

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>KRIS DEILY,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>WASTE MANAGEMENT OF ALLENTOWN,</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 00-1100</b>

**Reed, S.J.**

**December 19, 2000**

**M E M O R A N D U M**

Plaintiff Kris Deily brought this action against defendant Waste Management of Allentown under the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (“ADA”), the Pennsylvania Human Relations Act, 43 Pa. C.S. §§ 951, *et seq.* (“PHRA”), the Family and Medical Leave Act, 29 U.S.C. §§ 1001, *et seq.* (“FMLA”), and Pennsylvania common law. Defendant asked the Court to dismiss Counts I through V of the complaint on timeliness grounds, and the Court dismissed Counts II through V. Plaintiff has filed a combined motion to reconsider the Court’s dismissal of Counts II through V and for leave to amend his FMLA claim to allege retaliation pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure. For the following reasons, the motion for reconsideration will be granted in part and denied in part, and the motion for leave to amend will be denied.<sup>1</sup>

Typically, a motion for reconsideration is decided under Federal Rule of Civil Procedure

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<sup>1</sup> The facts of this case are fully stated in my prior decision on the motion to dismiss, and therefore I do not recount them again here. See Deily v. Waste Management of Allentown, 118 F. Supp. 2d 539, 540 (2000).

59 (e) or 60 (b). See Dayoub v. Penn-Del Directory Co., 90 F. Supp. 2d 636, 637 (E.D. Pa. 2000). However, neither Rule 59(e) nor 60(b) applies here because the order Deily seeks to have reconsidered is not a final judgment or order but rather an interlocutory decision. See id. (citing Davidson v. United States, No. 95-1506, 1998 U.S. Dist. LEXIS 8708, at \*5-6 (E.D. Pa. June 15, 1998) (denial of partial motion for summary judgment is not a final judgment, order, or proceeding within Rule 60(b) but rather an interlocutory decision); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2715, at 264 (3d ed. 1998) (“the denial of a Rule 56 motion is an interlocutory order from which no appeal [to the court of appeals] is available until the entry of judgment following the trial on the merits”)).

A federal district court has the inherent power to reconsider interlocutory orders “when it is ‘consonant with justice to do so.’” Walker by Walker v. Pearl S. Buck Foundation, Inc., No. 94-1503, 1996 U.S. Dist. LEXIS 17927, at \*6 (E.D. Pa. Dec. 3, 1996) (quoting United States v. Jerry, 487 F.2d 600, 605 (3d Cir. 1973)). “‘The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.’” Confer v. Custom Eng’s Co. Employee Health Benefit Plan, 760 F. Supp. 75, 77 (W.D. Pa.) (Quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), aff’d in part on other grounds and dismissed in part on other grounds, 952 F.2d 41 (3d Cir. 1991)). Because of the interest in finality, however, courts should grant motions for reconsideration sparingly. See Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1107 (E.D. Pa. 1992).

Plaintiff suggests that this Court should reconsider its decision because the Court relied upon an improper date in deciding whether plaintiff filed his claims within the appropriate limitations periods. Plaintiff argues that the Court erroneously fixed March 1, 2000, as the date

upon which this action was filed, when plaintiff in fact filed a Praecipe for a Writ of Summons in the Court of Common Pleas of Northampton County on September 20, 1999. I acknowledge that plaintiff is correct in arguing that a praecipe for a writ of summons commences an action for the purpose of the running of the statute of limitations. See Patterson v. American Bosch Corp., 914 F.2d 384, 387 (3d Cir. 1990) (federal courts sitting in diversity apply state procedural law when considering statutes of limitation, and Rule 1007(1) of the Pennsylvania Rules of Civil Procedure provides that an action may be commenced by filing with the prothonotary a praecipe for a writ of summons), and that the proper filing date for the purposes of determining whether plaintiff complied with the applicable statutes of limitation was September 20, 1999.

The corrected filing date has no effect on this Court's decision that plaintiff failed to exhaust administrative remedies in a timely manner prior to filing his PHRA claim under Count II.<sup>2</sup> Likewise, the corrected filing date does not save plaintiff's claim for intentional infliction of emotional distress under Count IV; this claim is based solely on conduct that took place during the time plaintiff was working for defendant, (Complaint, ¶¶ 66-78), and plaintiff last worked for defendant more than three years prior to the filing of the complaint, far beyond the two-year limitations period.

