

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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DONALD G. GROSS		)	
		)	
	Plaintiff,	)	
		)	
	v.	)	Civil Action No. 07-399 (EGS)
		)	
AKIN GUMP STRAUSS HAUER & FELD LLP		)	
		)	
	Defendant.	)	
<hr/>		)	

**MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT**

Comes now Plaintiff Donald G. Gross (“Plaintiff”), by and through his attorneys, and moves this Court, pursuant to Rules 15(a) and (d) of the Federal Rules of Civil Procedure, for leave to amend and supplement his previously filed Complaint. On February 26, 2007, Plaintiff Gross filed his Complaint in this matter alleging discrimination against him on the basis of his age in violation of the Age Discrimination in Employment Act and the District of Columbia Human Rights Act. On June 25, 2007, Defendant filed its Motion to Amend Answer and File Counterclaims alleging wrongdoing by Plaintiff and seeking money damages. Plaintiff moves to amend his Complaint and to add supplemental counts of retaliation. The grounds for Plaintiff’s motion are as follows:

1. Plaintiff filed this case under the Age Discrimination in Employment Act and the District of Columbia Human Rights Act for unlawful discrimination in connection with the termination of his employment by Defendant Akin Gump Strauss Hauer & Feld LLP. By filing his complaint, Plaintiff Gross engaged in protected activity.
2. Defendant, in turn, filed its Motion to Amend Answer and File Counterclaims, alleging wrongdoing and tortious conduct by Plaintiff and seeking money damages.

3. Defendant's Motion and proposed amended answer and counterclaims amount to an adverse action under the law because they would dissuade a reasonable employee from making a charge of discrimination.
4. Defendant filed its motion with the intent to chill Plaintiff's exercise of his rights and to retaliate against Plaintiff for his protected activity.
5. Pursuant to Rules 15(a) and 15(d) of the Federal Rules of Civil Procedure, leave to file amended and supplemented pleadings is to be liberally granted.

WHEREFORE, Plaintiff respectfully requests that this Court grant his Motion for Leave to Amend and Supplement Complaint to include counts of retaliation. Plaintiff's Motion is supported by good and substantial authority in the attached Memorandum of Points and Authorities.

Respectfully Submitted,

WEBSTER, FREDRICKSON & BRACKSHAW

/s/ Jonathan C. Puth

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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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DONALD G. GROSS )

Plaintiff, )

v. )

AKIN GUMP STRAUSS HAUER & FELD LLP )

Defendant. )

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Civil Action No. 07-399 (EGS)

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND  
AND SUPPLEMENT COMPLAINT**

**I. Introduction**

In its Motion to Amend Answer and File Counterclaims, Defendant Akin Gump Strauss Hauer & Feld LLP alleges that Plaintiff Gross engaged in wrongdoing, breached his duty of loyalty, and tortiously interfered with Defendant’s economic advantage. Because a motion for leave to amend and supplement pleadings should be granted liberally, and because filing a lawsuit (or filing counterclaims) against an employee who has alleged discrimination may constitute retaliation, the Court should grant Plaintiff leave to amend his Complaint to include retaliation counts. A copy of Plaintiff’s Amended Complaint is attached hereto.

**II. Argument**

In his February 26, 2007 Complaint, Plaintiff charged that Defendant Akin Gump discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act (“ADEA”) and the District of Columbia Human Rights Act (“DCHRA”) when Defendant terminated his employment because he was “too senior” and therefore “not a good fit”

with the firm. (Verified Complaint at ¶ 29.) Plaintiff's boss had previously told Plaintiff that he was "concerned" about Plaintiff's age and that Plaintiff seemed to be "very old" to be working in his position at the firm. (*Id.* at ¶ 10.) On June 25, 2007, Defendant filed its Motion to Amend Answer and File Counterclaims, alleging "after-acquired evidence," asserting two counterclaims, and seeking monetary damages. In his Amended Complaint, attached hereto as Exhibit 1, Plaintiff alleges that Defendant's Motion was filed in order to chill Plaintiff's exercise of his rights to be free from discrimination, amounting to illegal retaliation. As Plaintiff's supplemental claims are connected to his original pleading and will not prejudice Defendant's rights, the Court should grant Plaintiff leave to amend and supplement his Complaint.

