

1997 WL 86461

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United States District Court, D. Kansas.

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

Civil Action No. 93-2366-EEO.  
|  
Feb. 20, 1997.

#### Attorneys and Law Firms

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Jack L. Whitacre, Spencer, Fane, Britt & Browne, Kansas City, MO, J. Nick Badgerow, Michaela M. Warden, Spencer, Fane, Britt & Browne, Overland Park, KS, Russell P. Wright, IBP, Inc., Dakota City, KS, Paula S. Greathouse, Lawrence, KS, for IBP Inc.

#### MEMORANDUM AND ORDER

EARL E. O'CONNOR, District Judge.

\*1 This matter is before the court on the following motions:

Defendant IBP Inc.'s Motion for Reconsideration (Doc. # 405);

Plaintiffs' Motion to Strike Defendant's Suggestions in

Opposition to Motion for Leave to File Second Amended Complaint (Doc. # 413); and

Defendant's Motion for Partial Summary Judgment (Doc. # 317).

The court has considered the parties' briefing and the applicable law, and is now prepared to rule. For the reasons stated below, defendant's motion for reconsideration is granted in part. Plaintiffs' motion to strike is denied. Defendant's motion for partial summary judgment is denied as moot.

#### *I. Plaintiff's Motion to Strike Defendant's Suggestions in Opposition to Motion for Leave to File Second Amended Complaint.*

Plaintiffs seek to preclude defendant from filing a response opposing plaintiffs' motion to file a second amended complaint. In support, plaintiffs state that "[t]he Court granted plaintiffs' motion for leave to file the Second Amended Complaint on December 10, 1996 because the motion was unopposed. Defendant's memorandum in opposition is out of time and defendant has provided no justifiable reason as to why it can file its brief at this late date." Motion to Strike at 1. While it is true that on December 10, 1996, the court entered an order granting plaintiffs leave to file their Second Amended Complaint, the court did so on the basis that no response had been filed, and thus the motion was uncontested.

Defendant now presents the court with the affidavits of Jack L. Whitacre, J. Nick Badgerow, and Russell Wright, the attorneys representing defendant in this case. Each attorney in his affidavit avers that as of the date the court granted plaintiffs' motion to file a second amended complaint, he had not received a copy of the motion or a copy of the proposed second amended complaint. The court is of the view that such a showing justifies a finding of excusable neglect on behalf of the defendant, under the circumstances. *See* 4A C. Wright and A. Miller, *Federal Practice and Procedure* § 1148 (2d ed. 1987) ("Since service is complete upon mailing, nonreceipt ... of the papers generally does not affect its validity, although nonreceipt may justify a finding of excusable neglect.") Accordingly, plaintiffs' motion to strike will be denied, and the court will consider defendant's memorandum in support of its Motion for Reconsideration.

## II. Defendant's Motion for Reconsideration.

Defendant seeks reconsideration of this court's order of December 10, 1996, allowing plaintiffs to file their second amended complaint. The Tenth Circuit has recognized a number of factors that courts may consider in determining whether to allow amendment of a complaint:

These [factors] include whether the amendment will result in undue prejudice, whether the request was unduly and inexplicably delayed, was offered in good faith, or that the party had sufficient opportunity to state a claim and failed. Where the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion is subject to denial.

*\*2 State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 416 (10th Cir.1984).

"In the absence of a specific factor, such as flagrant abuse, bad faith, futility of amendment, or truly inordinate and unexplained delay, prejudice to the opposing party is the key factor to be evaluated in deciding a motion to amend." *Lange v. Cigna Individual Financial Serv. Co.*, 759 F.Supp. 764, 769 (D.Kan.1991) (citing *Dunn v. Kaaz Holding Co.*, No. 83-2375 (D.Kan., unpublished, July 2, 1985)). Prejudice under Rule 15 "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakayne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir.1969); see also *LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1474 (10th Cir.1983). The party opposing the amendment has the burden of showing prejudice. *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir.1977).

Plaintiffs represent that they "only seek to amend their complaint to add an allegation that they have filed EEOC charges of discrimination and have received right-to-sue letters as stated above." Plaintiffs' Motion for Leave to File Second Amended Complaint at 2. However, upon close inspection of the proposed second amended

complaint, the court finds that plaintiffs have injected new matters into the complaint, not raised in plaintiff Manuel Sigala's EEO charge.