The corrected filing date does alter my prior conclusion as to the timeliness of plaintiff's wrongful discharge claim in Count V; he was notified of his termination on December 15, 1997 and the Praecipe for Writ of Summons was filed on September 14, 1999, within the two-year limitations period for wrongful discharge claims. Thus, the wrongful discharge claim was filed

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<sup>2</sup> I dismissed the PHRA claim because it was clear that plaintiff had failed to exhaust his PHRA within 180 days of the last discriminatory act. A change in the date this action was commenced in court has no effect on that conclusion.

in a timely fashion. I conclude that plaintiff has stated a claim for wrongful discharge, and therefore I will reconsider my decision to grant the motion to dismiss as to the wrongful discharge claim.

Plaintiff also seeks leave to amend his Count III FMLA claim – which was dismissed in my prior decision for failure to state a claim – to add a claim for retaliation under FMLA under Rule 15 (a) of the Federal Rules of Civil Procedure. While I realize that Rule 15 provides for amendment of the complaint usually as a matter of course, I am disinclined to countenance the revival his FMLA claim by allowing him to amend it at this late stage, as plaintiff’s justifications for doing so are weak. Plaintiff argues that the motion should be granted because a judge in this district allowed a FMLA retaliation claim to go forward on facts plaintiff believes to be similar to those in this case. However, a cause of action for retaliation under FMLA has existed since the statute went into effect, see 29 U.S.C. § 2615 (b) (1), and is clearly not new law. Therefore, such a claim was available to plaintiff at the time the complaint was drafted. That a long-standing legal basis for a claim only recently came to the attention of plaintiff’s counsel is not a persuasive justification for allowing plaintiff to add a claim to his complaint nearly a year after the action was commenced.

But more importantly, even assuming I was to allow plaintiff to amend his pleading, plaintiff could not successfully state a claim for retaliation under FMLA. According to the complaint, plaintiff took FMLA leave in June 1996 and never returned to work, only contacting his employer 18 months after he had last worked to ask whether he still had a job. Plaintiff had received his FMLA leave and then some, and according to the complaint, his employer preserved plaintiff’s job for several months after plaintiff’s FMLA leave period had expired, and terminated

plaintiff only after a full year had passed since plaintiff had last worked. Thus, it is clear from the complaint that plaintiff was not fired for taking FMLA leave; in a sense, he terminated himself by abusing his rights to leave under FMLA and leaving his employer with no choice other than to terminate him.<sup>3</sup> Plaintiff's amendment, if allowed, would be futile. Accordingly, for the above reasons, plaintiff's motion for leave to amend will be denied.

An appropriate order follows.

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<sup>3</sup> I note that my conclusions concerning plaintiff's FMLA claims are not applicable to plaintiff's ADA claim. I have concluded that plaintiff has alleged that he received the leave to which he was entitled under FMLA and there is no possible scenario consistent with the facts of the complaint under which plaintiff could persuade the Court that he was entitled to anything more than what he received under FMLA. Plaintiff has, however, adequately alleged that he did not receive what he was entitled to under the ADA, and thus plaintiff may proceed with his ADA claim.

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<b>v.</b>	:	
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<b>WASTE MANAGEMENT OF ALLENTOWN,</b>	:	
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<b>Defendant.</b>	:	<b>NO. 00-1100</b>

**ORDER**

**AND NOW**, on this 19th day of December, 2000, upon consideration of the combined motions of plaintiff, Kris Deily, to reconsider the Court's dismissal of counts II through V of his complaint and for leave to amend the FMLA claim to allege retaliation (Document No. 29), and the response of defendant, Waste Management of Allentown, thereto, and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion for reconsideration is **GRANTED** as to Count V of the complaint and **DENIED** as to Counts II and IV, and Count V for wrongful discharge is hereby reinstated.

**IT IS FURTHER ORDERED** that, because the Court has concluded in the exercise of its discretion, for the reasons stated in the foregoing memorandum that plaintiff's motion for leave to amend the complaint is not even minimally justified, the motion for leave of court to amend his FMLA claim to include a claim for retaliation is **DENIED**.

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**LOWELL A. REED, JR., S.J.**