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

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| KIMBERLY A. HIVELY, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | CAUSE NO. 3:14-CV-1791-JD-MGG |
| | ) | |
| IVY TECH COMMUNITY COLLEGE, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**ORDER**

On January 22, 2018, Plaintiff, Kimberly Hively ("Hively") filed her Motion for Leave to Amend the Complaint. On February 5, 2018, Defendant Ivy Tech Community College ("Ivy Tech") filed its objections and response to Hively's motion. Plaintiff's motion became ripe on February 12, 2018, when Hively filed her reply.

## I. RELEVANT BACKGROUND

On August 15, 2014, Hively initiated this action by filing her original, *pro se*, complaint raising discrimination claims under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-5) and for equal rights under law (42 U.S.C. § 1981). [DE 1]. The claims in the complaint arise out of Ivy Tech's alleged denial of full time employment and promotions to Hively, an adjunct professor, based on her sexual orientation.

Hively alleges a pattern of discriminatory behavior that began in 2008 when she started applying for full time positions with her then-current employer, Ivy Tech. Hively alleges that she "consistently received high performance reviews as an adjunct professor,

as well as positive student-evaluations." [DE 37 at 2]. Furthermore, Ivy Tech awarded Hively the 2011-2012 Adjunct Faculty Award for Excellence in Instruction. Despite these positive reviews, Ivy Tech turned Hively down for at least six (6) full time positions and never hired her on a full-time basis.

Hively filed a complaint with the EEOC on December 10, 2013, asserting that Ivy Tech's decision not to promote her was due to her sexual orientation. In the spring of 2014, Hively applied for another full time position with Ivy Tech. Subsequently, in June of 2014, Ivy Tech purportedly "singled out [Hively] for a rigorous credentialing review." [DE 52 at 3]. Ivy Tech had credentialed Hively in late 2011 after she earned her master's degree. During the 2011 review, her coursework allegedly satisfied the Ivy Tech requirements for teaching all math courses. However, she was only credentialed for certain math courses in 2014 because some of her grades in her graduate coursework were deemed deficient. Hively asserts that both credentialing reviews examined the same record yet reached different conclusions.

Taking exception to the results of the second credentialing review, Hively apparently informed Ivy Tech that she had been singled out for re-credentialing in 2014. In response, Ivy Tech's campus president, Dr. Janet Evelyn, sent Hively a letter on June 26, 2014, stating that all faculty credentialing was being reviewed due to restructuring occurring in the academic units. Dr. Evelyn noted that Hively was also re-credentialed because she was applying for a full-time faculty position at the same time.

Subsequent to the 2014 credential review, Ivy Tech did not renew Hively's adjunct teaching contract. On August 15, 2014, Hively filed her original complaint in this action

alleging that Ivy Tech discriminated against her by denying her full time employment and promotion based on her sexual orientation. Neither Hively's Charge of Discrimination nor her original complaint included any claims of retaliation. On March 4, 2015, the district court dismissed Hively's original complaint and she appealed. On April 4, 2017, the Seventh Circuit reversed and remanded the case to this Court for further proceedings.

On June 28, 2017, this Court issued its Rule 16(b) Scheduling Order, which stated that "[a]mendments to the pleadings or joinder of parties without leave of court shall be accomplished by **July 26, 2017**." [DE 29 at 2]. The Court continued, stating that "[a]fter July 26, 2017, the parties may only amend the pleadings or join parties with leave of Court pursuant to Fed. R. Civ. P. 15(a)(2), (b)." [DE 29 at 2]. On July 26, 2017, Hively, still proceeding *pro se*, filed an unopposed motion for an extension of time to submit initial disclosures, amend pleadings, and join parties, which the Court granted extending "the deadline for amendments to the pleadings or joinder of parties without leave of court" until August 25, 2017. [DE 31 at 1]. On August 9, 2017, counsel entered their appearance for Hively after which Hively timely filed her first amended complaint on August 25, 2017.

On September 22, 2017, Hively served her First Set of Requests for Production on Ivy Tech followed by her First Set of Interrogatories on October 2, 2017. Hively's Request No. 9 asked Ivy Tech to produce "[a]ll 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." [DE 54-3 at 5]. On or around November 22, 2017, Ivy Tech served Hively with its first discovery responses followed by a second batch of responses on or around December 22, 2017. Hively asserts that no evidence of a credentialing review of any other faculty members was provided in either batch.

