



## I. BACKGROUND

Donald was employed by Northwest until March 13, 2002, when his employment was terminated. Following his termination, Donald filed a Charge of Discrimination with the EEOC. The EEOC issued Donald a Notice of Right to Sue, which is dated April 29, 2003. Directly below the date is a parenthetical indicating that this date is the "(Date Mailed)." On July 29, 2003, Donald filed a complaint against Northwest alleging employment discrimination. Donald, who at the time was proceeding *pro se*, filled out a preprinted complaint form provided by the Clerk of the Court. Paragraph 8 of the form reads, "The [EEOC] issued a Notice of Right to sue which was received by the plaintiff on [insert day-month-year] a copy of which notice is attached to this complaint." Donald inserted the date "April 29, 2003," and attached a copy of the EEOC Notice to his complaint.

On August 27, 2003, Northwest filed its answer to the complaint, as well as a Motion for Judgment on the Pleadings.<sup>1</sup> In its motion, Northwest asserts that ninety-one days elapsed between April 29, 2003, and July 29, 2003, and thus plaintiff's suit is time barred because he did not file his complaint within ninety days of receiving the EEOC Notice.

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<sup>1</sup>Northwest's Motion for Judgment on the Pleadings is pending before the District Judge at this time. Northwest stated at the January 7, 2004 status conference that if the court grants Donald's motion to amend the complaint, then the Motion for Judgment on the Pleadings would be rendered moot.

At some point, Donald retained counsel. On December 17, 2003, Northwest received a letter from Donald's attorney together with a Proposed Motion for Leave to File Amended Complaint. On December 19, 2003, Northwest responded to the letter via facsimile, stating that it would agree to the plaintiff's Motion for Leave to File Amended Complaint provided that Donald reimburse Northwest for its attorney's fees and costs incurred in preparing and filing the Motion for Judgment on the Pleadings. Northwest claims that Donald did not reply to its December 19 letter.

Instead, on January 5, 2003, Donald filed both his response to Northwest's motion, and the instant Motion for Leave to Amend Complaint. In his motion, Donald explains that he mistakenly entered the date that the Notice was issued, rather than the date on which he received the Notice. In an attached affidavit, Donald states that he received the Notice by mail on May 1, 2003. He now wishes to amend his complaint to reflect the May 1 receipt date. Northwest argues in response that Donald should be bound by the factual admissions in his complaint, including his assertion that he received the EEOC Notice on April 29, 2003. Northwest contends that the language on the preprinted complaint form is clear, and that Donald should not be held to a lesser standard of pleading and excused for his mistakes simply because he was proceeding *pro se* at the time. Northwest further maintains that Donald has not presented any objective evidence that would tend to show that he received the Notice after April 29, 2003, such as the envelope in

which the Notice was mailed, or evidence that the EEOC even mailed the Notice. Northwest argues that the "(Date Mailed)" language that appears under the April 29, 2003 date is part of the EEOC's preprinted form and "does not in any way indicate or prove whether in fact the document was mailed," as opposed to being picked up by Donald from one of the EEOC offices.

Alternatively, should the court permit Donald to amend his complaint, Northwest asks the court to require him to reimburse Northwest for attorney's fees and costs. Northwest argues that as a result of its "fully justified" reliance on the plaintiff's assertion that he received the Notice on April 29, 2003, Northwest incurred the expense of \$991.80 for preparing its Motion for Judgment on the Pleadings, and an additional \$3,424.50 for opposing the plaintiff's motion to amend. Finally, Northwest asks the court to impose a reimbursement deadline on the plaintiff, and withdraw leave to amend if the plaintiff fails to reimburse Northwest by the specified date.

## II. DISCUSSION

### A. Amending the Complaint

Fed. R. Civ. P. 15 governs the amendment of pleadings. After a responsive pleading has been filed to a complaint, Rule 15(a) provides that a party may file an amended complaint "only by leave of the court or by written consent of the adverse party," but such "leave shall be freely given when justice so requires." Rule 15(a) "reinforce[s] the principle that cases 'should be tried on their

merits rather than the technicalities of pleadings[,]” Moore v. City of Paducah, 790 F.2d 557, 559 (6th Cir. 1986) (quoting Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)), and therefore assumes “a liberal policy of permitting amendments.” Ellison v. Ford Motor Co., 847 F.2d 297, 300 (6th Cir. 1988). In evaluating the interests of justice, courts consider several factors, including “[u]ndue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment.” Coe v. Bell, 161 F.3d 320, 341-42 (6th Cir. 1998) (quoting Brooks v. Celeste, 39 F.3d 125, 130 (6th Cir. 1994)); see Foman v. Davis, 371 U.S. 178, 182 (1962).

Because Northwest filed its answer before Donald brought the instant motion to amend, he must obtain leave of court to amend his complaint. The parties do not dispute that Donald had to file his complaint in federal court within ninety days from the date on which he received his EEOC Notice. The parties also agree that the receipt date asserted in the original complaint would make Donald’s filing one day too late. Thus, if Donald is not permitted to amend his complaint, he would be severely prejudiced because the case would not be resolved on the merits.

