broadly as possible under the Federal Rules of Civil Procedure.

8. Any word written in the singular herein shall be construed as plural or vice versa when necessary to facilitate the response to any request.

9. The words “or,” “and,” “all,” “any,” “each,” “including,” and similar words of guidance are intended merely as such and should not be construed as words of limitation. The words “and” and “or” are to be construed both conjunctively and disjunctively, and the words “and,” “or,” “all,” “any,” and “each” shall include each other whenever possible to expand, not restrict, the scope of the request. The word “including” shall not be used to limit any general category or description that precedes the word.

10. Any pronoun shall be construed to refer to the masculine, feminine, or neutral gender, whichever is most appropriate.

INSTRUCTIONS

1. These requests shall apply to all Documents in Ivy Tech’s actual or constructive possession, custody, or control including, by way of example, but not limited to documents in possession of its agents and employees, where it has a right to obtain the document.

2. All Documents requested are to be produced in the same file or other organizational environment in which they are maintained. For example, a Document that is part of a file, docket, or other grouping, should be physically produced together with all other Documents from said file, docket, or grouping in the same order or manner of arrangement as the original. File folders with tabs or labels identifying Documents should be produced intact with such Documents. Alternatively, as to each Document produced in response hereto, Ivy Tech shall identify the request and where applicable, the request number, in response to which the Document is being produced.

3. Where an objection is made to a discovery request, state all grounds upon which the objection is based and, if applicable, the extent to which the discovery request is nonetheless being responded to.

4. If no Documents are responsive to a particular request, Ivy Tech is to state that no responsive Documents exist.

5. If attorney-client privilege, work product privilege doctrine, or other privilege or immunity is asserted as an objection to producing any requested document or thing, or if any document or thing is not produced in full, produce the document or thing to the extent the request for production is not objected to, and in doing so state the following: (a) the specific ground(s) for not producing the document or thing in full; (b) the bases for not producing the document or thing in full; and (c) all other information required to be disclosed by Federal Rule of Civil Procedure 26(b)(5)(A).

6. Unless otherwise indicated, these Requests refer to the time(s), place(s) and circumstance(s) of the occurrence(s) mentioned or complained of in the pleadings and the time from years 2000 to 2015.

7. The term, “jobs Kim Hively applied for,” includes the following:

- a. Faculty Mathematics: Applied for 8-24-2009
- b. Faculty ASA Mathematics: Applied for 3-29-2010
- c. Faculty Life Skills/Student Success: Applied for 6-16-2011
- d. Academic Advisor: Applied for: 7-30-2013
- e. Faculty co-requisite Mathematics– ASA: 11-25-2013
- f. Mathematics Faculty: 6-5-2014

8. Pursuant to Federal Rule of Civil Procedure 26(e), these requests are of a continuing nature. If at any time during the pendency of this This Action, Ivy Tech acquires possession, custody, or control of any additional Documents or information responsive to these requests, Ivy Tech shall promptly furnish such additional Documents or information to counsel for Hively.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1:

All documents concerning, referring, mentioning, and/or describing Kim Hively.

REQUEST FOR PRODUCTION NO. 2:

All documents concerning, referring, and/or describing Catherine Cassidy from 2008-2014.

REQUEST FOR PRODUCTION NO. 3:

All documents and communications concerning, describing, referring, or relating to the job qualifications for employment, job descriptions and duties, or job requirements for all jobs Kim Hively applied for at Ivy Tech.

REQUEST FOR PRODUCTION NO. 4:

All documents and communications describing, concerning, or relating to the job qualifications for employment, job description and duties, or job requirements for instructors, adjunct professors, or professors in the math department at Ivy Tech.

REQUEST FOR PRODUCTION NO. 5:

All documents regarding, communicating, or relating to formal or informal policies, practices, rules, procedures, or standards for employee conduct or discipline, including but not limited to manuals, employment, hiring, and promotion procedures.

REQUEST FOR PRODUCTION NO. 6:

Any resumes, applications, and/or other materials regarding or referring to applicants Ivy Tech considered, for jobs Kim Hively applied for at Ivy Tech between 2008 to present, and job performance and compensation (e.g., salary and benefits) of those hired.

REQUEST FOR PRODUCTION NO. 7:

All documents describing Ivy Tech's internal formal or informal procedures and standards, guidelines, criteria, and policies for applications (including interviews and hiring), applicable to instructors, adjunct professors, professors, or for jobs Kim Hively applied for at Ivy Tech from 2008-2014.

REQUEST FOR PRODUCTION NO. 8:

All documents describing Ivy Tech's hiring and credentialing policies for Ivy Tech (South Bend campus)'s, instructors, adjunct professors, or professors.

REQUEST FOR PRODUCTION NO. 9:

All documents describing, concerning, or regarding credentials, applications, performance reviews, evaluations, or financial or profit analyses of each of Ivy Tech's adjunct and full-time math professors and instructors, and the math department.

REQUEST FOR PRODUCTION NO. 10:

All documents related to the facts included in your Answer(s), including but not limited to your Affirmative Defenses, to any of Kim Hively's Complaint(s).

