

**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.)	

**RESPONSE TO DEFENDANT IVY TECH’S NOTICE TO COURT OF EFFORTS TO
COMPLY WITH MEDIATION DEADLINE AND REQUEST FOR RELIEF**

Comes now Plaintiff Kimberly Hively, by counsel and submits her Response to Defendant’s Notice and states the following:

INTRODUCTION

When you talk with attorneys or listen to attorneys talking amongst themselves, you would hear stories of past experiences, good and bad, that involved expert witnesses, other attorneys, judges, mediators, or other people that attorneys and staff interact with on a daily basis. Attorneys talk and share with one another these experiences, opinions, impressions, and practical tips often with the expectation that the other attorneys in the conversation will keep it between themselves. This is often the case when attorneys must decide on who to agree upon for services, such as expert opinions on accident reconstruction, but even more importantly, when the parties are trying to agree on neutral services such as mediation. For reasons unknown to Plaintiff’s counsel, Defendant has violated this principle.

Defendant’s “Notice” boils down to a Motion for Extension of Time to conduct mediation. Defendant, after providing an incomplete and extremely self-serving recitation of the parties’

efforts in discovery thus far, and the conversations between the parties' counsel, asks this Court to (1) extend the mediation deadline, (2) order Plaintiff to provide dates for mediation, and (3) order that Plaintiff provide a settlement demand.

Plaintiff also requests an extension of the mediation deadline, but also requests that this Court deny the remainder of Defendant's requests, including forcing the parties to mediate with Judge Nuechterlein and ordering Plaintiff to provide an "initial settlement demand" before mediation.

BACKGROUND

Some of the other interactions amongst the parties' counsel include:

1. This action was filed by Plaintiff, *pro se*, in August of 2014. [DE 1].
2. Judge Lozano and Magistrate Nuechterlein were involved with this case's early stages, which included a dismissal for failure to state a claim and an appeal to the Seventh Circuit, where the Court of Appeals reversed the dismissal and remanded for further proceedings. [DE 1-24].
3. Danielle J. Healey applied to appear *pro hac vice* on behalf of the Plaintiff on September 8, 2017. [DE 39].
4. Dan Pfeifer was retained as local counsel and on January 16, 2018, and he appeared on behalf of the Plaintiff. [DE 51]. On May 3, 2018, Mr. Pfeifer learned that the parties had agreed to mediate with Judge Nuechterlein. (Exhibit A, May 3, 2018 email from Mr. Bartrom to Mr. Pfeifer.)
5. On May 22, 2018—more than seven weeks before the mediation deadline—Mr. Pfeifer informed Mr. Bartrom that Plaintiff wanted to re-negotiate the agreement to mediate with Judge Nuechterlein. [DE 65 at 4]. Instead of listening to Mr. Pfeifer's suggestions and engaging in renegotiations, Ivy Tech insisted there was no reason to change. Ivy Tech continued to ask Hively to recommit to a mediation date with Judge Nuechterlein despite knowing Plaintiff's concern that mediating with Judge Nuechterlein would be unproductive. [DE 65 at 4-6].
6. At a deposition on June 20, 2018, Mr. Pfeifer again spoke with Mr. Bartrom about Plaintiff's concerns and belief that mediating this case with Judge Nuechterlein would not

be as productive as possible. Mr. Pfeifer suggested that the parties consider mediating with Judge Gene Duffin on July 2 or July 3, which would have allowed the parties to still meet the court's mediation deadline.

7. On June 25, 2018, counsel for Ms. Hively sent an email to Mr. Bartrom, confirming Judge Duffin's availability for July 2 or July 3. [DE 65 at 5-6].
8. On June 27, Mr. Bartrom rejected the suggestion to mediate with Judge Gene Duffin and stated that Defendant saw the options as: a) mediating with Anthony Sites (whom neither of Plaintiff's counsel has heard of or worked with before), or b) Defendant could file a motion for an extension of time to mediate with Judge Nuechterlein, who was unavailable July 2-3.
9. On July 3, Hively attempted to work with Ivy Tech once more in selecting a mediator without court intervention, proposing Judge Shewmaker as another alternative to either Judges Duffin or Nuechterlein. But instead of working with Plaintiff to find and coordinate a mutually acceptable mediator and mediation date, Defendant filed its Notice to Court of Efforts to Comply with Mediation Deadline and Request for Relief.

ARGUMENT

Defendant's "Notice" boils down to a Motion for Extension of Time to conduct mediation. Defendant, after providing an extremely self-serving and incomplete recitation of the parties' efforts in discovery thus far, asks this Court to (1) extend the mediation deadline, (2) order Plaintiff to provide dates for mediation, and (3) order that Plaintiff provide a settlement demand.

