

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
) No. 10-2696 A/P
vs.)
)
NEW BREED LOGISTICS,)
)
Defendant.)

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT

Before the court by order of reference is plaintiff Equal Employment Opportunity Commission's ("EEOC") Motion for Leave to File an Amended Complaint ("Motion to Amend"), filed on August 30, 2011. (ECF No. 23.) Defendant New Breed Logistics ("New Breed") filed a response in opposition on September 13, 2011. The EEOC filed a reply on September 19, 2011. For the reasons below, the Motion to Amend is GRANTED.

I. BACKGROUND

The EEOC filed this action against New Breed on September 23, 2010, alleging violations of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. The complaint was filed on behalf of Tiffany Pete, Capricius Pearson, Jacqueline Hines, and Christopher Partee. The EEOC alleges that James Calhoun, a supervisor at New Breed's Avaya facility in Memphis,

Tennessee, subjected Pete, Pearson, and Hines to unwanted sexual advances and then had them fired in retaliation for refusing his advances.

Hines began working at New Breed at its Avaya facility on April 1, 2008. At the time, she was a temporary employee and had been placed there by Select Staffing, a temporary staffing agency. Hines was terminated from that temporary position on April 29, 2008. Hines believed she was terminated because she had refused Calhoun's sexual advances, while New Breed claims that Hines had an attendance problem. After receiving several sexual harassment complaints about Calhoun from other female employees, New Breed began an internal investigation. As part of that investigation, Carissa Woods, New Breed's Regional Human Resources Manager, interviewed Hines on the telephone on May 22, 2008. Hines was also named as a witness and potential victim of harassment. Based on its investigation, New Breed fired Calhoun on May 30, 2008.

On May 28, 2008, Hines applied for a job at New Breed's Nail Road facility in Olive Branch, Mississippi. She was hired as a permanent employee and began working at that facility on June 11, 2008. On June 13, 2008, Peete (another former employee who had worked at the Avaya facility) filed an EEOC charge alleging sexual harassment by Calhoun. Shortly after Peete filed this charge, Hines was fired from her position at the Nail Road facility on June 20, 2008. According to Hines's deposition testimony (which was

taken on May 11, 2011), she believed she was terminated from the Nail Road facility in retaliation for her participation in the Calhoun investigation. However, she testified that no one told her why she had been terminated, she did not know who made the termination decision or what factors were considered in making the decision, and she was only told that New Breed was an at-will company and that she should read her handbook.

During discovery, the EEOC deposed Woods on August 12, 2011. Woods testified that Hines was fired from the Nail Road facility for falsifying her job application by answering "no" when asked on her employment application whether she had ever previously worked for New Breed. However, Woods further testified that "no" was the correct answer to the application question "[h]ave you ever worked for New Breed?" because Hines was only a temporary employee. Woods also testified that after Hines began working at the Nail Road facility, she recognized Hines's name as someone who had been interviewed as part of the Calhoun investigation and pulled Hines's personnel file to look at her application "to see how she got hired." After Woods's deposition, New Breed produced to the EEOC a copy of Hines's personnel file on August 25, 2011. The personnel file, which had been requested by the EEOC in its First Set of Requests for Production served on February 4, 2011, contained documents that the EEOC contends further support the claim that

Hines's termination from the Nail Road facility was retaliatory.¹

In the present motion, the EEOC seeks to amend its complaint in order to add a retaliation claim. Although the scheduling order's deadline for amending pleadings was March 7, 2011, the EEOC contends that it nevertheless should be permitted to add this new claim because the evidence to support the claim did not come to light until August 2011. New Breed opposes the motion, arguing that the EEOC has been well aware of the circumstances surrounding Hines's employment and termination since 2008, New Breed will be prejudiced by this late amendment, and the amendment would be "futile" because the new claim would not survive a motion to dismiss.

II. ANALYSIS

Rule 15 of the Federal Rules of Civil Procedure "reinforce[s] the principle that cases 'should be tried on their merits rather than the technicalities of pleadings.'" Moore v. City of Paducah, 790 F.2d 557, 559 (6th Cir. 1986) (quoting Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)). Rule 15(a)(2) states that once the time period for amending a pleading as a matter of course has passed, "a party may amend its pleading only with the opposing party's written consent or the court's leave. *The court should*

¹According to New Breed, it initially withheld production of Hines's personnel file because the complaint does not allege any wrongful conduct in connection with Hines's termination from the Nail Road facility.

freely give leave when justice requires." Fed. R. Civ. P. 15(a)(2)(emphasis added). The EEOC's proposed amended complaint, which seeks to add a new retaliation claim, satisfies Rule 15(a)(2)'s liberal standard.

However, when a motion to amend a pleading is filed after the amendment deadline set in the case management order, the moving party must first satisfy the stricter requirements of Rule 16(b). "Once the scheduling order's deadline passes, a plaintiff first must show good cause under Rule 16(b) for failure earlier to seek leave to amend before a court will consider whether amendment is proper under Rule 15(a)." Leary v. Daeschner, 349 F.3d 888, 909 (6th Cir. 2003); see also Edwards v. Grand Rapids Cmty. Coll., No. 1:09-cv-1067, 2010 WL 2163823, at *2 (W.D. Mich. May 27, 2010) ("The Sixth Circuit has made it clear, however, that a motion to amend that is filed after the expiration of the amendment deadline set in the case management order must satisfy the stricter requirements of Rule 16(b) as well as the requirements of Rule 15(a)."). "The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." Andretti v. Borla Performances Indus., Inc., 426 F.3d 824, 830 (6th Cir. 2005). In addition, the court must evaluate prejudice to the opponent before deciding whether or not to modify the scheduling order. Leary, 349 F.3d at 909.

