

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SALLY M. KINNEY,
Plaintiff,

vs.

HOLIDAY COMPANIES, HOLIDAY
STATIONSTORES, INC., HOLIDAY
DIVERSIFIED SERVICES, INC.,
and HOLIDAY ALASKA, INC.,

Defendants.

Case No. 3:07-cv-0147-RRB

ORDER DENYING
MOTION TO AMEND COMPLAINT

I. INTRODUCTION

Before the Court is Plaintiff Sally Kinney ("Plaintiff"), with a Motion to Amend the Complaint at Docket 22. Plaintiff claims that there is good cause to amend the complaint under Rule 16 of the Rules of Civil Procedure because the discovery process has revealed evidence of additional causes of action of which she was previously unaware.¹ Defendants Holiday Companies, Holiday Stationstores, Inc., Holiday Diversified Services, Inc., and Holiday Alaska, Inc. (collectively "Defendants") oppose at

¹ Docket 22 at 1.

Docket 23, arguing that Plaintiff had sufficient information to plead these causes of action prior to the Court's December 7, 2007, deadline for filing an amended complaint.² Oral argument was requested.³

Plaintiff filed a reply at Docket 25, which Defendants seek to strike at Docket 29. The Court has reviewed Plaintiff's reply and hereby **DENIES** Defendants' Motion to Strike at **Docket 29**.

II. BACKGROUND

Plaintiff was terminated as an employee at one of Defendant's gas stations in March 2007, pursuant to company policy, for allegedly failing a second cigarette compliance check within a twelve month period.⁴ The first violation allegedly occurred in November of 2006.⁵

² Docket 23 at 1.

³ Inasmuch as the Court concludes the parties have submitted memoranda thoroughly discussing the law and evidence in support of their positions, it further concludes oral argument is neither necessary nor warranted with regard to the instant matter. See Mahon v. Credit Bureau of Placer County Inc., 171 F.3d 1197, 1200 (9th Cir. 1999)(explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily oral argument would not be required). As a result, the request for oral argument is **DENIED**.

⁴ Docket 23 at 2.

⁵ Docket 23 at 2.

Plaintiff's original complaint alleged two causes of action: (1) that Defendants had violated the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq. ("FMLA") by denying her request for medical leave; and (2) that Defendants had interfered with Plaintiff's right to seek medical leave under the FMLA.⁶

In its scheduling order of November 5, 2007, the Court set a deadline of December 7, 2007, for filing amended pleadings.⁷ No amended complaint was filed prior to that date. On July 29 of this year, Plaintiff filed this Motion to Amend Complaint, alleging what amounts to two alternate theories for a breach of contract action: (1) that Plaintiff was the victim of disparate treatment when she was terminated, and that therefore the Defendants violated the covenant of good faith and fair dealing; and (2) that Defendants failed to give adequate written warning to Plaintiff as required by the employment contract.⁸

Plaintiff's justification for failing to amend the complaint prior to the Court's deadline is that she did not learn of the facts underlying the additional allegations until discovery had been completed. Plaintiff's disparate treatment claim is based on an allegation that another employee, Hector Rodriguez, who was

⁶ Docket 1 at Exhibit 1.

⁷ Docket 13.

⁸ Docket 22 at 4-5.

caught selling tobacco to a minor during a police sting, was not terminated for the violation.⁹ Her claim for failure to warn is based on an allegation that the Defendants failed to provide her a written warning that she might be terminated for a second violation of the company's cigarette sales policy.¹⁰

Defendants respond by arguing that Plaintiff's motion is untimely and that discovery has not revealed any causes of action of which Plaintiff was not aware or should not have been aware prior to the December 7, 2007 deadline.¹¹

III. STANDARD OF REVIEW

Because the deadline for filing an amended complaint has passed, Civil Rule 16(b)(4), which governs the modification of scheduling orders, supplies the proper standard of review for Plaintiff's motion. This Court may not apply Civil Rule 15's standard for amended pleadings until Plaintiff has first shown "good cause" to justify modification of the original deadline.¹²

The Ninth Circuit has held that, "[u]nlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the

⁹ Docket 25 at Exhibit 13, p. 2.

¹⁰ Docket 22 at 2.

¹¹ Docket 23 at 1.

¹² Fed R. Civ. P. 16(b)(4); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992).

party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment."¹³ Therefore, a party seeking to amend a pleading after the scheduling order deadline must show that the deadline could not "reasonably be met despite the diligence of the party seeking the extension."¹⁴

IV. DISCUSSION

The Court finds that Plaintiff has not shown that "good cause" exists for modifying the scheduling order to allow an amended complaint at this late stage in the proceedings. Although Plaintiff makes reference to a single additional cause of action in her Motion to Amend Complaint,¹⁵ her proposed amended complaint suggests two alternative bases for a finding of breach of contract: (1) failure to issue a written warning as required in the employment contract; and (2) disparate treatment and breach of the covenant of good faith and fair dealing.¹⁶ The Court will analyze each proposed breach of contract theory according to the "good cause" standard of Civil Rule 16(b).