On January 22, 2018, Hively filed the instant motion to amend her complaint. In support of her motion, Hively cites to facts including that (1) she believed Dr. Evelyn, at the time of her June 2014 letter, that the credentials of the entire faculty were being reviewed; (2) she had no reason to doubt the veracity of Dr. Evelyn's letter until new evidence came to light in the discovery process; (3) Ivy Tech produced nothing in response to her Request No. 9 for evidence that any other adjunct or faculty member underwent re-credentialing in 2014; and (4) Ivy Tech has presented inconsistent rationales for Hively's loss of employment in August 2014. Hively notes that Ivy Tech reported to the Indiana Department of Workforce Development in 2014 as part of her unemployment application that her employment was discontinued due to credentialing requirements ("the credentialing rationale") while it currently claims that Hively chose to walk away from her adjunct position ("the walk-away rationale"). Hively then notes that sometime between December 22, 2017, and January 22, 2018, her attorney found emails, that taken together with the above facts, implied the 2014 credentialing review was retaliatory.

On January 29, 2018, Ivy Tech deposed Hively and questioned her regarding the newly alleged retaliation. Hively testified that she did not know the scope of the 2014

credentialing audit, nor why it took place. She also testified as to having no evidence the credentialing audit was instituted because of her sexual orientation or EEOC charge.

On February 5, 2018, Ivy tech filed its response in opposition to Hively's instant motion. Ivy Tech first contends that Hively has not demonstrated the requisite good cause under Fed. R. Civ. P. 16(b)(4) to amend her complaint after the Court's deadline to amend the pleadings expired on August 25, 2017. Second, Ivy Tech contends that Hively's deposition testimony establishes that she does not have a good faith basis for bringing her proposed retaliation claim. Third, Ivy Tech argues that Hively's motion should be denied under the Rule 15(a)(2) amendment standard because she delayed unduly in seeking to add the retaliation claim, additional discovery would be required causing undue prejudice, and the retaliation claim is futile due to her failure to exhaust her administrative remedies on retaliation.

## II. LEGAL ANALYSIS

Motions to amend pleadings can be a two-step process. Generally, Fed. R. Civ. P. 15(a)(2) governs and provides that leave to amend a pleading shall be freely given when justice so requires. *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011); *see also Johnson v. Cypress Hill*, 641 F.3d 867, 872 (7th Cir. 2011). However, when a court's Rule 16(b) Scheduling Order includes a deadline for filing amended pleadings, the Rule 16(b)(4) heightened good cause standard may need to be considered before the Rule 15(a)(2) requirements. *Alioto*, 651 F.3d at 719. Under Fed. R. Civ. P. 16(b)(4), "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The good cause standard of Rule 16 "primarily considers the diligence of the party seeking

amendment." *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). Good cause exists when a movant shows that "despite [her] diligence the time table could not have reasonably been met." *Tschantz v. McCann*, 160 F.R.D. 568, 571 (N.D. Ind. 1995). Once good cause is established, the court can then turn to the requirements for amended pleadings in Rule 15.

**A. Fed. R. Civ. P. 16(b)(4) Good Cause Standard**

Ivy Tech argues that the Rule 16(b)(4) good cause standard must be considered here because the deadline that the Court established for the amendment of pleadings passed on August 25, 2017, almost five months before Hively filed the instant motion. Contrary to Ivy Tech's assertion, however, the good cause standard is not implicated here. The Court did not set a final deadline for the amendment of pleadings in its Rule 16(b) Scheduling Order as Ivy Tech contends. Instead, the Scheduling Order stated that, "[a]mendments to the pleadings or joinder of parties without leave of court shall be accomplished by **July 26, 2017**," and that "[a]fter July 26, 2017, the parties may only amend the pleadings or join parties with leave of Court pursuant to Fed. R. Civ. P. 15(a)(2), (b)." [DE 29 at 2] (emphasis in original). As a result, when the Court granted Hively's motion to extend the amended pleadings deadline to August 25, 2017, the Court only extended the time within which the parties could amend their pleadings ***without leave of court*** without putting any time limit on when a party could seek leave of Court to amend a pleading. [*See* DE 31]. Therefore, Hively's instant motion is timely and must only satisfy the requirements of Fed. R. Civ. P. 15(a)(2) as intended by the Court Scheduling Order.

