

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CECILIA GMUER, M.D., :
Plaintiff, :
 :
v. : CA 09-628 S
 :
ST. JOSEPH HEALTH SERVICES :
OF RHODE ISLAND, :
Defendant. :

MEMORANDUM AND ORDER
GRANTING SECOND MOTION TO AMEND

Before the Court is Plaintiff's Motion for Leave to File a Second Amended Complaint (Docket ("Dkt.") #27) ("Second Motion to Amend"¹ or "Motion"). Defendant St. Joseph Health Services of Rhode Island ("Defendant") has filed an objection to the Motion. See Memorandum of Law in Support of Defendant's Opposition to Plaintiff's Second Motion to Amend (Dkt. #29) ("Opposition"). A hearing on the Motion was held on March 10, 2011.

Introduction

By the instant motion, Plaintiff Cecilia Gmuer, M.D. ("Plaintiff" or "Dr. Gmuer"), seeks to add two additional claims to her action, one within her existing breach of contract count and one that alleges Defendant terminated her because of her age in violation of the Age Discrimination in Employment Act

¹ Plaintiff filed a previous motion to amend her Complaint, see Plaintiff's Motion to Amend Complaint (Dkt. #16) ("First Motion to Amend" or "First Motion"), which was granted on September 9, 2010, see Dkt.

("ADEA"), 29 U.S.C. §§ 621 et seq. See Memorandum of Law in Support of Plaintiff's Motion for Leave to File a Second Amended Complaint at 1. Defendant objects on the grounds that: (a) Plaintiff's ADEA claim is legally barred because she failed to file a charge of discrimination within 300 days after the alleged discrimination; (b) Plaintiff's ADEA claim is not ripe because she may not commence any civil suit under the ADEA until 60 days after filing a timely charge of discrimination and Plaintiff filed her charge of discrimination with the Rhode Island Commission for Human Rights ("RICHR") on January 25, 2011; and (c) Plaintiff was aware of all the facts alleged in support of her ADEA claim when she filed her First Motion to Amend on August 9, 2010.²

² Except for a two sentence footnote stating that the Second Motion to Amend "also seeks to add new factual allegations in support of [Plaintiff's] existing breach of contract and breach of the covenant of good faith and fair dealing claims," Opposition at 5 n.3, Defendant's Opposition is directed entirely at Plaintiff's ADEA claim, see id. at 1 6. The footnote asserts that these additional allegations are "untimely, as well as unnecessary." Id. at 5 n.3. However, Defendant does not identify them, and the Court declines to undertake the task of attempting to do so. See United States v. Williams, 630 F.3d 44, 50 (1st Cir. 2010) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."). Accordingly, to the extent that the Opposition is based on an argument contained in the footnote, such argument is deemed waived. See id. ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (alteration in original); id. (deeming argument "skeletal" and "waived" where it "consist[ed] of a single three sentence paragraph").

Law

The granting of leave to amend a complaint pursuant to Fed. R. Civ. P. 15(a) is within the discretion of the trial court. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S.Ct. 795 (1971); Glassman v. Computervision Corp., 90 F.3d 617, 622 (1st Cir. 1996); cf. United States v. City of Worcester, 565 F.3d 40, 48 (1st Cir. 2009) (“[W]e defer to the district court’s decision if any adequate reason for the denial is apparent on the record.”) (internal quotation marks omitted). Rule 15(a) “reflects a liberal amendment policy,” O’Connell v. Hyatt Hotels of P.R., 357 F.3d 152, 154 (1st Cir. 2004), and provides that a court “should freely give leave when justice so requires,” United States v. City of Worcester, 565 F.3d at 48. The United States Court of Appeals for the First Circuit has cautioned that “unless there appears to be an adequate reason for the denial (e.g., undue delay, bad faith, dilatory motive on the part of the movant, futility of the amendment), we will not affirm the denial.” Grant v. News Grp. Boston, Inc., 55 F.3d 1, 5 (1st Cir. 1995).

Discussion

Two circumstances caused the Court to scrutinize the instant Second Motion with an added degree of attention. This case is now almost sixteen months old, having been removed to this Court by Defendant on December 28, 2009, see Dkt., and this is the

second time that Plaintiff has sought to amend her pleadings,³ see id. With these facts in mind, the Court proceeds to consider Defendant's objections to the instant Motion.

Is Plaintiff's ADEA Claim Legally Barred?

