

1995 WL 646821

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United States District Court, D. Kansas.

Saul ZAPATA, et al., Plaintiffs,
v.
IBP, INC., Defendant.

Civ.A. No. 93-2366-EEO.
|
Oct. 6, 1995.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

EARL E. O'CONNOR, District Judge.

*1 This matter comes before the court on plaintiffs' Motion to Review the Magistrate's Orders of July 7, and September 1, 1995, pursuant to Federal Rule of Civil Procedure 72(a) (Doc. #265). Defendant opposes the motion. The court has reviewed the plaintiffs' motion, the parties' briefs in support and in opposition thereto, Magistrate Judge Rushfelt's orders, and the pertinent law, and is now prepared to rule.

On May 5, 1995, after almost two years of discovery and more than ten months after the expiration of the deadline to amend pleadings imposed by the court's scheduling order, plaintiffs moved to amend their First Amended Complaint to assert a theory of discrimination based upon race. On July 7, 1995, the magistrate judge entered an order denying plaintiffs' motion to add this new theory of

recovery. On September 1, 1995, the magistrate judge denied plaintiffs' motion to reconsider its July 7, 1995, order.

I. Standard of Review

The standard of review of a magistrate judge's order is set forth in 28 U.S.C. § 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a). 28 U.S.C. § 636(b)(1)(A) provides in pertinent part:

A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

Federal Rule of Civil Procedure 72(a) provides in part:

Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

A district court reviews a magistrate judge's decision on a motion for leave to file an amended complaint under a "clearly erroneous or contrary to law" standard. *Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1461-62 (10th Cir. 1988); *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 746 F.Supp. 1051, 1054 (D. Kan. 1990). The clearly erroneous standard requires the district court to affirm the magistrate judge's order unless the district court has the definite and firm conviction from all the

evidence that error has occurred. *Ocelot*, 847 F.2d at 1464.

II. Analysis

Federal Rule of Civil Procedure 15(a) governs the right of a party to amend the party's pleadings. It provides, in relevant part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it 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.* (Emphasis added.)

*2 In denying the motion to amend, Magistrate Judge Rushfelt reasoned:

Plaintiffs should have filed this motion long ago, within the deadline set by the Scheduling Order. They have not shown excusable neglect for the amendment at this late date. Discovery has long proceeded upon claims of discrimination arising from national origin, not race.... [T]he court finds that the motion is indeed untimely and lacks any adequate showing of excusable neglect to justify the untimeliness. Plaintiffs simply have not carried their burden to show that justice requires it in this case.

Memorandum and Order, July 7, 1995, pp. 2-3.

Plaintiffs subsequently moved for reconsideration of that order. The magistrate judge denied the motion to reconsider, and explained his ruling on both substantive and procedural grounds. With respect to the procedural basis for denying plaintiffs' motion, Magistrate Judge Rushfelt stated:

Implicit in [the prior] ruling is that plaintiffs had not demonstrated under the circumstances that justice indeed required the amendment. They had shown no reason whatsoever for the untimeliness of their motion. Timeliness became increasingly important with the approaching deadlines for determination of the certification issue.... In this instance plaintiffs did not accompany their motion with one for the extension of the deadline. They may not circumvent the requirement of the rule by simply ignoring it.

Memorandum and Order, September 1, 1995, p. 12.

As to the substantive issues, the Magistrate Judge Rushfelt noted:

Untimeliness aside, the court finds the present argument of plaintiffs unpersuasive. Their own citations refer to cases which suggest the likelihood of overlapping and the lack of clear distinction between discrimination based on race and that based on national origin.... The mere direction of the inquiry and the words used to phrase it do not necessarily mean defendant in discovery has acquiesced to a broadening of the pleadings.... Contrary to the suggestions of plaintiffs, probing discovery does not necessarily expand the underlying claims beyond the scope of the pleadings.

Id. at p. 4.

The court finds that Magistrate Judge Rushfelt acted well within his discretion when he denied plaintiffs' motion to file a second amended complaint, and again when he denied plaintiffs' subsequent motion to reconsider. In both motions, plaintiffs failed to demonstrate why they should be allowed to add a new theory of recovery after almost two years of discovery had been completed, and more than ten months after the deadline for filing amended pleadings had passed. The court's April 8, 1994, Scheduling Order established July 1, 1994, as the deadline for filing motions to amend pleadings. Because plaintiffs' motion to amend was submitted after that deadline, Federal Rule of Civil Procedure 16(b) required plaintiffs to show "good cause" why the deadline should be extended. *Denmon v. Runyon*, 151 F.R.D. 404, 407 (D. Kan. 1993) (because plaintiff's motion for leave to amend was untimely under scheduling order, court must not only determine if Rule 15(a) standards have been satisfied, but also must determine if "good cause" has been shown within the meaning of Rule 16(b)). *See also Sil-Flo, Inc.*

v. SFHC, Inc., 917 F.2d 1507, 1518 (10th Cir. 1990). To establish good cause, plaintiffs were required to show that the Scheduling Order's deadline "could not have been met with diligence." *Denmon*, 151 F.R.D. at 407. From a review of the record, we conclude that plaintiff to date has offered no showing of this kind.

***3** Accordingly, in light of Magistrate Judge Rushfelt's foregoing reasoning, we cannot say that his decision was "clearly erroneous or contrary to law."

IT IS THEREFORE ORDERED that with respect to plaintiff's Motion to Review the Magistrate's Orders of July 7, and September 1, 1995 (Doc. #265), Magistrate Judge Rushfelt's orders are affirmed.

All Citations

Not Reported in F.Supp., 1995 WL 646821