**B. Good Faith Basis**

Ivy Tech also contends that Hively does not have a good faith basis to bring her retaliation claim. Specifically, Ivy Tech argues that Hively's instant motion includes no evidence to support her factual allegations. Indeed, Hively testified at her deposition that she lacked knowledge as to whether other faculty members' credentials were reviewed in 2014, why the audit took place, the scope of the audit, or even who ordered the audit. Additionally, Hively testified that she did not, herself, have evidence that the credentialing audit was instituted because of her EEOC charge. Ivy Tech argues that Hively's lack of personal knowledge regarding the credentialing audit and her lack of evidence that the audit was instituted because of her EEOC charge reveal that Hively does not have a good faith basis to bring her proposed retaliation claim.

Hively responds by claiming that although she lacks personal knowledge, she has recently identified the following evidence through discovery that has led her to infer that Ivy Tech retaliated against her. First, she cites the lack of evidence produced by Ivy Tech in response to her discovery requests to support its assertion that other faculty members had their credentials audited. Second, she cites a purported discrepancy between the "walkaway rationale" presented in Ivy Tech's response to the instant motion [DE 53 at 3] and the "credentialing rationale" presented in Ivy Tech's October 2014 letter to the Indiana Department of Workforce Development [DE 54-2 at 2]. Third, she cites Ivy Tech's internal emails, produced for the first time in November/December 2017, and argues that they imply Hively was singled out for review in 2014. Fourth, Hively explains that during her deposition on January 29, 2018, she had not yet personally received the alleged

evidence that her attorney discovered. It is on the basis of that evidence—the lack of production, discrepant rationales, and internal emails described above—that she brings her instant claim.

As such, Ivy Tech's reliance on *United States 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)); *Flomo v. Bridgestone Americas Holding, Inc.*, No. 1:06-CV-00627-WTLJMS, 2009 WL 5200541, at *2 (S.D. Ind. Dec. 22, 2009); *Medallion Prods., Inc. v. McAlister*, No. 06 C 2597, 2008 WL 4542997, at *2 (N.D. Ill. Oct. 9, 2008) is misplaced. In all of those cases, the courts appropriately disregarded factual statements unsupported by evidence. Yet none involved a lack of evidence in support of a motion to amend a complaint. Additionally, Hively did cite to evidence in support of her motion. The cited evidence may not prove retaliation, but is sufficient to create a basis for a claim that could be further developed in discovery especially with no evidence from Ivy Tech that Hively is acting in bad faith by raising the retaliation claim at this time.

**C. Rule 15(a)(2) Standard**

Under Fed. R. Civ. P. 15(a)(2), a court may deny leave to amend a complaint if there is undue delay, bad faith, dilatory motive, undue prejudice, or futility. *Guise v. BWM Mortg., LLC*, 377 F.3d 795, 801 (7th Cir. 2004). "[A]n amendment may be futile when it fails to state a valid theory of liability or could not withstand a motion to dismiss." *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992) (internal citations omitted). When considering a motion to dismiss, the court should construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all

possible inferences in her favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). In the end, "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. Emps. Int'l Union*, 284 F.3d 715, 720 (7th Cir. 2002).

Here, Ivy Tech argues Hively's amended complaint is unduly prejudicial, unduly delayed, and futile. Accordingly, Ivy Tech asks that Hively's motion be denied.

**1. Prejudice and Delay**

"The court not only may but should consider the likelihood that the new claim is being added in a desperate effort to protract the litigation and complicate the defense; its probable merit; whether the claim could have been added earlier; and the burden on the defendant of having to meet it." *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). "Undue prejudice occurs when the amendment brings in entirely new and separate claims . . . . and when the additional discovery is expensive and time-consuming." *Round v. Majestic Star Casino, LLC*, No. 2:15-CV-425-JVB-PRC, 2017 WL 5592856, at *3 (N.D. Ind. 2017).