Defendant contends: (1) that Plaintiff was aware of her impending termination by March 23, 2010, see Opposition at 4; (2) that Plaintiff was required to file her charge of discrimination with the RICHR within 300 days of being notified of Defendant's decision to terminate her employment, see id. at 3, which meant "on or before January 17, 2011, at the latest," id. at 4; (3) that Plaintiff did not file her charge of discrimination with the RICHR until January 25, 2011, see id.; and (4) that as a result of missing the deadline Plaintiff's ADEA claim is time barred, see id.; see also Roth v. Rhode Island Hosp. Trust Nat'l Bank, 848 F. Supp. 15, 16 (D.R.I. 1994) ("The parties are in agreement that Rhode Island is a 'deferral state' In order to bring

³ With regard to the age of the case, this is largely due to the fact that Defendant filed a partial motion to dismiss, see St. Joseph Health Services of Rhode Island's Partial Motion to Dismiss (Dkt. #4) ("Motion to Dismiss"), and that the Court, after hearing argument on the motion, granted limited discovery on the issue of whether Defendant's pension plan is a church plan which is exempt from ERISA's regulations, see Dkt. (entry for 9/9/10). That discovery now has been completed, but the parties disagree as to whether the pension plan is exempt. See Recording of 3/10/11 Hearing. Defendant's counsel indicated at the March 10, 2011, hearing that because of this disagreement a ruling on the pending Motion to Dismiss is necessary. In response to this observation, the Court suggested that Defendant's counsel make the District Judge aware of the disagreement and of Defendant's belief that a ruling on the Motion to Dismiss will be required.

an age discrimination action in a federal court located in a deferral state, the plaintiff is required under 29 U.S.C. § 626(d) to have filed a charge with the Equal Employment Opportunity Commission ('EEOC') within 300 days after the alleged unlawful practice occurred.").

The Court is unable to accept Defendant's argument for the following reasons. The Court does not agree that the March 23, 2010, email from Plaintiff's counsel establishes that Plaintiff knew at least by that date of her impending termination. The email states in relevant part:

As I may have mentioned, Dr. Gmuer *anticipates possibly changing employers in the coming months*. As I understand it, she will continue in her role as Chief of Pathology at the hospital, but she will be considered an employee of University Pathology. We disagree on the amount of the retirement benefit now available to Dr. Gmuer. I would like to discuss with you whether we can agree that once Dr. Gmuer formally leaves the hospital's employment, she can take the early retirement benefit, as currently offered by the hospital, without prejudice to the claims and arguments she is raising in the action.

Opposition, Exhibit ("Ex.") A (Email from Magratten to Kostakos of 3/23/10) at 1-2 (*italics added*).

The reference to Plaintiff's termination in this email is too tentative to support a finding that Plaintiff knew as of this date that her employment with Defendant was, in fact, going to be terminated. Plaintiff did not receive written notice of the termination of her employment agreement until April 19, 2010. See Plaintiff's Reply to Defendant's Objection to Plaintiff's

Motion to Amend (Dkt. #30) ("Plaintiff's Reply"), Ex. D (Letter from Fogarty to Gmuer of 4/19/10). The Court finds that the 300 day clock began to run when Plaintiff received this written notice.

Moreover, Plaintiff actually filed a complaint of discrimination with the RICHR on January 13, 2011. See id., Ex. B (Letter from Magratten to EEOC c/o RICHR of 12/3/10). Thus, even if the deadline for Plaintiff to file her complaint with the RICHR were January 17, 2011, as Defendant contends, Plaintiff met that deadline. See id. Accordingly, Plaintiff's ADEA claim is not legally barred. Defendant's argument to the contrary is rejected.

Is Plaintiff's ADEA Claim Ripe?

After arguing that "Plaintiff's ADEA claim is time barred," Opposition at 4, Defendant changes direction 180 degrees and argues that the Motion should be denied because "Plaintiff's ADEA claim is not ripe," id. The basis for this contention is Defendant's belief that "Plaintiff filed her charge of discrimination with the [RICHR] on January 25, 2011," id., and that, therefore, "she is statutorily prohibited from filing her Second Amended Complaint until March 26, 2011," id. (citing 29 U.S.C. § 626(d)⁴). Defendant presumably obtained the January 25,

⁴ 29 U.S.C. § 626(d) provides in relevant part:

(1) No civil action may be commenced by an individual under

2011, date from a letter which Defendant's president received from the RICHR, stating that Plaintiff had filed a charge of discrimination against Defendant on that date. See Opposition, Ex. B (Letter from Toribio to Fogarty of 2/3/11). However, as already discussed, Plaintiff filed a previous charge of discrimination which was received by the RICHR on January 13, 2011. See Plaintiff's Reply, Ex. B. Using this earlier date, the prohibition against commencing a lawsuit based on the charge expires on March 14, 2011.

At the March 10th hearing, Plaintiff's counsel explained that the reason he sent two letters of complaint to the RIHRC, the first dated December 3, 2010 (received by the RICHR on 1/13/11), see Plaintiff's Reply, Ex. B, and the second dated January 19, 2011 (received by the RICHR on 1/25/11), see Opposition, Ex. B at 5, is that the RICHR requested that the letter be notarized. The Court accepts this explanation but

this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed

(A) within 180 days after the alleged unlawful practice occurred; or

(B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 626(d).

notes that the fact that a letter of complaint is "not sworn or notarized is meaningless because ADEA does not require that it be sworn or notarized in order to constitute a charge." Roth, 848 F. Supp. at 16-17; id. (rejecting defendant's argument that because plaintiff's letter to the EEOC was not sworn to or notarized, it was insufficient to constitute a charge). Thus, this Court could reasonably find that the sixty day period commenced to run on January 13, 2011, and that Plaintiff is only prohibited from filing her proposed Second Amended Complaint until March 14, 2011.