REQUEST FOR PRODUCTION NO. 11:

All documents related to Kim Hively's EEOC complaint.

REQUEST FOR PRODUCTION NO. 12:

All documents describing, concerning, or regarding any reduction in force at Ivy Tech's South Bend campus.

REQUEST FOR PRODUCTION NO. 13:

All documents describing, concerning, or regarding Ivy Tech's formal or informal non-discrimination policies, practices, procedures, guidelines, or standards, as well as their enforcement in any way.

REQUEST FOR PRODUCTION NO. 14:

All documents describing, concerning, or regarding Ivy Tech's formal or informal policies, practices, procedures, or standards, as well as their enforcement in any way, concerning public displays of affection on Ivy Tech's grounds or, for employees, during their work hours for Ivy Tech.

REQUEST FOR PRODUCTION NO. 15:

All documents describing, concerning, or regarding Ivy Tech's process, formal or informal, for recording and addressing formal or informal complaints regarding improper employee behavior, in anyway, conduct, or performance.

REQUEST FOR PRODUCTION NO. 16:

All documents concerning any investigations, discipline, or formal or informal counselling or action taken regarding public displays of affection on Ivy Tech's grounds or, for those involving employees, during their work hours.

REQUEST FOR PRODUCTION NO. 17:

Documents which describe all functions of the position(s) held by Katherine Waltz-Freel while working for Ivy Tech, and the duties of those positions.

REQUEST FOR PRODUCTION NO. 18:

All documents regarding, relating to, or concerning Katherine Waltz-Freel's job performance for each position she held.

REQUEST FOR PRODUCTION NO. 19:

All documents concerning, describing, or referring to the compensation (e.g., salary and benefits), and any subsequent increases in compensation for the positions that Kim Hively applied for with Ivy Tech from 2007-2014.

REQUEST FOR PRODUCTION NO. 20:

All documents that Ivy Tech reviewed in preparing its Answer(s) (including Affirmative Defenses), initial disclosure, and any other pleading, motion, interrogatories, or other discovery response.

REQUEST FOR PRODUCTION NO. 21:

Any documents provided to or by any consultant or expert, including but not limited to documents regarding communications with any consultant or expert.

REQUEST FOR PRODUCTION NO. 22:

All documents regarding the June 26, 2014 letter from Dr. Janet Evelyn, including any document referring or relating to the decision to send the letter, or the contents of the letter (e.g., drafts and comments).

REQUEST FOR PRODUCTION NO. 23:

All documents sufficient to show compensation (including benefits and their value) for each adjunct professor, instructor, and professor at Ivy Tech South Bend campus.

REQUEST FOR PRODUCTION NO. 24:

Documents concerning, describing, summarizing, or referring to any investigation conducted by Ivy Tech, referring to any formal or informal allegations of discrimination or harassment, on the basis of sex (including sexual orientation and identification) in the workplace, employment, hiring, discharge, or promotion.

Date: September 22, 2017

Respectfully submitted,

FISH & RICHARDSON P.C.

/s/ Raisa Ahmad

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healey@fr.com

TBA No. 09327980

Karrie E. Wheatley

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Houston, Texas 77010

Telephone: 713-654-5300

Facsimile: 713-652-0109

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served on September 22, 2017, via email to the following:

Jason T. Clagg (24123-02)

jason.clagg@btlaw.com

Adam L. Bartrom

adam.bartrom@btlaw.com

BARNES & THORNBURG LLP

888 South Harrison Street, Suite 600

Fort Wayne, Indiana 46802

Telephone: (260) 423-9440

Facsimile: (260) 424-8316

ATTORNEYS FOR DEFENDANT

IVY TECH COMMUNITY COLLEGE

/s/ Raisa Ahmad

Received

08/2014

SEP 14 2011

Evaluation of qualifications of faculty candidate
Ivy Tech Community College, North Central Region, Academic Affairs

Academic Affairs

Candidate: Kim Hively C#: _____

Campus. Campus initiating this request. Circle one: Elkhart, Warsaw or South Bend.

This candidate meets our credentialing criteria and is recommended for approval to teach either (a) all courses in a specific program or (b) only the specific courses listed below. Check one:

Program level approval. Recommend approval of this candidate to teach all courses, at all levels, in one specific instructional program or academic discipline.

Specific discipline or program: all math

Courses only approval. Recommend approval to teach only the following specific courses:

Candidate's background. The specific education, degrees, certifications, experience, portfolio or background of this candidate that satisfy our minimum credential requirements are:

MLP - IUSB has 46 grad credits math
26 are 100-level & above

Attached. Copies of this candidate's credentials demonstrating compliance are attached.

This candidate meets our credentialing standards as specified in our current APPM 3.8

Initiated, evaluated and recommended by: _____ Date: _____

Reviewed and recommended by Program Chair: _____ Date: _____

Reviewed and recommended by School Dean: J. Fall Date: 9/8/11

Approved by Vice Chancellor Academic Affairs: Full Date: 2/20/11

Limitations on approval, if any: _____

Signed form copied to initiator, Chair, Dean, Vice Chancellor and Human Resources. ✓ 2