On the other hand, the court must consider whether allowing Donald to amend his complaint would result in undue prejudice to Northwest. This case is in its earliest stages. Apart from the initial pleadings, only defendant’s Motion for Judgment on the

Pleadings and plaintiff's motion to amend have been filed. The scheduling conference has been continued pending the outcome of these motions, and the parties have not yet begun discovery. Therefore, the court finds that permitting Donald to amend his complaint would not result in any prejudice to Northwest's ability to defend this case on its merits.

Moreover, Northwest informed Donald that it was willing to agree to the motion to amend provided that he reimburse Northwest for its attorney's fees and costs for preparing and filing its Motion for Judgment on the Pleadings. The court does not find that the expense to the defendant rises to the level of undue prejudice sufficient to deny the plaintiff's motion. Therefore, the court will grant Donald's motion to amend his complaint, and consider next whether to award attorney's fees and costs to Northwest.<sup>2</sup>

**B. Conditioning Amendment on Reimbursement of Fees**

Under certain circumstances, courts have balanced the interests of the party seeking amendment and those of the party objecting to it by imposing conditions on the movant's leave to amend under Rule 15(a). 6 Charles A. Wright, et al., Federal

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<sup>2</sup>Northwest argues that Donald has not presented any evidence that shows that he received his EEOC Notice in the mail on May 1. For purposes of deciding whether to allow plaintiff to amend his complaint under Rule 15(a), however, the court does not consider the strength of the evidence at this stage. Cashman v. Montefiore Med. Ctr., 1993 WL 227700, at \*4 (S.D.N.Y. 1993) ("for purposes of a Rule 15(a) motion to amend, the Court cannot consider the strength of the evidence, but rather must focus only on the legal sufficiency of the allegations contained in the Proposed Amended Complaint").

Practice and Procedure § 1486 (2d ed. 1990). Such conditions have included the costs of preparing previously filed responsive pleadings rendered moot by the amendment. See, e.g., Hayden, et al. v. Feldman, et al., 159 F.R.D. 452, 453, 455-56 (S.D.N.Y. 1995); O'Rear v. Am. Family Life Assurance Co., 139 F.R.D. 418, 421 (M.D. Fla. 1991). When considering whether to impose costs as a condition for granting a party's motion for leave to amend a complaint, the court may consider several of the same factors that are relevant in determining initially whether to grant leave to amend. 6 Charles A. Wright, et al., at § 1486-87; see Coe v. Bell, 161 F.3d at 341-42.

Northwest makes no allegations that the defect in the original complaint was due to bad faith on the part of plaintiff. Based on the current record, the court finds no reason to disbelieve Donald's assertion that he made an innocent mistake.<sup>3</sup> The cases that Northwest cites in support of its request for attorney's fees are distinguishable from the case at bar. Both the Campania and Anderberg cases involved conditioning amendment of pleadings on reimbursement for additional discovery costs. See Campania Management, Inc. v. Rooks, et al., 290 F.3d 843, 849-50 (7th Cir. 2002); Anderberg v. Masonite Corp., 176 F.R.D. 682, 687 (N.D. Ga. 1997). In those cases, the litigation had proceeded beyond the

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<sup>3</sup>The court finds it relevant that the plaintiff was proceeding *pro se* when he filed his original complaint. While the court need not address what, if any, legal effect the plaintiff's status may have, it provides further circumstantial evidence to support the plaintiff's claim of innocent mistake.

early stages, and the amendments would either render completed discovery unnecessary or require that the parties engage in additional discovery. See Campania, 290 F.3d at 849-50; Anderberg, 176 F.R.D. at 687.

Northwest also cites the Estes and Envision cases, but in neither case did the court impose costs on the party seeking to amend its pleading. See Estes v. Kentucky Utilities Company, 636 F.2d 1131, 1134-35 (6th Cir. 1980) (granting motion to amend pleading without imposing litigation costs, but stating that such costs could be imposed on a party seeking to amend its pleadings to raise an untimely affirmative defense); Envision Realty, LLC v. Henderson, et al., 182 F.Supp.2d 143, 144-45 (D. Me. 2002) (recognizing that costs could be imposed as a condition where a party's delay in seeking amendment was "particularly egregious," but denying the motion as futile).

Hayden and O'Rear are the only two cases cited by Northwest where the courts actually conditioned filing of the plaintiffs' amended complaint on payment of the defendants' attorney's fees incurred in preparing motions to dismiss the prior complaint. See Hayden, 159 F.R.D. at 453, 455-56; O'Rear, 139 F.R.D. at 421. But unlike the present case, Hayden and O'Rear involved plaintiffs who amended their complaints multiple times. See Hayden, 159 F.R.D. at 453-54 (court imposed condition where plaintiffs sought to file their Fourth Amended Complaint); O'Rear, 139 F.R.D. at 421 (plaintiffs "lacked diligence by failing to remedy basic flaws,

which were in three previous complaints").

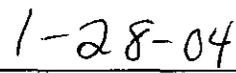
After considering the case authority, and given the particular facts of this case, the court finds that it is not appropriate to condition its permission for Donald to amend his complaint on payment of Northwest's attorney's fees.

**III. CONCLUSION**

Accordingly, the plaintiff's Motion for Leave to Amend Complaint is GRANTED. Northwest's request for attorney's fees and costs is DENIED.

IT IS SO ORDERED.

  
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TU M. PHAM  
United States Magistrate Judge

  
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DATE