NOTICE TO ALL DEFENSE COUNSEL IN EMPLOYMENT DISCRIMINATION CASES CONCERNING REQUIRED ATTENDANCE AT SETTLEMENT CONFERENCES BEFORE MAGISTRATE JUDGE WILLIAM G. HUSSMANN, JR.

The Magistrate Judge is taking the extraordinary step of issuing this notice because of a recurring problem arising out of settlement conferences in employment discrimination cases – the failure of defendants to attend the settlement conference with a client representative who has the level of authority necessary to settle the claim. The purpose of this notice is not to chastise any one defendant's counsel. Rather, this notice is issued to clarify what level of authority is necessary to attend settlement conferences and to assist counsel in bringing the correct person to the table in the future.

It is understandable why a defendant fails to bring a person with appropriate authority to the conference. Frequently, in employment discrimination cases, the defendant sincerely believes it has done no wrong. In the vast majority of the cases that reach a settlement conference – unscientifically estimated at approximately 90 percent by the Magistrate Judge – the defendant believes that the proper resolution of the case involves the filing of a motion for summary judgment. The defendant has been through the winnowing process of the EEOC filing and pre-suit negotiations with plaintiff's counsel. Any case with substantial risk of loss has often been settled through those processes. In those cases which remain before the court for settlement, the defendant is usually convinced that it has made a sound personnel decision; moreover, most often the defendant has many employees, some of whom inevitably will leave unhappy. The defendant believes it is a prudent business

decision not to settle every case brought by a plaintiff for fear of the precedent that business practice might set. The defendant's mindset entering the conference is almost always that the defendant does not intend to settle at all. Or, if settlement will happen, it will only happen if plaintiff will take a nuisance value settlement. According to most employers, since the decision has already been made not to settle, there is no need to send anyone with more than nuisance authority to the conference.

It is not the purpose of the court's settlement conference to force settlement upon a defendant, and in fact it is both important and enjoyable from the court's perspective that trials be conducted. However, less than two percent of civil cases filed in this District are resolved by trial.[1] During 2005 in the Southern District of Indiana, 3,391 civil and criminal cases were closed; 28 of which were closed by the completion of jury trials. During 2004 in the District, 3,434 civil and criminal cases were closed; 32 of which were resolved by the completion of jury trials.

If the case does not settle at an early stage, the defendant must incur attorney's fees and costs to assemble employment data and assist in the filing of responses to interrogatories and requests for production of documents; to attend (usually) four to ten or more depositions; and to prepare the materials necessary to file a motion for summary judgment. It is rare that these functions can be conducted in less than 50 hours of attorney time, and often it may take 100 or

[1]See http://jnet.ao.dcn/cgi-bin/cmsd2005.pl.

200 hours of attorney time to complete these functions. It is the rare case in which cost of defense is less than $7,500, and often the cost of defense may approach the $40,000 to $50,000 range.

There is also always some risk that the case will not be resolved in the defendant's favor. Of the last sixteen jury trials conducted in employment cases in the Evansville, Terre Haute and New Albany Divisions of this District, there have been eight plaintiff's verdicts and eight defendant's verdicts. The cases which go to trial are not strong plaintiff's cases. In the 18 years of experience of this Magistrate Judge, no defendant faced with strong evidence of discriminatory conduct has chosen to go to the jury. So even in cases where the plaintiff's evidence of discrimination is not strong, there is a risk of loss.

The summary judgment process is also not a certain outcome for defendants. In a survey done of summary judgment motions in employment cases in the Evansville, Terre Haute and New Albany Divisions of this District during the time period from January 1, 2001, to December 31, 2002, there were 54 such motions filed. The court granted 35 such motions and denied 19 motions.[2] Thus, whether at the summary judgment stage or at trial there is always a chance that in the employment context a defendant will not prevail in a case where it is certain it has done no wrong.

[2]During that time period, 204 employment cases were closed. Five were resolved by jury trial (two found for plaintiff; three found for defendant), one by bench trial, and 142 were settled prior to the filing of the summary judgment motion.

The Magistrate Judge allots three hours of mediation time for each employment discrimination claim. That time is set at an early stage of the litigation, intentionally before all discovery is completed, all depositions are taken, and any summary judgment motions are filed. The three-hour time period allows significant detailed inquiry into the facts believed to be true by each party; examination of the costs of going forward; and the opportunity to explore the Magistrate Judge's opinion – unclouded by the emotion of the case – as to the likelihood that a particular District Judge will handle a legal issue in a particular way.