**A. Leave to Amend and Supplement Pleadings is Granted Liberally.**

A party may file amended pleadings by leave of court "and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). A party may file supplemental pleadings "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed.R.Civ.P. 15(d). "A court should liberally grant a party's request to file a supplemental pleading if those supplemental facts connect to the facts asserted in the original pleading." *City of Moundridge, KS v. Exxon Mobil Corp.*, 471 F. Supp.2d 20, 29 (D.D.C. 2007) (citing *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir.1995)). Furthermore, supplemental pleadings may introduce new causes of action not alleged in the original complaint so long as their introduction does not create surprise or prejudice the rights of the adverse party. *Montgomery Env't'l Coalition v. Fri*, 366 F.Supp. 261, 265-66 (D.D.C.1973). Indeed, "leave to file a supplemental pleading should be freely permitted." *Quaratino*, 71 F.3d at 66; *see also Health Ins. Assoc. v. Goddard*, 213 F.R.D. 63, 66 (D.D.C. Feb 21, 2003) (citing *Wells v. Harris*, 185 F.R.D. 128, 132 (D.

Conn.1999).

Because Defendant's retaliation occurred only after Plaintiff Gross filed his Complaint, Plaintiff did not have an opportunity to include the count for retaliation in his original pleading. Furthermore, Defendant will not be prejudiced by Plaintiff's amendments or supplementation of his Complaint as discovery remains open and no depositions have been taken.

**B. Defendant's Motion to Amend Answer and File Counterclaims Constitutes Unlawful Retaliation.**

To prove unlawful retaliation, a plaintiff must demonstrate that he engaged in a protected activity and that the employer took an adverse action against him. *E.g.*, *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 368 (D.C. 1993). There is little question that filing a lawsuit alleging discrimination constitutes protected activity under the law. *Arthur Young & Co.*, 631 A.2d at 368; *Rochon v. Gonzales*, 438 F.3d 1211, 1220 (D.C. Cir. 2006) (filing Title VII complaints is protected activity). An adverse action occurs so long as it would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Ry. Co. v. White*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2405, 2415 (2006) (quoting *Rochon*, 438 F.3d at 1219). Defendant's new counterclaims seek monetary damages, and, thus, would ordinarily serve to "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *See Burlington Northern*, 126 S.Ct. at 2415.

Courts have long held that filing a lawsuit (and, by implication, counterclaims) against an employee complaining of discrimination can constitute retaliation under the federal and state anti-retaliation statutes. *See, e.g.*, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996); *Cozzi v. Pepsi-Cola Gen. Bottlers, Inc.*, 74 FEP Cases (BNA) 321, 323 (N.D. Ill. 1997); *Shafer v. Dallas*

*County Hosp. Dist.*, 76 FEP Cases (BNA) 1555, 1560 (N.D. Tex. 1997) (“It is well established that filing a retaliatory lawsuit may be actionable under Title VII.”) Even if the Defendant has “a valid legal claim” that fact “does not preclude the employee of from establishing that the employer’s motive in asserting the claim was impermissible retaliation.” *Arthur Young*, 631 A.2d at 368 (citing *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 644 (N.D. Ill. 1981)).

The rationale for protecting against unlawful retaliation is the necessity of preventing “employer interference with unfettered access to [the Act’s] remedial mechanisms.” *Burlington Northern*, 126 S.Ct. at 2415. This policy rationale, which is inherent in the statutory anti-retaliation provisions of the DCHRA and of the ADEA, would not be effectuated by allowing employers to engage in coercion through the filing of retaliatory lawsuits whenever an employee complained of unlawful discrimination or opposed discriminatory practices.

### **III. Conclusion**

For the foregoing reasons, Plaintiff respectfully requests that this Court grant his Motion for Leave to Amend and Supplement Complaint.

**Duty to Confer Under Local Rule 7**

Counsel for Plaintiff has discussed this Motion with counsel for Defendant in a telephone conference on July 9, 2007. Counsel for Defendant indicated that Defendant would oppose the motion.

Respectfully Submitted,

WEBSTER, FREDRICKSON & BRACKSHAW

/s/ Jonathan C. Puth

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Attorney for Plaintiff

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AKIN GUMP STRAUSS HAUER & FELD LLP	)	
	)	
Defendant.	)	
_____	)	

**ORDER**

Upon consideration of Plaintiff's Motion for Leave to Amend and Supplement Complaint, any Opposition thereto, and the entire record herein, it is hereby

**ORDERED** that the Plaintiff's Motion for Leave to Amend and Supplement Complaint is hereby, **GRANTED**.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge Emmet G. Sullivan  
United States District Court for the District of Columbia



**CERTIFICATE OF SERVICE**

I hereby certify that on this ***11th*** day of July, 2007, a copy of the foregoing Motion for Leave to Amend and Supplement Complaint, with Proposed Order and attached Amended Complaint was sent by first class mail, postage prepaid, and transmitted electronically to:

Christine Nicolaides Kearns, Esq.  
Karen McTavish, Esq.  
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Counsel for Defendant

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