

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 10-24337-CIV-HOEVELER-BANDSTRA

JOSE RABEIRO,

Plaintiff,

v.

SAFELITE GROUP, INC.,

Defendant.

**PLAINTIFF'S MOTION TO AMEND FIRST AMENDED COMPLAINT AND DEMAND
FOR JURY TRIAL**

Plaintiff, by and through his undersigned counsel, and pursuant to Rule 15, Federal Rules of Civil Procedure, and Rule 7.1, Local Rules of the United States District Court for the Southern District of Florida, respectfully requests that this Honorable Court allow Plaintiff to amend his First Amended Complaint and Demand for Jury Trial ("Complaint") to add allegations and claims of disability/handicap discrimination based on Defendant regarding Plaintiff as being handicapped/disabled. Plaintiff states the following in support thereof:

1. On or about October 29, 2010, Plaintiff filed his original Complaint in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida alleging claims of disability/handicap and age discrimination, as well as retaliation, under the Florida Civil Rights Act ("FCRA").
2. On December 7, 2010, Defendant removed the instant action to this Court.
3. Thereafter, on June 10, 2011, Plaintiff amended his Complaint to add identical claims for disability and age discrimination under the Americans With Disabilities Act ("ADA"),

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the Americans With Disabilities Amendment Act (“ADAA”), and the Age Discrimination in Employment Act (“ADEA”).

4. Plaintiff’s Complaint, therefore, currently asserts claims for disability/handicap discrimination under the FCRA (Count I) and the ADA/ADAA (Count IV), in addition to his other claims for age discrimination and retaliation.

5. Prior to initiating the instant lawsuit, Plaintiff properly exhausted his administrative remedies by filing administrative charges of discrimination with the Equal Employment Opportunity Commission (“EEOC”) and Florida Commission on Human Relations (“FCHR”), alleging age and disability discrimination, as well as retaliation. (See Exhibits A and B, respectively, attached hereto.) Plaintiff also obtained a Right to Sue Notice from the EEOC. (See Exhibit C, attached hereto.)

6. The ADA, ADAA, and FCRA define “disability” with respect to an individual as (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. See 42 U.S.C. § 12102.

7. Plaintiff’s claims for handicap/disability discrimination in the instant action currently allege that Defendant discriminated against Plaintiff as a result of his kidney failure which actually and substantially limits him in one or more major life activities, consistent with 42 U.S.C. § 12102(A).

8. On July 9, 2011, Plaintiff’s counsel, Defendant’s counsel, and Plaintiff’s counsel for Production which also indicate that Defendant adversely affected Plaintiff’s employment

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because it *regarded* Plaintiff as having such an impairment, consistent with 42 U.S.C. §12102(C), irrespective of whether Plaintiff was or was not actually limited in one or more major life activities.

9. Through this Motion, and consistent with the discovery produced, Plaintiff seeks to add allegations that Defendant adversely affected Plaintiff's employment because it "regarded" Plaintiff as having a disability/handicap, in addition to the current allegations that he was adversely affected because he in fact had/has a disability/handicap.

10. Plaintiff has not unduly delayed his request for the foregoing amendments, having sought the amendments shortly after receiving discovery responses giving rise to the requested amendments and after giving defense counsel an opportunity to consider Plaintiff's requested amendments. In addition, the parties are not under any material deadlines until the close of discovery on November 11, 2011. The parties, moreover, have only exchanged written discovery requests to date. No depositions have been taken. The parties are not subject to an amendment deadline. The parties are scheduled for mediation on August 22, 2011. Pursuant to Rule 15(b)(1), in fact, the Court has the discretion to permit amendments to the pleadings even at trial in order to bring the pleadings in line with proffered evidence allegedly not within the issues previously raised in the pleadings.