Just as every potential juror is not fit for every trial, not every mediator is suitable for every mediated case. This has less to do with the juror or mediator's experience, so much as their prior interactions with a person's attorneys, their personality, views, and other life experiences that can shade the juror or mediator's view of the case, the parties, or the attorneys. Plaintiff's counsel, DJ Healey, agreed to mediate with Nuechterlein without knowing anything about him as a mediator. After Plaintiff retained Daniel Pfeifer to assist as local counsel, and discovery progressed, Plaintiff's counsel discussed whether Nuechterlein would be an appropriate mediator for this case.

Based on the discovery and information Mr. Pfeifer learned of through discovery, Plaintiff's counsel proposed alternative mediators whom Plaintiff believed would be better suited to be a neutral in this case, and for these specific parties and attorneys. Instead of discussing the proposed mediators or responding with other options, Defendant stuck to a mediator with whom Plaintiff did not have full confidence in for this case. Defendant's communications show that it is willing to mediate with someone other than Judge Nuechterlein, but only if Ivy Tech can choose the alternative. However, one side unilaterally picking a mediator will not result in a productive mediation because the other side will not have the necessary trust in the mediator as a "neutral" entity.

When counsel for Ms. Hively agreed to mediate with Judge Nuechterlein, counsel did so without the insight of local counsel Mr. Pfeifer, who did not join the case until months later. Mr. Pfeifer has had several cases before Judge Nuechterlein, and has had both successful and unsuccessful mediations where Judge Nuechterlein has acted as the mediator. Judge Nuechterlein was an excellent magistrate and is an extremely hard working mediator. But, given the various facts in this case and the attorneys involved, Plaintiff no longer believes that this is a good case for Judge Nuechterlein to mediate.

Defendant points out that Judge Nuechterlein was involved as the magistrate when this case was dismissed but that his rulings were mostly procedural, and therefore Judge Nuechterlein should be acceptable. If the case had not been dismissed, and Judge Nuechterlein not have retired, the case would probably have been referred to another magistrate for a settlement conference or mediation. Why? Cases are often referred to a magistrate or mediator that has had no involvement on the case so that the parties will have the trust in the mediator's neutrality. Plaintiff's counsel tried to discuss this with Defendant's counsel and negotiate a new mediator that would be suitable

to both parties but Defendant refused to budge, unless Plaintiff again agreed to use a mediator whom Defendant unilaterally picked. Plaintiff proposed both Judges Duffin and Shewmaker as alternative mediators that might be better able to assist the parties reach a settlement at mediation.

Defendant expressed a concern that neither Judges Duffin nor Shewmaker's website biographies list Title VII case experience. Judges Duffin, Shewmaker, and Scopelitis handle approximately 75% all civil mediation in the North-Central Indiana area. Judges Duffin and Shewmaker are prior judges with significant experience in civil litigation and are very highly qualified. Plaintiff's counsel, Mr. Pfeifer believes that neither of these mediators' websites are adequately or regularly updated to reflect the range of case and legal area experience they bring with them to a mediation.

Defendant's "Notice" presents this Court with the story of Defendant's difficulties in its noble quest for a mutual resolution. However, this presentation is disingenuous in light of the discovery tactics Defendant has used in this case. For example, on June 8, 2018—just three days before the close of discovery—Ivy Tech produced a key piece of evidence regarding Ms. Hively's retaliation claim. *See Exhibit B* (email discussing "the powers that be" getting rid of Ms. Hively.) Had Ms. Hively agreed to mediate in late May or early June, prior to this production, as Ivy Tech advocated, Ms. Hively would have mediated without key evidence that supports her claims.

Ivy Tech's tardy disclosure of relevant discovery has not only prejudiced Ms. Hively, but has effectively shortened the time-period to conduct meaningful mediation. As it is, Ms. Hively was prejudiced by the late disclosure because counsel for Ms. Hively had already taken both the corporate representative and personal deposition of the author of the email seen in Exhibit B, Ms. Kathryn Waltz-Freel, without knowing about or having this email. There are other examples of the discovery disputes and Defendant's tactics that would be repetitive for the purposes of this

Response, but Defendant's hands in this discovery dispute and problem scheduling mediation are nowhere as clean as Defendant presents in its Notice.

Often in litigation, there are discovery disputes that arise based on attorneys' misunderstanding one another or a request. However, when one side becomes rigid and does not budge from its position on an issue, the parties inevitably come to the Court for help. Here, Defendant has asked this Court to (1) extend the mediation deadline, (2) order Plaintiff to provide dates for mediation, and (3) order that Plaintiff provide a settlement demand. Plaintiff also asks for an extension of the mediation deadline, but requests that the parties be allowed, and Defendant encouraged, to find a new mediator. The reasons for a new mediator have been discussed above. Plaintiff has actively been offering dates on which this case could be mediated, as discussed in the Background section above, but Defendant's unwillingness to negotiate a new mediator has delayed and impeded the parties' ability to agree on a date and mediate this case.