Here, Ivy Tech first contends that Hively had sufficient information to add her retaliation claim much earlier and that her delay in initiating discovery prevented her from gathering the allegedly new evidence before the August 25, 2017, amended pleadings deadline. Based on this argument, the Court infers that Ivy Tech is accusing Hively of failing to diligently prosecute her claim and is now asking to add the retaliation claim in a desperate attempt to protract and complicate this litigation to overcome her own delay. In support, Ivy Tech points to Dr. Evelyn's June 2014 letter, which reported

that the 2014 credentialing audit was part of the academic restructuring process going on at that time. Ivy Tech then contends that Hively had Dr. Evelyn's letter in hand and so knew about the credentialing audit in August 2017 when her adjunct contract was not renewed.

While these basic facts are admittedly the starting point for a retaliation claim, they do not necessarily justify a retaliation claim on their own. Ivy Tech ignores Hively's allegations that Dr. Evelyn's letter misrepresented the scope of the audit, an allegation she was only able to make after Ivy Tech served its responses to her discovery requests in November and December 2017. Furthermore, Hively only inferred that she was singled out for the 2014 credentialing review after receiving Ivy Tech's internal emails in November or December, 2017. As such, the Court is not persuaded that Hively had all the facts in hand to justify a retaliation claim before Ivy Tech's November and December 2017 discovery responses.

Ivy Tech's allegations that Hively has not diligently prosecuted her case by seeking to amend her complaint after the Court's amended pleadings deadline and by initiating discovery after the amended pleadings deadline passed are not persuasive either. First, Hively's instant motion seeking leave to amend her complaint is timely under the Court's Scheduling Order as discussed above.

Second, nothing in the scheduling order dictated when initial discovery requests had to be made. [*See* DE 29]. It would be reasonable to expect parties to serve discovery requests at least 30 days before the discovery deadline because the Federal Rules governing the use of interrogatories, requests for production, and requests for admission

require responses within 30 days. Fed. R. Civ. P. 33(b)(2); 34(b)(2)(A); 36(a)(3). On September 22, 2017, Hively actually served her initial discovery requests on Ivy Tech about four months before the Court's original discovery deadline of January 26, 2018, more than satisfying this reasonable expectation.

Moreover, the Court's Scheduling Order left open the possibility that its case management deadlines in that order would need to be extended. Specifically, the Court acknowledged Plaintiff's intent to secure counsel and explicitly indicated its willingness to entertain a motion to extend the deadlines if counsel were to enter an appearance. [DE 29 at 1 n.1]. As such, Ivy Tech should not have been surprised that discovery was not initiated before Hively secured counsel. Additionally, Hively's new counsel promptly served the discovery requests after entering their appearance a few weeks prior to the September discovery requests.[1]

And lastly, Hively could have had the relevant discovery responses in hand by October 22, 2017, had Ivy Tech produced the responsive materials as required under the standard deadline under the Federal Rules. Whether for good reason or not, Ivy Tech's delayed responses cannot be held against Hively who timely served discovery requests in September.

Ivy Tech's reliance on non-binding authority in *Paoli v. Stetser,* No. CIV.A. 12-66-GMS-CJB, 2013 WL 2154393, at *1 (D. Del. 2013) and *Beneficial Living Sys., Inc. v. Am. Cas. Co. of Reading, PA,* No. 08-CV-01980-LTB-MJW, 2009 WL 3497780, at *2 (D. Colo. 2009) do

[1] Plaintiff's counsel also faced the challenges associated with Hurricane Harvey in August 2017 while preparing Plaintiff's initial discovery requests.

not compel a different outcome. The court in *Paoli* denied the plaintiff's motion to amend the complaint based upon delayed discovery requests and the plaintiff's failure to identify specific discovery responses that revealed a potential new complaint. 2013 WL 2154393, at *1. However, the plaintiff's motion to amend was filed after both the original and extended discovery deadline had passed and while a motion for summary judgment was pending. *Id.* at *1–*2, *7. As such, the prejudicial effect on the *Paoli* defendants was considerably different than the effect on Ivy Tech here. Notably, the *Paoli* court also referenced its knowledge of the "extensive history of the parties" and exercised its discretion noting the risk of never ending new claims. *Id.* at *7. There is no similar history that the Court is aware of between Hively and Ivy Tech to warrant special care based on the unique circumstances of the case. *See Brunt*, 284 F.3d at 720.

