

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

KIMBERLIE WEBB : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA : NO. 05-5238

MEMORANDUM

Bartle, C.J.

January 23, 2007

Plaintiff Kimberlie Webb ("Webb") moves to amend her complaint to add an additional count for retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000(e), et seq. Webb's initial complaint against the City of Philadelphia, filed on October 5, 2005, alleges religious discrimination, retaliation, hostile work environment and sex discrimination under Title VII as well as a supplemental state claim under the Pennsylvania Religious Freedom Protection Act ("RFPA"), 71 P.S. § 2402, et seq. These claims are based on the City's denial of Webb's request to wear a khimar, a Muslim head covering, while she is on duty as a Philadelphia Police Officer.

In support of her motion to amend, Webb maintains that since the filing of her complaint, the City has engaged in an ongoing course of harassing conduct against her, culminating in a two week suspension from work in May of 2006. Webb contends that this alleged harassment "was initiated in retaliation for filing an EEOC complaint" and was "designed to punish [Webb] and deter her from pursuing this claim." Pl.'s Proposed Am. Compl. ¶¶ 51

and 46. Webb's pending motion was filed on December 18, 2006, the final date for discovery.

The amendment of complaints is governed by Rule 15(a) of the Federal Rules of Civil Procedure. Rule 15(a) provides in relevant part that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading 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.

Although the decision to permit amendment of a complaint is within the sound discretion of the district court, see Averbach v. Rival Mfg. Co., 879 F.2d 1196, 1203 (3d Cir. 1989), the Supreme Court has interpreted the phrase "freely given" as a limit on the district court's discretion. Riley v. Taylor, 62 F.3d 86, 90 (3d Cir. 1995). Thus, it is an abuse of discretion for a district court to deny a motion for leave to amend without justification. Foman v. Davis, 371 U.S. 178, 182 (1962); Shane v. Faver, 213 F.3d 113, 115 (3d Cir. 2000). Our Court of Appeals has identified the following as permissible justifications for the denial of a motion to amend: (1) undue delay; (2) bad faith or dilatory motive; (3) undue prejudice to the opposition; (4) repeated failures to correct deficiencies with previous amendments; (5) futility of the amendment. Riley, 62 F.3d at 90; Shane, 213 F.3d at 115.

We first turn to the question of whether plaintiff's proposed amendment to the complaint would be futile. Before

instituting a lawsuit under Title VII, a plaintiff must first exhaust her administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. § 2000e-5(e); Anatol v. Perry., 82 F.3d 1291, 1295 (3d Cir. 1996). Indeed, our Court of Appeals has made it clear that "federal courts lack jurisdiction to hear a Title VII claim, unless the plaintiff has filed a charge with the EEOC." Woodson v. Scott Paper Co., 109 F.3d 913, 926 (3d Cir. 1997) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)).

The Court of Appeals, however, has defined broadly what can be considered a "charge filed with the EEOC." Generally, "if the allegations in the administrative complaint could be 'reasonably expected to grow out of' those made in the EEOC charge ... the administrative remedies available to plaintiff will have been exhausted." Schouten v. CSX Transp., Inc., 58 F. Supp. 2d 614, 616 (E.D. Pa. 1999) (quoting Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1999); see also Anjelino v. New York Times Co., 200 F.3d 73, 93-96 (3d Cir. 1999). Thus, "a district court may assume jurisdiction over additional charges if they are reasonably within the scope of the complainant's original charges and if a reasonable investigation by the EEOC would have encompassed the new claims." Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984). When a plaintiff fails to exhaust her administrative remedies, a court should dismiss the unexhausted claims. Id. at 87-88; Schouten,

58 F. Supp. 2d at 617; Hicks v. Arthur, 843 F. Supp. 949, 956 (E.D. Pa. 1999).

Even under this generous standard, it is clear that Webb's new Title VII retaliation claim would be dismissed as she has failed to take the predicate administrative steps. Webb's allegations regarding the May 2006 discipline could not have been included in her initial EEOC filing, which was made on February 28, 2003. The EEOC purportedly issued a right-to-sue letter based on those claims on July 8, 2005. Thus, a reasonable investigation by the EEOC could not have encompassed those claims. There is also no evidence that Webb filed a new or amended EEOC charge based on the May 2006 retaliation, despite her counsel's representations to the court during a phone conference on December 20, 2006 that she filed such a charge in June or July of 2006. In fact, Webb testified at her July 24, 2006 deposition that the only charge she has filed with the EEOC was her original 2003 charge for religious discrimination. Pl.'s Dep. 69:25 - 70:4; 87:21 - 89:11, July 24, 2006.

In addition, even if the proposed amendment to the complaint were not futile, granting the request would cause undue delay and prejudice to the City because of the late hour at which the request was made. This action is now well over a year old and one of the oldest cases on the court's docket. The court has already granted a number of extensions for a variety of unusual circumstances. Webb has waited until the very day of the close of discovery to bring a new claim relating to discipline that

occurred seven months earlier, in May 2006. This tardiness would preclude the City from conducting discovery as to the events underlying these claims and from establishing its defense. During a phone conference with the court on December 20, 2006, Webb's counsel explained that the reason for the delay stemmed from the need to finish taking the depositions of Police Commissioner Sylvester Johnson and two other fact witnesses. However, the two latter witnesses were deposed on November 9, 2006 and Commissioner Johnson was deposed on November 16, 2006, more than a month before the filing of the motion for leave to file an amended complaint. Any amendment to Webb's complaint would cause unjustified further delay. Now is the time to move this aging case to resolution.

Accordingly, the motion of the plaintiff to amend her complaint will be denied.