11. Nor are Plaintiff's requested amendments brought in bad faith or with a dilatory motive. As noted, the amendments sought are based on and consistent with discovery recently produced, and only for the purpose of including an alternative theory of recovery under already existing disability/handicap discrimination claims. Given that the parties have not taken any

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depositions and continue to have time to issue written discovery, no delay in the proceedings will be necessary. ~~Additionally, Plaintiff has either exhausted his administrative remedies with~~ respect to the requested amendments through his previously filed Charges of Discrimination, or is excused from so exhausting his administrative remedies, since the requested amendments could reasonably have been expected to grow out of Plaintiff's Charges of Discrimination.

12. Plaintiff's requested amendments, furthermore, are not the result of repeated failures to cure deficiencies by amendments previously allowed. Plaintiff has not heretofore ~~sought such amendments, and is only seeking amendments based on discovery recently~~ produced.

13. Plaintiff's requested amendments will not prejudice the Defendant. As noted above, the allegations Plaintiff seeks to add are subsumed within already existing disability/handicap discrimination claims, discovery does not cut off for another 3 months, and the parties have not taken any depositions at this time. As such, Defendant will have an opportunity to explore these issues during the course of discovery. Under Rule 15(b)(1), furthermore, this Court could allow Plaintiff to amend his Complaint at trial in order for it to be consistent with any "regarded as" evidence presented.

14. Plaintiff's requested amendments will not be futile as Plaintiffs' additional allegations arise from Defendant's documentation, state claims for which relief may be granted and, at a minimum, reasonably grow out of the substance of Plaintiff's allegations in his administrative Charges of Discrimination.

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15. Plaintiff has attached hereto as Exhibit D, his Second Amended Complaint and Demand for Jury Trial reflecting the additional allegations referenced herein.

16. Counsel for Plaintiff certifies that he has made several efforts to consult with counsel for Defendant regarding the instant request. Specifically, the undersigned sent emails to counsel for Defendant on August 2, 9, and 12, 2011 regarding the instant request. Counsel for Defendant has not responded to Plaintiff's request and as such, Plaintiff has been unable to resolve the issues presented by the instant motion.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court permit him to amend his First Amended Complaint and Demand for Jury Trial to add allegations and claims

that Defendant adversely affected Plaintiff's employment because it regarded him as handicapped/disabled.

MEMORANDUM IN SUPPORT

On October 29, 2010, Plaintiff filed his original Complaint and Demand for Jury Trial in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida alleging disability/handicap and age discrimination, as well as retaliation, under the FCRA as a result of conduct he was subjected to while working for Defendant, and as a result of his discharge from employment with Defendant. On December 7, 2010, Defendant removed the instant action to this Court. On April 28, 2011, Plaintiff served his First Request for Production of Documents upon Defendant, making responses due by May 31, 2011. Plaintiff, however, agreed to extensions of time for Defendant's discovery responses. On June 7, 2011, pending discovery responses from Defendant, Plaintiff amended his original Complaint and Demand for Jury Trial

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with Defendant's consent, adding identical federal claims under the ADA, ADAA, and ADEA. Prior to initiating the instant lawsuit and submitting his First Amended Complaint and Demand for Jury Trial, Plaintiff properly exhausted his administrative remedies by filing charges of discrimination with the EEOC and FCHR alleging disability/handicap and age discrimination, as well as retaliation, and obtained a Right to Sue notice from the EEOC. (See Exhibits A, B, and C, attached hereto)

The ADA defines "disability" with respect to an individual as (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. See 42 U.S.C. § 12102(2).¹ Heretofore, Plaintiff's Complaint has only sought to pursue disability/handicap discrimination claims under § 12102(2)(A) More specifically, Plaintiff's

of his impairment (kidney failure) which actually and substantially limits him in one or more major life activities.

On July 8, 2011, however, Defendant served Plaintiff with responsive documentation indicating that Defendant also adversely affected Plaintiff's employment because it regarded him as having such an impairment (irrespective of whether Plaintiff's condition in fact substantially limited him in one or more major life activities), implicating 42 U S C. § 12102(C) as well. Based on this discovery, Plaintiff now seeks to amend his Complaint to assert allegations and

¹ The ADA and FCRA are interpreted and defined in the same manner. See Ross v. Jim Adams Ford, Inc., 871 So. 2d 312, 314 (Fla. 2d DCA 2004).