Plaintiff Sigala's EEO charge states, in its entirety: "I allege that I was discharged due to my national origin, Mexican, in that my supervisor made biased comments regarding Mexicans." As to each of the eleven plaintiffs who filed EEO charges in June, July, and August of 1996, plaintiffs seek to add a sentence in the second amended complaint that states "[plaintiff] has filed a claim of racial and national origin discrimination with the Equal Employment Opportunity Commission (EEOC) in a timely manner. On [date], he [she] received a right-to-sue letter from the EEOC, attached to hereto as Exhibit [ ]." Neither the original complaint, filed September 3, 1993, nor the first amended complaint, filed July 29, 1994, made any claim of race discrimination.

Plaintiffs state that "IBP will not be prejudiced by the proposed amendments as the claims against them do not change." However, it appears that plaintiffs are indeed attempting to broaden the scope of the original pleadings. The court finds that allowing plaintiffs' proposed amendments at this time would cause undue prejudice to defendant, and could well necessitate a new round of discovery and dispositive motions based on plaintiffs' new theories of recovery not asserted in either of the previously filed complaints.

However, because plaintiffs state that they "seek this amendment solely to ensure that the administrative and pleading prerequisites to pursuing their separate claims are finalized," the court will permit plaintiffs to file a second amended complaint alleging solely the facts as set forth in paragraphs 9 and 44 of the second amended complaint. See *Sharpe v. American Express Co.*, 689 F.Supp. 294, 300-01 (S.D.N.Y.1988) (the pendency of a class action tolls the filing of administrative claims with the EEOC, where class action complaint asserts identical or similar claims). The court finds that allowing plaintiffs to amend their complaint in this manner fulfills the objective of plaintiffs without undue prejudice to defendant.

*\*3* The court cautions plaintiffs, however, that such amendment will not be viewed as allowing plaintiffs to bootstrap into their complaint the various other allegations of discrimination, such as disability and retaliation, that they have now alleged in their administrative charges. The court notes the following observation made by Justice Powell in his concurring opinion in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352-54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983):

The tolling rule of *American Pipe* [*& Constr. Co. v. Utah*, 414 U.S. 538, 544, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)] is a generous one, inviting abuse. It preserves for class members a wide range of options pending a decision on class certification. The rule should not be read, however, as leaving a plaintiff free to raise different or peripheral claims following denial of class status.

... It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit.... [w]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the District Court should take care to ensure that the suit raises claims that “concern the same evidence, memories and witnesses as the subject matter of the original class suit” so that “the defendant will not be prejudiced.” *Ibid*. Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations.

In addition, plaintiffs are directed to strike the class action allegations from their second amended complaint.

The court notes that the plaintiffs have been dilatory in honing the issues before the court. For example, the court observes that although plaintiffs’ motion for class certification was denied on May 15, 1996, plaintiffs did not file their proposed second amended complaint until November 1, 1996, and then did not bother to delete the obsolete references to the class action. Plaintiffs’ contentions to this point have been like a moving target, and consequently have made it extremely difficult for defendant to attempt to develop its arguments in opposition. The court expects plaintiffs, in drafting their second amended complaint, to comply with the spirit of Rule 8 of the Federal Rules of Civil Procedure, and our

caveats stated in this order. If plaintiffs so comply, the defendant should be better able to focus on the issues and develop its arguments, and the court will be in a better position to make an intelligent ruling thereon.

IT IS THEREFORE ORDERED that Plaintiffs’ Motion to Strike Defendant’s Suggestions in Opposition to Motion for Leave to File Second Amended Complaint (Doc. # 413) is denied.

IT IS FURTHER ORDERED that Defendant IBP Inc.’s Motion for Reconsideration (Doc. # 405) is granted in part. The court hereby vacates its order dated December 10, 1996, (Doc. # 398) granting plaintiff leave to file its Second Amended Complaint. The clerk is directed to strike the Second Amended Complaint from the court file. Plaintiffs are granted leave to file a Second Amended Complaint, setting forth the allegations now contained in paragraphs 9 and 44 of their currently filed Second Amended Complaint. The court also hereby directs plaintiff to strike the class action allegations from their second amended complaint.

**\*4** IT IS FURTHER ORDERED that, based upon our ruling granting plaintiffs leave to file a second amended complaint, defendant’s motion for partial summary judgment as to plaintiffs’ first amended complaint (Doc. # 317) is now moot, and is denied without prejudice. To the extent defendant intends to refile this motion, the court expects better briefing from both parties on any issues raised with respect to plaintiff’s Title VII claims.

#### All Citations

Not Reported in F.Supp., 1997 WL 86461