

Analysis

The standard for permitting a party to amend his complaint is well established. Without an opposing party's consent, a party may amend his pleading only by leave of the court. Fed. R. Civ. P. 15(a).¹ Although such leave to amend “shall be freely given when justice so requires,” whether to grant leave is within the court's discretion. Panis v. Mission Hills Bank, 60 F.3d 1486, 1494 (10th Cir. 1995)(citing Woolsey v. Marion Labs., Inc., 934 F. 2d 1452, 1462 (10th Cir. 1991)). In exercising its discretion, the court must be “mindful of the spirit of the federal rules of civil procedure to encourage decisions on the merits rather than on mere technicalities.” Koch v. Koch Industries, 127 F.R.D. 206, 209 (D. Kan. 1989). The court considers a number of factors in deciding whether to allow an amendment, including timeliness, prejudice to the other party, bad faith, and futility of amendment. Hom v. Squire, 81 F.3d 969, 973 (10th Cir. 1996).

Defendant opposes plaintiff's motion, arguing that the proposed amendment would be futile because Farm Credit is an “executive agency” under the ADEA and “liquidated damages” are not available against the federal government. Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985)(punitive damages cannot be awarded against Production Credit Association); Wilson v. Federal Land Bank of Wichita, 1989 WL 12731 at *1 (D. Kan. Jan. 30, 1989)(J. Rogers, dismissing punitive damage claim against

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A party may amend its pleading once as a matter of course before a responsive pleading is filed. The time for amending “as a matter of course” is long past.

Federal Land Bank).² However, plaintiff counters with a Seventh Circuit holding that Federal Land Bank Associations and Production Credit Associations are private employers rather than federal agencies for purposes of the ADEA. Hanna v. Federal Land Bank Association of Southern Illinois, 903 F. 2d 1159 (7th Cir. 1990)(employees entitled to jury trial). Plaintiff also argues that the Eleventh Circuit’s reasoning in Smith is contrary to the U.S. Supreme Court’s more recent analysis and holding in FDIC v. Meyer, 510 U.S. 471 (1994), that “sue-and-be-sued waivers are to be liberally construed.”

Research reveals no controlling Tenth Circuit or Supreme Court decision directly on point concerning the remedies available in an ADEA case against defendant, an agricultural credit association. Moreover, the Seventh and Eleventh Circuits appear to be split on the issue of whether an agricultural credit association is a “federal agency” and defendant has not addressed plaintiff’s argument concerning FDIC v. Meyer. Under the circumstances the court is not prepared to rule that the proposed amendment is “futile” at this time. Because the law is unsettled in this circuit, the motion to amend shall be granted and defendant is granted leave to file an appropriate dispositive motion challenging plaintiff’s claim for liquidated damages. Proceeding in this fashion allows for a better developed record should the matter ultimately reach the Tenth Circuit.

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Judge Rogers relied on Smith for his ruling. The Seventh Circuit decided Hanna *after* Judge Rogers ruled in the Wilson case.

IT IS THEREFORE ORDERED that plaintiff's motion to amend (**Doc. 18**) is **GRANTED**. Plaintiff shall file and serve the amended complaint on or before **August 25, 2009**. This ruling is without prejudice to any dispositive motion by defendant concerning liquidated damages.

Dated at Wichita, Kansas this 11th day of August 2009.

S/ Karen M. Humphreys

KAREN M. HUMPHREYS
United States Magistrate Judge