

Rule 15(a) case  
for 2/13 class

United States District Court,  
W.D. Texas, San Antonio Division.  
David D. Bald RIDGE, Plaintiff,

v.

UTILIQUEST, LLC, f/k/a Byers Locate Services,  
LLC, Defendant.

No. Civ.A. SA03CA0733.

NOWAK, Magistrate J.

\*1 The matters before the Court are defendant's motion to strike plaintiff's failure to promote claim, first presented in his response to defendant's motion for summary judgment. Plaintiff opposes the motion and subsequently requested leave to amend.

Plaintiff filed a petition in state court on June 18, 2003 against defendant, his former employer, complaining of alleged discrimination (race/national origin--Native American) resulting in his termination and retaliation, under section 21 of the Texas Labor Code. Defendant removed the action on July 30, 2003, based on the diversity jurisdiction of this Court.

After defendant filed its "motion for complete summary judgment", plaintiff filed a response in which he referenced for the first time a claim for discriminatory denial of promotion. Defendant asks that insofar as this reference could be construed as a claim before the Court in this case, that it be stricken. Defendant argues that plaintiff did not include a failure to promote claim in his state court petition or in his TCHR Charge. Plaintiff responds that plaintiff discussed the facts supporting the claim in his deposition and that the claim is reasonably related to the specific claims made in his Charge.

On the same day that he filed his response to the motion to strike, plaintiff filed his motion for leave to amend. While he admitted that his request was untimely, plaintiff proffered that defendant would suffer no prejudice from allowing the amended pleading with the new claim as defendant fully explored the facts supporting the claim with plaintiff at his deposition. Defendant responds that plaintiff failed to show good cause for the late filed request, that unfair prejudice would result as the dispositive motion deadline had passed, and reurges its futility argument.

Federal Rule of Civil Procedure 15(a) provides as follows:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may **amend** the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 15(a) evidences a bias in favor of granting leave to **amend**. Following the Supreme Court's guidance, the Fifth Circuit uses five **factors** to determine whether to grant a party leave to **amend a complaint**: 1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment. Absent any of these factors, the leave sought should be "freely given."

\*2 Here, plaintiff's request for leave to amend was clearly untimely. Early in the case the parties jointly agreed that motions to amend or supplement pleadings would be filed no later than December 1, 2003. Later the Court entered a Scheduling Order and extended that deadline to April 1, 2004. The motion for leave to amend was not filed until July 27, 2004, almost four months after the deadline.

Plaintiff has given no reason for omitting the claim nor formally presenting it at such late date in the untimely proposed amendment. Clearly, he was aware of the potential claim in that he testified regarding the promotion incident at his deposition in January of 2004. He also included a reference to the promotion incident in his July 9, 2004 response to the summary judgment motion. [FN8]

FN8. Curiously, plaintiff's own Affidavit supporting his response to the summary judgment motion in which he discusses the facts supporting his claims omits any discussion of the promotion incident. Exhibit 1, attached to docket entry 33.

Contrary to plaintiff's assertion, defendant would suffer prejudice if the amendment were granted. Defendant filed a voluminous motion for summary judgment, presumably after conducting discovery on those claims which plaintiff included in his petition. The discovery deadline and the dispositive motion deadline have now passed. It is reasonable to assume that the amendment would necessitate the reopening of discovery and extension of the dispositive motion

deadline, which would in turn impose additional expenses on defendant--expenses which could have been avoided or minimized had the claim been timely pled.

Additionally--and perhaps most importantly--plaintiff omitted any reference to a promotion claim in his TCHR Charge.[FN9] Nor does plaintiff's two-page Affidavit submitted on September 16, 2002, presumably in support of his original Charge, make any reference to the promotion incident. "It is well-settled that courts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies," or which were not developed in the course of a reasonable administrative investigation of that charge. The promotion claim was neither explicitly made nor reasonably within the investigation of the harassment and termination claims; nor is there any evidence the investigation included the latent promotion claim. Accordingly, this Court is without jurisdiction to consider the proposed promotion claim, even if the motion to amend were timely presented.

**FN9.** Neither the September 16, 2002 and September 24, 2002 "amendment make any reference to the promotion. Exhibits 3-A and 3-B, attached to docket entry 33.

Plaintiff's motion is untimely, would result in unfair prejudice, and attempts to present a futile claim. For these reasons, it is ORDERED that the motion for leave to amend is DENIED and the motion to strike the failure to promote claim GRANTED.