

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN SUK KIM,  
  
Plaintiff,  
  
v.  
  
THOMAS J. VILSACK, Secretary of  
United States Department of  
Agriculture,  
  
Defendant.

No. C 10-02101 CW  
  
ORDER GRANTING  
PLAINTIFF'S  
MOTION TO MODIFY  
SCHEDULING ORDER  
AND FOR LEAVE TO  
FILE A SECOND  
AMENDED COMPLAINT  
(Docket No. 23)

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Plaintiff In Suk Kim moves for leave to file a second amended complaint. Defendant Thomas J. Vilsack opposes Plaintiff's motion. The motion was taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS Plaintiff's motion.

BACKGROUND

Plaintiff lodged a proposed second amended complaint along with her current motion. In response to deficiencies identified in Defendant's opposition, Plaintiff revised her proposed amended pleading and submitted a corrected version. The allegations below are contained in the most recent iteration of Plaintiff's proposed pleading.

Plaintiff is a former employee of the United States Department of Agriculture. On March 6, 2007, her application to be promoted to "Supervisory Chemist Branch Chief was rejected because the

1 position announcement was 'canceled.'" Revised Proposed 2d Am.  
2 Compl. (P2AC) ¶ 5. On March 26, 2007, Plaintiff filed an  
3 administrative complaint, alleging age discrimination.

4 On January 3, 2009, Plaintiff filed another administrative  
5 complaint, which alleged age and national origin discrimination and  
6 retaliation.<sup>1</sup> Plaintiff apparently disagreed with scores she  
7 received on performance evaluations and claimed that they were the  
8 products of age discrimination and retaliation for her March, 2007  
9 complaint. She also complained that, in 2007, agency employees  
10 took actions against her that were motivated by age and national  
11 origin discrimination.

12 At some unspecified time, "Defendant promoted a young, non-  
13 Asian woman to Chemistry Branch Chief." P2AC. ¶ 15. Plaintiff  
14 does not allege that she applied for this position. This  
15 allegation apparently pertains to the February, 2010 selection of  
16 Dr. Patricia Nediaalkova for this position. See Def.'s Answer ¶ 15.

17 On March 4, 2010, Plaintiff was reassigned from the position  
18 of Lead Chemist to Chemist. She was also "directed to vacate her  
19 office immediately, and was relieved of all of her assignments."  
20 P2AC. ¶ 16. She claims that she "was constructively discharged on  
21 March 4, 2010, in that a reasonable person would have reassigned  
22 [sic] under the said circumstances." Id. ¶ 17. She filed an  
23 administrative complaint regarding these actions on July 6, 2010.

24 Plaintiff initiated this lawsuit on May 17, 2010. Plaintiff  
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26 <sup>1</sup> Plaintiff did not plead the subject of this complaint in her  
27 proposed pleading, but instead lodged a copy of the complaint with  
28 her current motion. See Rogers Decl., Ex. 2, at 18-19.

1 filed an amended complaint on May 26, 2010. Defendant answered  
2 Plaintiff's amended complaint on July 19, 2010. The Court's Case  
3 Management Order set August 24, 2010 as the deadline to add parties  
4 or claims. Plaintiff filed her current motion on November 4, 2010.

5 DISCUSSION

6 Pursuant to Federal Rule of Civil Procedure 16(b)(4), a  
7 scheduling order "may be modified only for good cause and with the  
8 judge's consent." Where a schedule has been ordered, a party's  
9 ability to amend its pleading is governed by this good cause  
10 standard, not the more liberal standard of Rule 15(a)(2). Johnson  
11 v. Mammoth Recreations, Inc., 975 F.2d 604, 608 (9th Cir. 1992).  
12 In order to determine whether good cause exists, courts primarily  
13 consider the diligence of the party seeking the modification. Id.  
14 at 609; see also Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294  
15 (9th Cir. 2000). Courts also consider five factors when assessing  
16 the propriety of a motion for leave to amend: undue delay, bad  
17 faith, futility of amendment, prejudice to the opposing party and  
18 whether the plaintiff has previously amended the complaint.  
19 Ahlmeier v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th  
20 Cir. 2009).

21 In her proposed amended pleading, Plaintiff appears to bring  
22 claims for age discrimination, in violation of the Age  
23 Discrimination in Employment Act (ADEA); national origin  
24 discrimination, in violation of Title VII; and retaliation, in  
25 violation of the ADEA and Title VII. Plaintiff's claims are  
26 apparently based on the administrative complaints she filed on  
27 March 26, 2007; January 3, 2009; and July 6, 2010.

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1 Defendant does not argue that Plaintiff lacks good cause to  
2 amend her complaint after the deadline to add claims. Instead,  
3 Defendant asserts that leave to amend should be denied because  
4 Plaintiff's amendments are futile. Many of Defendant's arguments  
5 stem from Plaintiff's errors and lack of clarity with respect to  
6 her initial proposed amended pleading.<sup>2</sup> In any amended pleading,  
7 Plaintiff shall plead her allegations accurately and in accordance  
8 with Federal Rule of Civil Procedure 8.