The court finds that the EEOC has satisfied Rule 16's good cause standard because it acted diligently in trying to obtain discovery relating to the new retaliation claim. Once the EEOC obtained Woods's testimony relating to New Breed's reason for the termination and received Hines's personnel file in August 2011, the EEOC promptly filed its Motion to Amend on August 30, 2011. The EEOC filed the motion prior to the close of discovery and prior to the filing of any dispositive motions.² While New Breed argues that the EEOC has investigated the case since 2008, the EEOC did not represent Hines during the investigation or conciliation process. In any event, the fact remains that neither the EEOC nor Hines knew about New Breed's claimed reason for terminating Hines from the Nail Road facility until August 2011. As to New Breed's contention that the EEOC should have filed its Motion to Amend in May 2011 when Hines testified that she believed her termination from the Nail Road facility was retaliatory, Hines also testified that New Breed never told her why she had been terminated, and she did not know who made the termination decision or what factors were considered in making the decision. The EEOC could not have been expected to seek an amendment in May 2011 because it had no independent factual basis to support Hines's belief.

In regard to prejudice, New Breed argues that allowing an amendment of the complaint at this time would be prejudicial

²To date, neither party has filed summary judgment motions.

because the discovery period has closed. The parties disagree as to whether additional discovery would be required if the EEOC is permitted to amend its complaint. The EEOC claims that no further discovery is necessary, while New Breed argues that adding a retaliation claim would require that Hines be redeposed. The court finds that even if the discovery period is reopened, the additional discovery would be narrow (limited to the new retaliation claim), and thus New Breed would not be significantly prejudiced by engaging in additional discovery. The discovery period only recently closed, and the EEOC filed its motion before the discovery deadline, thereby putting New Breed on notice of the potential for additional limited discovery. Moreover, as mentioned above, to date neither party has filed any dispositive motions.

New Breed cites cases within the Sixth Circuit for the proposition that allowing amendment of a plaintiff's complaint after the discovery deadline has passed, and thereby requiring the court to reopen discovery, is per se prejudicial to the defendant. See Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999); Serrano v. Cintas Corp., 271 F.R.D. 479, 485 (E.D. Mich. 2010); see also Scheib v. Boderk, No. 3:07-CV-446, 2011 WL 208341, at *3 (E.D. Tenn. Jan. 21, 2011). In Duggins, the Court of Appeals affirmed the district court's order denying the plaintiff's motion to amend the complaint because the plaintiff had been aware of the basis for the new claim for many months, the plaintiff delayed in

pursuing the new claim until after the discovery and dispositive motions deadlines had passed and a motion for summary judgment had been filed, and the plaintiff offered no justification for the delay. Duggins, 195 F.3d at 834. Similarly, in Serrano the district court denied the EEOC's motion to amend the complaint because the EEOC had been involved in the case for over a decade and the EEOC admitted that it knew about the underlying facts for its new claim for almost five years. Serrano, 271 F.R.D. at 484. In Scheib, the district court denied the plaintiff's motion to amend the complaint where the plaintiff sought to amend his complaint for the fifth time, the discovery deadline had passed and the defendant had already filed its summary judgment motion, the plaintiff knew about the facts underlying his new claim for over three and a half years, and the plaintiff engaged in no discovery until after the defendant filed its summary judgment motion. Scheib, 2011 WL 208341 at *2-4. The extraordinary facts that supported the courts' denials of the motions to amend in the above cases are simply not present in the case at bar. Moreover, neither Duggins nor the cases cited in Duggins mention a per se prejudice rule. At most, Duggins stands for the proposition that, under certain circumstances, the fact that discovery would have to be reopened if the court were to allow a pleading to be amended *can* amount to significant prejudice, not that it always *must* qualify as such.

Finally, New Breed argues that the EEOC's new retaliation claim would not survive a motion to dismiss, and therefore the amendment would be futile, because the new retaliation claim is untimely. When a claim is brought pursuant to Title VII, a plaintiff must first exhaust his or her administrative remedies by filing an EEOC charge. 42 U.S.C. § 2000e-5(f). "Accordingly, 'federal courts do not have subject matter jurisdiction to hear Title VII claims unless the claimant explicitly files the claim in an EEOC charge or the claim can be reasonably expected to grow out of the EEOC charge.'" EEOC v. Taco Bell Corp., 575 F. Supp. 2d 884, 890 (W.D. Tenn. 2008) (quoting Strouss v. Michigan Dep't of Corr., 250 F.3d 336, 342 (6th Cir. 2001)). The Sixth Circuit has recognized the "single filing rule" exception, which permits a claimant to avoid the requirement of filing an EEOC charge "where a substantially related non-filed claim arises out of the same time frame as a timely filed claim[.]'" Id. at 890 (quoting EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 840 (6th Cir. 1994)). It would appear to the court that the new retaliation claim would satisfy the single filing rule exception, as the claim is substantially related to and arises out of the same time frame as the existing claims. The court believes, however, that the issues relating to the applicability of that rule would be more appropriately addressed after the EEOC files its amended complaint, at which time New Breed may file a motion to dismiss pursuant to

Fed. R. Civ. P. 12(b)(6).

III. CONCLUSION

For the reasons above, the EEOC's Motion to Amend is GRANTED. The EEOC shall file its amended complaint within five (5) days from the date of this order.

The parties shall have sixty (60) days to engage in additional discovery relating to the new retaliation claim.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

November 7, 2011
Date