IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANAKA HUNTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No: 4:12-CV-0004-ERW**
	)	
CITY OF SALEM, MISSOURI, BOARD OF TRUSTEES, Salem Public Library, and GLENDA WOFFORD, Individually, and in her official capacity As Director of the Salem Public Library,	)	**JURY TRIAL DEMANDED**
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR EXTENSION OF TIME FOR DEFENDANTS TO DISCLOSE EXPERTS AND REPORTS, AND TO FILE A DISPOSITIVE MOTION

COME NOW Defendants Glenda Wofford and the Board of Trustees of the Salem Public Library, by and through their attorneys of record, Baird, Lighter, Millsap & Harpool, P.C., and in support of their motion to extend the time in which to disclose experts and file a dispositive motion, state as follows:

I. Extension for Depositions, Discovery, and Expert Disclosure.

Defendants believed that both parties were operating in good faith to schedule additional depositions and complete discovery in effort to proceed toward mediation. While Plaintiff claims that Defendants made no diligent effort to obtain discovery responses or deposition dates (Memorandum, p. 2.), Defendants continually contacted Plaintiff's counsel to obtain available dates for Plaintiff's deposition which previously was cancelled at Plaintiff's request due to her alleged health challenges and resulting physical inability to attend her deposition. Defendants repeatedly inquired as to the status of Plaintiff's discovery responses, and received assurances

that Plaintiff's counsel would work with Defendants counsel to set a deposition date. Defendants, out of professional and personal courtesy to Plaintiff and her counsel, waited for Plaintiff's counsel to advise when his client's health concerns were resolved before compelling her to deposition. Now Plaintiff's counsel attempts to use the courtesy as a sword against Defendant.

On October 31, 2012, Defense Counsel was informed that there was "no chance" Plaintiff would attend her November 1, 2012, deposition, as previously agreed to by the parties, and that Plaintiff's Counsel "will work with you to set up an alternative depo date for Ms. Hunter…." Exhibit A. That same date, Defense Counsel requested in a letter to Plaintiff's Counsel, that he "[p]lease provide the first available dates for your client's deposition." Exhibit B. Defense Counsel agreed to take the deposition at a later date on the condition that Defendants would receive sufficient time after the deposition to disclose experts and reports, and that other deadlines would be adjusted accordingly. Exhibit B. On November 1, 2012, Plaintiff's counsel stated that he was "more than agreeable" to extending time to disclose and file expert reports seven days beyond "the date we are able to coordinate our client's deposition." Exhibit G. Defense Counsel never received available dates for Plaintiff's deposition despite repeated requests and Plaintiff's counsel's agreement to coordinate the date. Defense counsel was never told Plaintiff's health stabilized to permit a deposition to be scheduled.

Defense Counsel also repeatedly requested the deposition and discovery response of Plaintiff as discussions regarding mediation took place. On December 19, 2012, Defense Counsel stated that "[i]t is possible that learning more about your client's claims could cause us to reevaluate our position. Perhaps the previous statements from her don't fully detail all of her complaints. We will only know when she complies with discovery." Exhibit C. In that same

email, Defense Counsel stated "We also have repeatedly requested dates for your clients deposition which we were advised needed to be rescheduled to accommodate her medical care. We will need to take your experts deposition as soon as your clients deposition can be concluded." Exhibit C. Each instance demonstrates the understanding that the expert disclosure cannot take place until after Plaintiff's deposition has been taken and her discovery responses received.

In a separate email dated December 21, 2012, Defendants' Co-counsel again inquired, "any word on deposition dates for your client and discovery responses?" Exhibit D. On February 8, 2013, Defense Counsel again stated to Plaintiff's counsel, "When will I get your clients answers to interrogatories and be able to take her deposition? Why have you not responded to our requests for that discovery from your client? Both would be important in my evaluation of the legal argument you pose in your email. I can mediate April 30 but need your clients discovery as soon as possible so I can advise my client on settlement and be prepared for mediation." Exhibit E. Counsel went on to state, "[p]erhaps your clients deposition and discovery answers will provide support for your claims. I won't know till I have them." Exhibit E. Finally, on Monday, February 25, Defense Counsel reminded Plaintiff's counsel via email that "We have repeatedly asked for your client's deposition." Exhibit F. At no time during any of that correspondence did Plaintiff's Counsel respond that they did not intend to respond to discovery or produce their client for deposition, or inform Defendants of their position that discovery responses from Defendant had not been received. At no time did Plaintiff's counsel advise that he was no longer "more than agreeable" to extending the time to disclose and file expert reports to seven days beyond his client's deposition. Exhibit G.

Defendants believed that the parties were proceeding toward a good-faith mediation of the claim, had agreed to April 30, 2013, as the date, and selected Richard Sher as the mediator. Exhibits D and E. Throughout discussions regarding mediation, Defendants' counsel believed that Plaintiff's counsel was operating in good faith to resolve disputes and proceed toward mediation, and that the parties could resolve any disputes amicably, as had been done in previous instances. See Exhibits H-L. The attached Exhibits do not constitute an exhaustive list, but only some examples of Defendants' attempts to reschedule Plaintiff's deposition, and provide examples of the parties working out disputes and the basis for Defense Counsel's belief that the parties were working in good faith.