9 I. Claims for Failure to Promote to Chemistry Branch Chief  
10 Position in March, 2007

11 Defendant contends that Plaintiff's proposed claims based upon  
12 the March, 2007 denial of her application for a promotion are time-  
13 barred. This argument apparently was based on Plaintiff's initial  
14 proposed amended pleading, in which she alleged that she was  
15 notified of her non-selection on July 7, 2006. Because she alleged  
16 that she did not complain until March, 2007, Defendant asserted  
17 that her claim was time-barred based on 29 C.F.R. § 1614.105(a)(1),  
18 which requires aggrieved federal employees to contact an Equal  
19 Employment Opportunity (EEO) counselor within forty-five days of an  
20 alleged discriminatory action. However, in her opposition,  
21 Plaintiff asserts that the July, 2006 date was plead in error. In  
22 her revised proposed amended pleading, she alleges that she  
23 received notice of her non-selection on March 6, 2007, which falls  
24 within forty-five days of the date of she contacted an EEO  
25 counselor. Thus, Plaintiff's claims related to the March, 2007

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26 <sup>2</sup> For instance, Plaintiff alleges in her proposed amended  
27 complaint that she is "of Korean ancestry and, at all times  
28 pertinent hereto, over 4 years of age." P2AC ¶ 3.

1 decision not to promote her do not appear to be time-barred.

2 Defendant also contends that these claims are futile because  
3 Plaintiff alleges that Defendant "cancelled" the announcement for  
4 the position for which she applied. Defendant interprets this  
5 allegation to mean that no position existed, which would preclude a  
6 disparate treatment claim. See Gay v. Waiters' & Dairy Lunchmen's  
7 Union, 694 F.2d 531, 548 (9th Cir. 1982) (stating that "the  
8 failure to prove the existence of a job opening' is a failure as a  
9 matter of law to make out a prima facie case of disparate treatment  
10 under McDonnell Douglas") (quoting Chavez v. Tempe Union High Sch.  
11 Dist., 565 F.2d 1087, 1091 (9th Cir. 1977)). However, Plaintiff's  
12 allegation, although somewhat opaque, need not be given such an  
13 unfavorable reading. Interpreted generously, the revised proposed  
14 complaint could be understood to allege that the job announcement  
15 was withdrawn, not for legitimate business reasons, but based on  
16 unlawful discrimination against Plaintiff.

17 Plaintiff's vague pleadings suggest that she intends to bring  
18 claims for age and national origin discrimination and retaliation  
19 based on the March, 2007 denial of her application for promotion.  
20 However, her March, 26, 2007 administrative complaint alleged only  
21 age discrimination. Further, she does not plead any facts that  
22 suggest that the decision not to promote her was the product of  
23 unlawful retaliation. Thus, with respect to the March, 2007 denial  
24 of her application, Plaintiff is granted leave to amend her  
25 complaint to allege only a claim for age discrimination under the  
26 ADEA.

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1 II. Claims Arising from Allegations Contained in Plaintiff's Third  
2 Administrative Complaint

3 Defendant argues that Plaintiff's claims based on her  
4 allegation that "Defendant promoted a young non-Asian woman to  
5 Chemistry Branch Chief" are futile because she failed to exhaust  
6 her administrative remedies with respect to it. In particular,  
7 Defendant points to a letter signed by Plaintiff, in which she  
8 states that she withdrew her January, 2010 administrative complaint  
9 concerning this personnel action. See Sladden Decl., Ex. A.

10 Plaintiff acknowledges that she withdrew her January, 2010  
11 administrative complaint, but asserts that it was not a complaint  
12 on which she bases her current civil action. Instead, she  
13 maintains that her proposed second amended pleading rests in part  
14 on her July 6, 2010 administrative complaint. As noted above, that  
15 complaint concerned her purported demotion and constructive  
16 discharge in March, 2010, which she claimed to be caused by  
17 discrimination and harassment based on age, national origin, race  
18 and retaliation.

19 Based on the allegations contained in her proposed amended  
20 pleading, Plaintiff's claims arising from her July 6, 2010  
21 administrative complaint do not appear to be futile. She is  
22 therefore granted leave to amend her pleadings to charge Defendant  
23 based on conduct plead in that complaint.

24 CONCLUSION

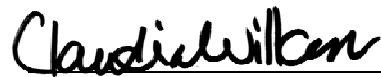
25 For the foregoing reasons, the Court GRANTS Plaintiff's motion  
26 (Docket No. 23). Plaintiff is granted leave to amend to plead a  
27 claim for age discrimination based on the March, 2007 denial of her

1 application and claims for retaliation and age and national origin  
2 discrimination based on the allegations contained in her July 6,  
3 2010 administrative complaint. Plaintiff shall file an amended  
4 pleading within seven days of the date of this Order. She shall  
5 not file the P2AC attached to her reply; Plaintiff must revise her  
6 proposed complaint to plead her claims with clarity and correct any  
7 errors noted above. Defendant may file an amended answer within  
8 fourteen days of the date that Plaintiff's amended pleading is  
9 filed.

10 Plaintiff's counsel sent a letter, dated November 30, 2010,  
11 asking the Court to strike the Sladden Declaration filed at Docket  
12 No. 32. Plaintiff represents that Docket No. 32, which has been  
13 locked by the Court's staff, contains private information; a  
14 corrected Sladden Declaration appears at Docket No. 33. If  
15 Plaintiff seeks such administrative relief, she shall file an  
16 administrative motion pursuant to Civil L.R. 7-11. In the  
17 alternative, she may file a joint stipulation seeking removal of  
18 the document. Plaintiff's informal letter is not adequate.

19 IT IS SO ORDERED.

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21 Dated: 2/3/2011



CLAUDIA WILKEN  
United States District Judge

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