It must also be noted that the purpose of the settlement conference is not to convince the plaintiff that he/she must settle the lawsuit for a nuisance value. Rather, the purpose of the settlement conference is to determine whether the parties both agree that it is prudent that litigation move forward given the costs and risks faced in that particular case. It is not fair, and it does not appear fair, to require a plaintiff to spend several hours and make hard decisions about whether to go forward with this litigation when the opposing party with decision making authority need not appear. It is simply a waste of the plaintiff's time, the plaintiff's counsel's time, and the Magistrate Judge's time to go through a three hour or more process when the defendant does not have present a person who can decide – in his or her own volition – to attempt to resolve the claim by compromise. The information provided at the settlement conference will include a detailed look at the facts and will allow the defendant's decision maker to hear new perspectives on the case from plaintiff and plaintiff's counsel that often have not

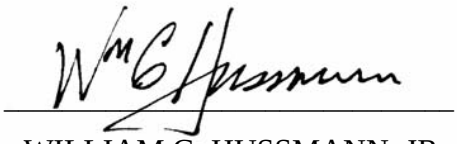
been heard before. The decision maker will have the benefit of the opinions of a judicial officer as to how legal issues are likely to be resolved in light of the information developed at the settlement conference. These new perspectives need not, but often do, cause a defendant to re-examine previously held beliefs about the propriety of continuing to litigate the case. The settlement conference often provides a vehicle to resolve the dispute more quickly and with less expense than simply allowing the case to proceed through the litigation process.

The Magistrate Judge understands that a busy executive has many demands on his/her time. Attending a settlement conference is only one of many chores that must be accomplished. The executive who wishes to avoid the trip may do so by designating and granting specific authority to another person to revolve the claim in that person's own discretion. That authority, however, must be at a level that realistically addresses costs of defense and potential loss in the case. As a general rule, the amount of authority necessary to resolve the case should not be less than Fifty Thousand Dollars ($50,000.00). Or alternatively, the executive may attend the conference by telephone if the plaintiff's counsel expressly agrees to that arrangement before the conference, and if the executive is personally present throughout the conference and calls the court's bridge line at (812) 434-6403, or such other number as may be directed. However, it is not an option simply to send a representative to the settlement conference with no or nuisance value authority.

All parties are expected to comply with the attached language for settlement conference preparation, specifically including the defendant's

requirement that the person with settlement authority up to the plaintiff's last demand be present in person for the settlement conference. Defendants who appear at future settlement conferences without appropriate authority will likely have the settlement conference continued and will be taxed a sanction of the reasonable cost of plaintiff's and plaintiff's counsel's attendance at the originally scheduled settlement conference.

Dated: July 19, 2006



WILLIAM G. HUSSMANN, JR.
Magistrate Judge

SETTLEMENT CONFERENCES BEFORE
U.S. MAGISTRATE JUDGE WILLIAM G. HUSSMANN, JR.

Unless excused by order of the court, clients or client representatives with complete authority to negotiate and consummate a settlement shall attend the settlement conference along with their counsel. This requires the presence of each party, or the authorized representative of each corporate, governmental, or other organizational entity. For a defendant, such representative must have final settlement authority to commit the organization to pay, **in the representative's own discretion,** a settlement amount up to the plaintiff's prayer, or up to the plaintiff's last demand, whichever is lower. For a plaintiff, such representative must have final authority, **in the representative's own discretion,** to authorize dismissal of the case with prejudice, or to accept a settlement in the amount of the defendant's last offer. Any insurance company that is a party, or is contractually required to defend or indemnify any party, in whole or in part, must have a fully authorized settlement representative present at the conference. Such representative must have final settlement authority to commit the company to pay, **in the representative's own discretion,** an amount within the policy limits, or up to the plaintiff's last demand, whichever is lower. If trial counsel has been fully authorized to commit the client to pay or to accept in settlement the amount last proposed by the opponent, **in counsel's sole discretion,** the client, client representative, or insurance company, as applicable, need not attend. Counsel are responsible for timely advising any involved non-party insurance company of the requirements of this order. The purpose of this requirement is to have in attendance a representative who has both the authority to exercise his or her own discretion, and the realistic freedom to exercise such discretion without negative consequences, in order to settle the case during the settlement conference without consulting someone else who is not present.

Each party shall submit (not file) a confidential settlement statement directly to the Magistrate Judge no later than two business days prior to the conference, setting forth the relevant positions of the party concerning factual issues, issues of law, damages, and the settlement negotiation history of the case, including a recitation of any specific demands and offers that have been conveyed.

Any request to continue this conference must be in motion form and filed with the court no later than one week prior to the conference, except for emergencies.

You are reminded of your obligation under Local Rule 16.1(c) which states: "Prior to all court conferences, counsel shall confer to prepare for the conference."