Plaintiff repeatedly asserts that Defendants did not reschedule Plaintiff's deposition after Plaintiff backed out of her agreed-to deposition date on the eve of the deposition. Plaintiff's Memo in Opposition, p. 3. However, Defendants made repeated requests for available deposition dates, and based on ongoing discussions, believed that Plaintiff's counsel was operating in good faith to ensure that the deposition was taken and that all discovery responses were sent and received. See Exhibits A-F. Plaintiff fails to inform the court that no response was ever received from Plaintiff on repeated attempts to obtain deposition dates. Defendants were and are waiting for Plaintiff to profess herself physically capable of attending her deposition, which never occurred.

Regarding Defendants' discovery responses to Plaintiff, Defendants' counsel believed that the discovery responses had been sent to Plaintiff's counsel in December of 2012 and Plaintiff's position on the issue was only brought to counsel's attention for the first time in an email from Plaintiff's counsel on February 25, 2013, the same day Plaintiff suddenly denounced any intention to mediate and filed for summary judgment.

II. Extension for Filing of a Dispositive Motion.

Pursuant to Rule 56(d), Defendants may request this court to defer consideration of Plaintiff's Motion for Summary Judgment to allow Defendants to conduct additional discovery needed to respond to the motion. F. R. Civ. P. 56(d). Under Rule 56(d),

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). 56(c) requires that stated facts must be supported by admissions, interrogatory answers, or other materials. F. R. Civ. P. 56(c)1(a). Defendants have filed an appropriate motion, pursuant to the rule, for additional time to complete discovery so as to fully and properly respond to Plaintiff's Motion for Summary Judgment. An extension of the deadline for Defendant to file its Motion for Summary Judgment will result in no additional delay beyond what granting that motion would require. It is appropriate the Court have appropriately supported cross motions for summary judgment before it.

Here, Defendants were entitled to take Plaintiff's deposition and receive her discovery responses. Defendants agreed to Plaintiff's request to postpone her deposition due to her health, not to proceed without it. While waiting for notice, Plaintiff's health had improve, Defendant operated under a good-faith belief that the parties were working towards those ends in effort to mediate the case on April 30, 2012. Those were the agreements reached by the parties when the deposition was postponed. The court ordered Plaintiff to attend a deposition, but Defendants were never provided dates by which Plaintiff would be physically able to attend her deposition.

The facts obtained in interrogatory answers and deposition testimony are necessary for Defendants to file a Motion for Summary Judgment in addition to supporting their own factual

allegations in response to Plaintiff's Summary Judgment, as required by Rule 56(c). For Plaintiff to argue that her failure to inform Defendants of the improved status of her health (in spite of repeated requests) justifies her avoiding deposition is not only disingenuous and breaches previous agreements of counsel, but only obstructs the mission of this Court to make a fully advised decision in this matter.

III. Justice Will be Served by the Extension.

This case presents important constitutional issues (that are likely the subject of an appeal for either party) that cannot be decided on a record that lacks adequate facts on which to base the decision. The United States Supreme Court has stated, "important constitutional issues are best decided on the basis of factual records which tender the underlying constitutional issues in clean-cut and concrete form." Piccirillo v. New York, 400 U.S. 548, 558, 91 S. Ct. 520, 526, 27 L. Ed. 2d 596 (1971). "A basic principle of constitutional adjudication is, however, that the courts will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and that constitutional issues should not be decided in absence of the necessity to do so, and then only on an adequate factual record." Brenden v. Indep. Sch. Dist. 742, 342 F. Supp. 1224, 1230 (D. Minn. 1972) aff'd, 477 F.2d 1292 (8th Cir. 1973).

Here, the facts currently in the record are insufficient for the Court to formulate an important rule of constitutional law required by precise facts. As described in numerous communications between counsel, the deposition and discovery responses are necessary to evaluate the legal claims of Plaintiff, and for Defendants to fully defend the case. Defendants also note that this case will be bench tried, meaning that the Court should have all relevant facts before it before rendering a decision. As such, Defendants respectfully request an order pursuant

to Rule 56(d) to allow them to depose Plaintiff, depose Plaintiff's expert, and receive discovery responses and file Defendants' expert report before filing a Motion for Summary Judgment.

IV. Conclusion.

For the reasons stated herein and those stated in Defendants' Motion for Extension Defendants pray this court to modify the scheduling order and grant an extension of time to disclose their experts and reports until ten days after Plaintiff's deposition is taken, discovery responses are received, and Plaintiff's expert is deposed and for an extension to file a dispositive motion until such discovery is complete.

Respectfully submitted,

BAIRD, LIGHTNER, MILLSAP & HARPOOL, P.C.

By: /s/M. Douglas Harpool

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which provided a copy of same to the below listed counsel of record:

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