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claims of disability/handicap discrimination because Defendant regarded him as disabled/handicapped.²

Although this Court has already issued a scheduling order, the parties are not currently subject to any imminent and material deadlines as discovery does not cut off until November 11, 2011. The parties to date have only exchanged written discovery. No depositions have been taken. The parties are scheduled for mediation on August 22, 2011. The Court, moreover, did not impose a deadline for seeking amendments.

Rule 15 of the Federal Rules of Civil Procedure allows a plaintiff leave as of right to amend his pleading within 21 days of service of a responsive pleading or a motion under rule 12(b), (e), or (f). In all other instances, amendments may only be effectuated with leave of the court or the opposing party's written consent. The rule goes on to state that "The court should freely give leave when justice so requires."

In deciding whether to grant a party leave to amend a pleading, a district court may consider several factors, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. Equity Lifestyle Properties, Inc. v. Florida Mowing and Landscape Service, Inc., 556 F.3d 1232, 1241 (11th Cir. 2009). In the instant matter, none of the foregoing factors

² Having already alleged discrimination based on "disability" in his Complaint, Plaintiff has theoretically already implicated all forms of disability discrimination included within the definition of that term in his existing Complaint. In an abundance of caution, however, and in an effort to clarify the pleadings, Plaintiff seeks the requested amendments.

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counsels against permitting the requested amendments. Indeed, pursuant to Rule 15, the circumstances of this matter require that leave to amend be freely given.

Undue Delay: Undue delay is not present in this matter. Plaintiff has sought the requested amendments shortly after obtaining the discovery material giving rise to the requested amendments, and only after giving defense counsel an adequate opportunity to consider Plaintiff's requested amendment. In addition, the parties are not currently subject to any imminent and material deadlines until the discovery cut-off date of November 11, 2011. The parties, moreover, are not subject to any amendment deadlines. The parties have not taken any depositions to date, and given that there is still 3 months of discovery remaining, time remains to issue additional written discovery. Rule 15(b)(1), in fact, allows the Court to permit amendments to the pleadings even at trial in order to bring the pleadings in line with proffered evidence allegedly not within the issues previously raised in the pleadings.

Bad Faith or Dilatory Motive: Similarly, Plaintiff's requested amendments are not the result of bad faith or dilatory motive. The amendments sought are the result of discovery documents recently produced by Defendant and only add alternative theories of recovery under already existing handicap/disability claims. As noted, moreover, the parties have not yet taken depositions and time remains to issue additional written discovery requests if necessary. Accordingly, no delay in the proceedings will result from the requested amendments, particularly given that such amendments could occur even during trial under Rule 15(b)(1)

In addition to the foregoing, Plaintiff is not seeking to circumvent the requirement that an aggrieved employee exhaust his administrative remedies prior to initiating a lawsuit for

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discrimination. Plaintiff has in fact exhausted his administrative remedies with respect to the requested amendments, as the requested amendments were an integral part of Plaintiff's administrative Charges of Discrimination. Defendant was therefore already aware of these allegations even before the instant action was filed.