¹³ Johnson at 609.

¹⁴ Johnson at 609(citing Fed. R. Civ. P. 16(b) advisory committee notes).

¹⁵ Docket 22 at 1.

¹⁶ Docket 22 at 4-5.

A. No "Good Cause" for Amending Complaint to Add Cause of Action for Failure to Give Written Warning.

Plaintiff argues that she should be permitted to add a cause of action for failure to give a written warning. Specifically, she argues that Defendants failed to give her a written warning of the possibility of termination for a second tobacco policy violation and that she did not receive notice of this failure to warn until the commencement of the discovery process.¹⁷

The logical fallacy in this argument is readily apparent. Even if Defendants cannot produce any evidence that she was given adequate warning, Plaintiff cannot plausibly claim that she was not aware of the failure to warn until after the commencement of discovery. As the Defendants note, Plaintiff should be presumed to have personal knowledge of whether she received a written warning after her first violation.¹⁸ Even if Plaintiff was unaware of Holiday's company policy concerning termination for improper tobacco sales (an oversight which itself cannot be imputed to Defendants), Defendants provided Plaintiff with documentation of

¹⁷ Docket 22 at 2.

¹⁸ Docket 23 at 8.

the company's policy in their initial disclosures of October 15, 2007.¹⁹

Plaintiff's failure to plead this claim for relief in her original complaint can only logically be characterized as an oversight, and the Ninth Circuit has held that "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief" under Rule 16(b)(4).²⁰ Therefore, Plaintiff has failed to show good cause to amend the complaint to include a claim for failure to issue a written warning pursuant to company policy.

It should be noted, parenthetically, that in her reply to the Defendants' response, Plaintiff places great emphasis upon an alleged misinformation by defense counsel regarding Holiday's record-keeping policy.²¹ Plaintiff argues, in essence, that Holiday's lack of documentation of Plaintiff's alleged violation of November 2006 positively proves that no such violation occurred.²² This assertion, even if true, is irrelevant to the present motion for precisely the same reasons which the Court has outlined above: If Plaintiff was terminated for a tobacco violation which never

¹⁹ Docket 23 at Exhibit 5.

²⁰ Johnson at 609, citing Engleson v. Burlington Northern R.R. Co., 972 F.2d 1038, 1043 (9th Cir. 1992).

²¹ Docket 25 at 2-6.

²² Id.

occurred, then Plaintiff should have had personal knowledge of that fact prior to the scheduled deadline for amending the complaint. Moreover, the Court fails to see how these allegations of misinformation relate to any of the causes of action listed in the proposed amended complaint. The Court, therefore, considers such allegations irrelevant to its consideration of Plaintiff's motion.

B. No "Good Cause" for Amending Complaint to Add Cause of Action for Disparate Treatment

Plaintiff's amended claim for disparate treatment fares no better under the "good cause" standard of Rule 16(b)(4). The disparate treatment claim is based on Holiday's failure to terminate Hector Rodriguez, who was caught selling tobacco to a minor by the police. It is clear from the record that Plaintiff had this claim in mind back on February 21 of this year. On that day, Plaintiff's counsel deposed Tom Iverson, a Holiday employee, regarding the Hector Rodriguez incident, expressly questioning Mr. Iverson regarding the similarities and differences between Mr. Rodriguez's situation and Plaintiff's own.²³

It seems obvious that Plaintiff knew of the facts upon which her claim for disparate treatment is based by the date of the Iverson deposition at the latest, and probably earlier; Plaintiff's counsel presumably did not pull the questions about Mr. Rodriguez

²³ Docket 23 at Exhibit 2, p. 5.

out of thin air. The fact that Plaintiff listed Mr. Rodriguez as a potential witness in her initial discovery disclosures simply reinforces the notion that the disparate treatment claim was known or should have been known to Plaintiff prior to the deadline for filing an amended complaint.²⁴

Even if Plaintiff was not aware of this potential claim until after the December 2007 deadline, the failure to file an amended pleading until July 29, 2008, more than five months after the Iverson deposition, demonstrates a lack of "diligence" of the kind required for a finding of "good cause" under Rule 16(b).²⁵

V. CONCLUSION

Because Plaintiff has failed to carry her burden of showing "good cause" for modifying the scheduling order under Rule 16(b)(4), Plaintiff's Motion to Amend Complaint is **DENIED**.

ENTERED this 25th day of September, 2008.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

²⁴ Docket 23 at 8.

²⁵ See U.S. v. 1948 South Martin Luther King Dr., 270 F.3d 1102,1110 (7th Cir. 2001) (no good cause shown where amended pleading was filed five months after scheduled deadline, in the absence of "any facts supporting a finding of cause" for the delay.)