Finally, Defendant asks this Court to order Plaintiff to provide an initial settlement demand before mediation. Defendant provides no authority or precedent for a Plaintiff to be ordered to provide a settlement demand before mediation. Moreover, Defendant has an expert report for Plaintiff's lost income damages and should be able to formulate an initial settlement offer from the report, deposition testimony, and other discovered evidence.

CONCLUSION

For the reasons discussed more thoroughly above, Plaintiff respectfully requests that this Court: (1) Grant an extension of time for mediation, (2) Order the parties to select a new and mutually agreeable mediator, or alternatively for this Court to select an appropriate neutral, and (3) Deny the remainder of Defendant's requests.

Respectfully submitted,

PFEIFER, MORGAN & STESIAK

/s/ Daniel H. Pfeifer

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed using the CM/ECF system on July 9, 2018, and sent to the following counsel of record:

Jason T. Clagg
jason.clagg@btlaw.com
Adam L. Bartrom
adam.bartrom@btlaw.com
Barnes & Thornburg LLP
888 South Harrison Street, Suite 600
Fort Wayne, IN 46802
Telephone: 260-423-9440
Facsimile: 260-424-8316

/s/ James Barth _____
James P. Barth

Raisa Ahmad

From: Bartrom, Adam <Adam.Bartrom@btlaw.com>
Sent: Thursday, May 3, 2018 11:39 AM
To: Daniel H. Pfeifer; DJ Healey; Raisa Ahmad; Karrie Wheatley
Cc: Clagg, Jason; Julia Cuson
Subject: RE: Ivy Tech/Hively: Available Mediation Dates

(former) Judge Nuechterlein is the mediator.

Adam Bartrom | Partner

Barnes & Thornburg LLP

Direct: (260) 425-4629 | Mobile: (260) 403-3330

Fax: (260) 424-8316

Atlanta | Chicago | Dallas | Delaware | Indiana | Los Angeles |

Michigan | Minneapolis | Ohio | Washington, D.C.

From: Daniel H. Pfeifer [mailto:Dpfeifer@pilawyers.com]
Sent: Thursday, May 03, 2018 6:50 AM
To: Bartrom, Adam; Healey@fr.com; ahmad@fr.com; wheatley@fr.com
Cc: Clagg, Jason; Julia Cuson
Subject: Re: Ivy Tech/Hively: Available Mediation Dates

I am available June 18 and June 19. Who is the mediator? I can not find any email identifying who the mediator is. Thanks.

From: Bartrom, Adam <mailto:Adam.Bartrom@btlaw.com>

Sent: May 02, 2018 1:15 PM

To: <mailto:Healey@fr.com> ; <<mailto:ahmad@fr.com>> <mailto:ahmad@fr.com> ; <<mailto:wheatley@fr.com>> <mailto:wheatley@fr.com> ; <<mailto:dpfeifer@pilawyers.com>> dpfeifer@pilawyers.com

Cc: Clagg, Jason <mailto:Jason.Clagg@btlaw.com>

Subject: RE: Ivy Tech/Hively: Available Mediation Dates

Counsel,

Following up on the email below, can you please let us know on the mediation dates?

Thanks much,

Adam

Adam Bartrom | Partner

Barnes & Thornburg LLP

Direct: (260) 425-4629 | Mobile: (260) 403-3330

Fax: (260) 424-8316

Atlanta | Chicago | Dallas | Delaware | Indiana | Los Angeles |

Michigan | Minneapolis | Ohio | Washington, D.C.

From: Bartrom, Adam
Sent: Tuesday, April 24, 2018 2:34 PM
To: DJ Healey (Healey@fr.com <mailto:Healey@fr.com>); 'ahmad@fr.com'; Karrie Wheatley (wheatley@fr.com <mailto:wheatley@fr.com>); dpfeifer@pilawyers.com <mailto:dpfeifer@pilawyers.com>
Cc: Clagg, Jason
Subject: Ivy Tech/Hively: Available Mediation Dates

Counsel,

My assistant reached out to the mediator's office who gave us his available dates in May and June. We cross-referenced those dates against our available dates and are able to mediate on any of the following days:

- May 21, 22, 24, 29, and 30;
- June 1, 4, 5, 12, 13, 15, 18, 19, 21, 22, 28, and 29.

Please let us know which date you would prefer so that we can get it on the calendar.

Thanks,

Adam

Adam Bartrom | Partner

Barnes & Thornburg LLP

Direct: (260) 425-4629 | Mobile: (260) 403-3330

Fax: (260) 424-8316

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From: Kathryn L. Waltz-Freel
Sent: Wednesday, July 9, 2014 6:28 PM
To: Margaret M Semmer; Janet Joan Evelyn
Cc: Deborah S. Schmitt
Subject: Kim Hively

I just wanted to let you know that I had a faculty ask me today about Kim Hively because a student had stated to her that Kim was one of the best teachers she had ever had and it was too bad the "powers that be" were getting rid of her. I responded that the situation was not anything I could talk about.

KWF