Even if it is determined that the "regarded as" allegations Plaintiff seeks to add were not specifically contained in Plaintiff's Charges of Discrimination, however, Plaintiff should still be permitted to amend his Complaint to include such allegations. It is well settled that before an employee may pursue an employment discrimination claim in federal court, he or she must exhaust his or her administrative remedies by filing an administrative charge of discrimination with the EEOC. See Forehand v. Florida State Hosp., 89 F.3d 1562, 1567 (11th Cir. 1996); Buzzi v. Gomez, 62 F.Supp 2d 1344, 1351 (S.D. Fla. 1999). To ensure that strict compliance with filing requirements does not frustrate the remedial efficacy of the anti-discrimination laws, however, Courts have carved out certain exceptions to this requirement. One exception permits courts to entertain previously unasserted allegations of the judicial complaint which are "reasonably related" to those contained in the administrative charge. Buzzi, 62 F.Supp 2d at 1351-1352. If the allegations of the subsequent complaint could have been a reasonably expected out-growth of the EEOC's investigation of the charged conduct, the omitted allegations of discrimination are deemed within the scope of the EEOC filing. See Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988); Gupta v. East Texas State University, 654 F.2d 411, 414 (5th Cir. 1981); Buzzi, 62 F.Supp 2d at 1352. In sum, a plaintiff's judicial complaint is limited not just by the actual allegations made in the charge itself, but also

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by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. Harrison v. International Business Machines, 2010 WL 1852589 *2 (11th Cir. 2010); Ward v. State of Florida, 212 F.Supp.2d 1349, 1355 (S.D. Fla. 2002); Armstrong v. Lockheed Martin Beryllium Corp., 990 F.Supp. 1395, 1400 (M.D. Fla. 1997). The scope of the EEOC charge, moreover, should not be strictly interpreted. Harrison, 2010 WL 1852589 at *2; Ward, 212 F.Supp.2d at 1355. The specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow. Id. The suit may include allegations reasonably related to the allegations in the administrative charge. Ward, 212 F.Supp.2d at 1355-1356. From a practical standpoint, one of the most important considerations is whether the defendant had sufficient notice from the administrative charge of the alleged *kinds* and *areas* of discrimination. Brown v. Walt Disney World Co., 805 F.Supp. 1554, 1558 (M.D. Fla. 1992). Clearly, and at a minimum, the amendments sought by Plaintiff grow out of Plaintiff's allegations of handicap/disability discrimination contained in his Charges of Discrimination, and Plaintiff's Charges of Discrimination placed Defendant on notice of the kinds and areas of discrimination Plaintiff seeks to add through the requested amendments.

Repeated Failure to Cure: Plaintiff's requested amendments are not the result of repeated failures to cure deficiencies by amendments previously allowed. Plaintiff has not heretofore requested the instant amendments. Plaintiff, moreover, is only seeking amendments based on discovery recently produced.

Undue Prejudice: Defendant will not be prejudiced by the requested amendments. As noted above, the allegations Plaintiff seeks to add are subsumed within already existing claims.

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As further noted, discovery does not cut off for another 3 months and the parties have not taken any depositions at this time. As such, Defendant will have an opportunity to explore these issues during the course of discovery. Pursuant to Rule 15(b)(1), furthermore, Plaintiff could ostensibly present evidence at trial with respect to Defendant regarding Plaintiff as handicapped/disabled, and the Court would be permitted at that time to allow an amendment to the Complaint so that it is consistent with the evidence presented.

Futility of Amendment: Finally, Plaintiff's requested amendments would not be futile. Plaintiff's requested amendments are supported by discovery documents, existing law, state claims for which relief may be granted, and provide an alternative theory for recovery.

Furthermore, and as noted above, Plaintiff has already exhausted his administrative remedies with respect to the requested amendments, or the requested amendments reasonably grow out of

~~Plaintiff's Charge of Discrimination filed with the EEOC and FCIM.~~

As a result of the foregoing, Plaintiff should be permitted to amend his First Amended Complaint in the manner set forth above and reflected in Exhibit D attached hereto, and the Court should accept for filing Plaintiff's Second Amended Complaint and Demand for Jury Trial, as reflected in Exhibit D

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August, 2011, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will serve electronically a copy of the foregoing on all counsel or parties of record on the attached service list. I HEREBY FURTHER CERTIFY that a copy of the foregoing along with the Notice of Electronic Filing generated by CM/ECF were also served via U.S. Mail on this 16th day of August 2011 on all counsel or parties of record on the attached service list.

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