The facts of *Beneficial Living* are even further removed from the facts of this case. In *Beneficial Living*, the Court precluded a business loss damages claim after it was included in the plaintiff's original complaint, but was not further developed until a supplemental disclosure more than a month after the discovery deadline despite the Rule 26(a) initial disclosure requirements and the defendant's explicit requests for such information in discovery. 2009 WL 3497780, at *1. Discovery was not closed when Hively filed the instant motion and her discovery requests were not untimely as discussed above.

In sum, Hively has abided by the court-imposed deadlines for amending her complaint. She timely served her discovery requests about four months before the Court's initial discovery deadline. And she timely filed the instant motion after receiving

Ivy Tech's discovery responses in November and December 2017. Therefore, Hively's has been sufficiently diligent in prosecuting her case and in seeking to amend her complaint.

Furthermore, Ivy Tech has not established any prejudice from having to defend a new retaliation claim at this time. There is no doubt that a retaliation claim could require some additional discovery. However, Ivy Tech knew about the proposed retaliation claim before deposing Hively on January 29, 2018, and asked Hively questions about retaliation at that deposition. Moreover, Ivy Tech has not specified what additional discovery would be required if the retaliation claim were added. More interestingly, Ivy Tech has not suggested that there is any information relevant to the retaliation claim not already in its possession. Ivy Tech has not even suggested that any additional discovery could not be concluded by the discovery deadline[2], or that such discovery would be unduly expensive or time-consuming. As such, the Court sees no prejudicial effect in allowing Hively to amend her complaint, unless it would be futile.

**2. Futility**

Ivy Tech's best argument against Hively's amended complaint is that it is futile. "District courts may refuse to entertain a proposed amendment on futility grounds when the new pleading would not survive a motion to dismiss." *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 869 (7th Cir. 2013).

Ivy Tech argues that Hively failed to exhaust her administrative remedies before the EEOC and therefore cannot raise a retaliation claim here. Ivy Tech finds support in

[2] At the time Hively filed the instant motion and Ivy Tech filed its response brief, the discovery deadline was May 9, 2018, after an extension by this Court on December 21, 2017. [DE 50]. As of this date, the discovery deadline is June 11, 2018, after an extension on March 26, 2018. [DE 58].

*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *National Railroad* involved an African-American former employee who alleged racial discrimination and retaliation. The Court held that discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. *Id.* at 113. The Court reasoned that "42 U.S.C. § 2000e–5(e)(1) is a charge filing provision that specifies with precision the prerequisites that a plaintiff must satisfy before filing suit." *Id.* at 109 (internal citations omitted).

The Seventh Circuit interpreted *National Railroad* in *Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014). *Adams* involved multiple minority police officers and firefighters who were passed over for promotion as a result of an examination process with an allegedly disparate and intentional discriminatory impact on minority candidates. *Id.* at 724–25. On a motion to amend the complaint, the court held that each failure to promote was a discrete discriminatory act starting a new clock for filing a Title VII disparate impact charge. *Id.* at 730. The court explained that, under *National Railroad*, each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice for purposes of the limitations period for filing EEOC charges. *Id.* at 730 (internal citations omitted).

Ivy Tech contends that, taken together, *National Railroad* and *Adams* require that Hively's retaliation claim be denied as futile. It contends that the retaliation alleged here is a discrete act—the targeted re-credentialing of Hively—and that Hively never filed a charge for retaliation with the EEOC. Ivy Tech further contends that because the alleged

retaliation took place in 2014, Hively is now time barred from bringing a retaliation claim. The Court is not persuaded.

Ivy Tech's argument fails to adequately account for legal authority holding that plaintiffs may bring claims of retaliation that grow out of earlier charges of discrimination before the EEOC. "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." *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1030 (7th Cir. 2013).

The court in *Luevano* held that a plaintiff who suffered ongoing and repeated retaliation did not need to file a charge with the EEOC for the retaliation that occurred as a response to her original EEOC filings. *Id.* The court reasoned that any other requirement could result in an endless loop of EEOC charges and retaliations for those charges. *See id.* at 1030 (citing *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482–83 (7th Cir. 1996) (granting summary judgment for defendant where plaintiff had suffered retaliation prior to filing EEOC charge)); *see also Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981) (holding that a plaintiff could bring suit for retaliatory discharge occurring after filing EEOC charge of discrimination without first filing EEOC charge for retaliation).