Plaintiff, however, states that she does not intend to file the Second Amended Complaint if the Motion is granted until after March 26, 2011. See Plaintiff's Reply at 8. Accordingly, the Court considers Defendant's ripeness argument utilizing this later date.

Defendant argues that there is no guarantee that Plaintiff's claim will not be resolved by the RICHR, "thereby eliminating the need to amend her complaint." Opposition at 4. Defendant further argues that "these proceedings should not be delayed for an additional 60 days based on the mere possibility that Plaintiff will need to amend her complaint." Id. at 4-5. While the Court recognizes that Defendant's Opposition was filed on February 10, 2011, at this point granting the Motion will only "delay" these proceedings, at most, by less than two weeks.

Furthermore, "a claim is unripe where there are too many contingencies which might moot the claim." Mann v. Chase Manhattan Mortg. Corp., 316 F.3d 1, 6 n.8 (1st Cir. 2003). Plaintiff argues that there are no such contingencies here, Plaintiff's Reply at 8, and the Court is inclined to agree. Certainly, the circumstances which the First Circuit identified in Mann as raising "a serious question" as to whether the claim at issue was ripe for adjudication, Mann, are markedly different than the circumstances present here. In the instant matter, there is only one possibility which could moot Plaintiff's claim, i.e., a settlement before the RICHR within the next two weeks.

Plaintiff argues that settlement at the RIHRC within this time frame is highly unlikely given the backlog of cases. See Plaintiff's Reply at 8. Plaintiff further argues that it is impractical to deny the Motion on this basis and require re-litigating and rehearing the issue in two or three weeks. See id. The Court is persuaded, at least on the facts here, that the possibility that Plaintiff's claim may be resolved at the RICHR within the next two weeks is not a contingency for which Plaintiff's request for leave to amend should be denied. Accordingly, Defendant's ripeness argument is denied.

Should Plaintiff's Claim be Barred for Lack of Due Diligence?

Defendant argues that Plaintiff has no valid excuse for failing to assert the ADEA claim when she filed her First Motion

to Amend on August 9, 2010. See Opposition at 5. Defendant contends that Plaintiff was aware of all the facts supporting her ADEA claim at that time and that her failure to include the claim at that time warrants denial of the Second Motion. See id.

It is true that a party seeking the benefit of Rule 15(a)'s liberality has an obligation to exercise due diligence and that "unseemly delay, in combination with other factors, may warrant denial of a suggested amendment." Quaker State Oil Ref. Corp. v. Garrity Oil Co., 884 F.2d 1510, 1517 (1st Cir. 1989); see also Bell v. Allstate Life Ins. Co., 160 F.3d 452, 454 (8th Cir. 1998) (affirming denial of motion to amend complaint where district court found "undue delay, prejudice to the defendants in having to reopen discovery on new substantive claims so close to the trial date"); Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994) ("[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.") (alteration in original).

The Court, however, is persuaded by the information in Plaintiff's declaration that it would be wrong to deny the Motion on the basis that Plaintiff did not exercise due diligence given the mixed signals which Plaintiff received from Defendant regarding when, or even if, the terminations would take place. See Declaration of Cecilia Gmuer in Support of Reply Brief

("Gmuer Decl.") ¶¶ 2-12. As late as the end of December 2010, Defendant's Human Resources Department could not tell Plaintiff whether she had been terminated as an employee or whether she was still employed by Defendant. Given the uncertainty which appears to have existed from the outset regarding the terminations, see id., the Court accepts Plaintiff's contention that prior to August 25, 2010, Plaintiff did not know for certain the names and ages of the employees who were going to be terminated,⁵ see Plaintiff's Reply at 9. The Court, therefore, is unpersuaded that Plaintiff did not exercise due diligence with respect to the claims contained in the Second Amended Complaint. Defendant's argument to the contrary is rejected.

Conclusion

For the reasons stated above, the Second Motion to Amend is GRANTED. Plaintiff shall file her Second Amended Complaint within fifteen days of the date of this Order.

⁵ The Court has considered Defendant's argument that Plaintiff and the other employees who were going to be terminated had worked together for years in a small department and that Plaintiff necessarily would have been aware of their approximate ages at the time she filed her First Amended Complaint. In other circumstances, this argument might carry the day. Here it fails because even before Plaintiff filed her First Amended Complaint, Defendant had deviated from what it had communicated to Plaintiff and the other employees regarding their terminations. See Declaration of Cecilia Gmuer in Support of Reply Brief ("Gmuer Decl.") ¶¶ 5-6 (stating that Defendant's president confirmed that "we [referring to Plaintiff and the other pathologists] would be terminated in July 2010," but "[o]nly one pathologist, Dr. Phyllis Vezza, was terminated in July 2010"). Thus, this Court finds that until Plaintiff received the Release of Claim on or about August 25, 2010, she could not be certain that all of the other pathologists were, in fact, going to be terminated.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
March 14, 2011