

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ELAINE CARON, :  
Plaintiff, :  
 :  
v. : C.A. No. 16-15ML  
 :  
FEDEX FREIGHT, INC., :  
Defendant. :

**MEMORANDUM AND ORDER**

This case, still in its infancy, has tumbled into a procedural miasma. Pending before the Court are Defendant FedEx Freight, Inc.’s (“FedEx”) motions to dismiss the Complaint for failure to state a claim and to strike the Amended Complaint, which purports to cure the deficits flagged by the motion to dismiss, because Plaintiff filed it without leave of Court. After FedEx filed these motions, Plaintiff belatedly attempted to comply with Fed. R. Civ. P. 15(a)(2) and asked the Court for leave to file the Amended Complaint *nunc pro tunc*. ECF No. 16-1 at 2. Exacerbating the confusion, Plaintiff’s opposition to the motion to dismiss is focused not on the original Complaint, which is the subject of the motion to dismiss, but rather on its improperly filed Amended Complaint.

The tale began simply enough. On January 1, 2016, Plaintiff filed a Complaint against FedEx alleging various forms of employment discrimination. FedEx responded with a Fed. R. Civ. P. 12(b)(6) motion to dismiss primarily based on two arguments: first, for Plaintiff’s allegations of discrimination based on events that occurred between 2007 and 2012, the claims are barred by a settlement agreement, failure to exhaust and the statute of limitations; and second, for discriminatory conduct occurring in 2013, the pleadings fail to clear the Twombly/Iqbal bar. On March 18, 2016, Plaintiff filed an assented-to motion for extension of

time, ostensibly because she needed “additional time to research and brief issues relative to this matter;” the motion respectfully requested that “the time period to file a response to Defendants’ Motion to Dismiss be extended to April 17, 2016 or to a date the Court deems fit and proper.” ECF No. 11. The motion for extension did not seek leave to extend the time to amend the complaint as a matter of course pursuant to Fed. R. Civ. P. 15(a)(1), even though it was filed inside the twenty-one period when it would have been permissible to do so. Fed. R. Civ. P. 15(a)(1)(B). The Court granted the assented-to motion by text order making Plaintiff’s response due by April 18. See Text Order of March 21, 2016.

Plaintiff’s next move created the current conundrum. On April 18, 2016, forty-eight days after the filing of the motion to dismiss, without a motion for leave, Plaintiff filed an Amended Complaint (ECF No. 12) aimed at curing the deficiencies outlined in FedEx’s motion to dismiss by adding more detail to strengthen the factual plausibility of Plaintiff’s claims arising in 2013 and by dropping the claims based on alleged discrimination occurring in the earlier period from 2007 to 2012. On the same day, Plaintiff filed a lengthy objection to FedEx’s motion to dismiss that relied entirely on the Amended Complaint, clarified that the suit is focused on 2013 events, and explained that the references in the original Complaint to discriminatory acts from 2007 to 2012 were not an “independent basis for liability in this lawsuit,” but rather were presented as “background evidence.” ECF No. 13-1 at 7.

Understandably frustrated, FedEx has moved to strike the Amended Complaint and is pressing its motion to dismiss the original Complaint. FedEx points out that Rule 15(a) allows a party to amend a pleading without leave of court within twenty-one days of service of a Fed. R. Civ. P. 12(b)(6) motion. Because Plaintiff waited forty-eight days after service to file the Amended Complaint and did not seek leave to amend, FedEx contends it should be stricken.

ECF No. 14. In FedEx's view, the Court should treat the original Complaint as the operative pleading and dismiss the case in its entirety for the reasons stated in its motion to dismiss. ECF No. 15.