*Luevano* stands on the *McKenzie-Gupta* precedent that held it "unnecessary for a plaintiff to exhaust administrative remedies prior to [bringing] a retaliation claim growing out of an earlier charge." *McKenzie*, 92 F.3d at 482–83 (quoting *Gupta*, 654 F.2d at 414). *Luevano* clarifies the rule further based upon *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) (superseded by statute on other grounds). In that case, a minority plaintiff filed an EEOC charge of discrimination and was later fired for it, but did not file

another EEOC charge before bringing suit. *Id.* at 1308–09. The court held that his retaliation claim was still valid because it grew out of his previous EEOC charge. *Id.* at 1312. Taken together, this collection of cases shows a plaintiff can sue for retaliation that occurred after filing an EEOC Charge without first exhausting her administrative remedies for the retaliation claim.

Ivy Tech attempts to distinguish *Luevano* from Hively's situation, here. The key distinguishing facts, according to Ivy Tech, are that the plaintiff in *Luevano* suffered ongoing and repeated retaliation and filed two charges with the EEOC prior to the Seventh Circuit's decision, whereas Hively filed only one EEOC charge for discrimination and alleges only one instance of retaliation based on the re-credentialing discussed above. As a result, Ivy Tech contends the alleged discrete instance of retaliation should be evaluated under the *National Railroad* precedent rather than *Luevano*.

However, such a distinction is not persuasive as some of the cases in the *McKenzie-Gupta* line of precedent are more similar to Hively's case here. Most strikingly, the relevant facts in *Malhotra* match those here very neatly. Like the plaintiff in *Malhotra*, Hively is a member of a protected class who filed one EEOC charge and was allegedly fired for doing so. Similarly, Hively and the *Malhotra* plaintiff did not suffer ongoing or repeated retaliation and did not file a separate EEOC charge for the discrete act of alleged retaliation. It follows that her claim is not time barred just as the retaliation claim in *Malhotra* was not time barred.

Furthermore, *National Railroad* does not preclude Hively from asserting her claim here. In *National Railroad*, the Supreme Court held that a plaintiff alleging retaliation

could not sue for retaliatory acts that took place more than 300 days *prior* to filing a discrimination and retaliation charge with the EEOC. 536 U.S. at 109–10. The relevant distinction in *National Railroad* is between acts more than 300 days prior to the EEOC filing and those that took place within that 300-day window. As such, *National Railroad* is not applicable in a case where the retaliation occurred *after* the plaintiff filed her discrimination charge with the EEOC. Similarly, the court in *McKenzie* denied the plaintiff's requested remedy for discrete acts that occurred before she filed her original EEOC Charge. *McKenzie,* 92 F.3d 473 at 482-83. Accordingly, *National Railroad* is consistent with the *McKenzie-Gupta* precedent and should be read to apply in different circumstances.

The reconcilability of these two precedents is further evidenced by the fact that *Luevano* was decided over a decade after *National Railroad.* The Seventh Circuit has not, in all that time, held against the *McKenzie-Gupta* rule in favor of a *National Railroad* approach. Nor has the Seventh Circuit ignored *National Railroad.* Rather, as demonstrated in *Adams*, the Seventh Circuit has applied *National Railroad* with fervor. In short, the Seventh Circuit has applied both precedents, but in different circumstances.

Hively rightly contends that the original charge of discrimination she filed with the EEOC satisfies the requirement that she seek administrative remedies prior to suing even though she did not include retaliation in her charge of discrimination. Hively filed her EEOC Charge in December of 2013 after which the alleged retaliation began with the credentialing review in the spring of 2014. While it is true that Hively did not exhaust her administrative remedies by filing an EEOC Charge for retaliation, her retaliation claim as

proposed is not time barred because it was raised alleging retaliation as a consequence of her earlier EEOC Charge of Discrimination consistent with *Luevano*, *McKenzie*, and *Gupta*.

## III. CONCLUSION

For the reasons stated above, Hively's proposed amended complaint is not futile, unduly prejudicial, unduly delayed, or presented in bad faith. Therefore, the Court **GRANTS** Hively's motion to amend. [DE 52]. Hively may separately file her Second Amended Complaint as attached [DE 52-1] no later than **May 10, 2018.**

**SO ORDERED.**

Dated this 4th day of May 2018.

s/Michael G. Gotsch, Sr.
Michael G. Gotsch, Sr.
United States Magistrate Judge