The confusion would have been avoided if Plaintiff had been clearer about her intention to amend when she moved for an extension or if she had simply moved for leave to amend before filing the Amended Complaint. Nevertheless, the cure proposed by FedEx runs contrary to Fed. R. Civ. P. 15(a)(2)'s mandate that leave to amend should be freely given, particularly at such an early stage of the case. See Nicholson v. Prudential Ins. Co. of Am., 235 F. Supp. 2d 22, 26 (D. Me. 2003). At best, it would amount to a time-wasting exercise of dismissal-with-leave-to-amend because this Court cannot ignore the bedrock principle that cases should be decided on the merits. See In re Lombardo, 755 F.3d 1, 4 (1st Cir. 2014) (Souter, J.) ("The system favors liberal amendment of pleadings to ensure that litigants' claims are resolved on their merits."); Fed. Ins. Co. v. Delta Mech. Contractors, LLC, No. CA 11-048ML, 2013 WL 1343528, at \*5 (D.R.I. Apr. 2, 2013) (courts should be "guided by the strong preference to decide cases on the merits"). The Court also must remain mindful that motions to strike are disfavored. Koch v. I-Flow Corp., 715 F. Supp. 2d 297, 305 (D.R.I. 2010). Thus, when a complaint is stricken based on the failure of the filer to seek leave to amend, courts generally rely on other reasons, in addition to the procedural irregularity. See, e.g., Mudge v. Bank of Am., N.A., Civil No. 13-cv-421-JD, 2014 WL 2196899, at \*2-3 (D.N.H. May 27, 2014) (motion to strike third amended complaint granted because no motion for leave and filing was after scheduling order deadline); Seguin v. Chafee, No. 12-CV-708-JD, 2012 WL 6553621, at \*4 (D.R.I. Dec. 14, 2012), aff'd, (1st Cir. 13-1241) (Nov. 1, 2013) (motion to strike granted because, even if plaintiff had moved for leave to file amended complaint, court would still deny motion as futile). Consistently, our

Circuit has labeled as “reasonable” and worthy of deference a district court’s construction of a claimant’s amended filing as an implicit request for leave to amend. U.S. ex rel. D’Agostino v. EV3, Inc., 802 F.3d 188, 194 (1st Cir. 2015).

In this instance, FedEx’s motion to strike relies solely on Plaintiff’s failure to comply with Fed. R. Civ. P. 15(a)(2); it points neither to prejudice nor to futility as grounds for denying Plaintiff the ability to amend her pleading at this early stage of the case. Like the district court in D’Agostino, 802 F.3d at 194, I find that the reasonable course is to accept Plaintiff’s request in her objection to the motion to strike as a motion for leave to amend; in light of the early stage of the case, coupled with the absence of any prejudice or futility, I further find there is no principled basis to deny the motion to amend. Accordingly, FedEx’s motion to strike (ECF No. 14) is DENIED<sup>1</sup> and Plaintiff’s request for leave to file the Amended Complaint *nunc pro tunc*, as stated in her objection to FedEx’s motion to strike (ECF No. 16-1 at 2), is GRANTED. To mitigate any prejudice to FedEx, the Amended Complaint shall be deemed filed as of the date of this Order.

That leaves FedEx’s motion to dismiss, which has been referred to me for report and recommendation. 28 U.S.C. § 636(b)(1)(B). Since the Amended Complaint is now the operative pleading, and because the confusion created by its filing without a motion for leave was none of FedEx’s making, the Court establishes the following protocol to clarify FedEx’s options for proceeding from here. Within ten days of this Order, FedEx is directed to make a filing that advises Plaintiff and the Court whether it intends to (1) press the arguments already made in its pending motion to dismiss to challenge the Amended Complaint; or (2) withdraw the pending

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<sup>1</sup> The Court notes that Defendant’s motion to strike was referred for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Because the Amended Complaint adds additional factual detail but no new causes of action, striking the amended pleading would not be dispositive of any claims and the Court treats the referral as one for determination order under 28 U.S.C. § 636(b)(1)(A).

motion to dismiss and file an answer or a new motion to dismiss. If FedEx chooses to rely on the pending motion, the Court will set the motion down for a hearing. If FedEx withdraws the motion and opts either to answer or file a new motion to dismiss or other responsive pleading, it shall have thirty days from the date of this Order to do so. If FedEx needs more time either for advising of its decision to rely on the pending motion or for the new filing, a reasonable request will be favorably considered.

So ordered.

ENTER:

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
May 10, 2016