

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 13-11934-RGS

PERRY J. FORGIONE,

v.

TRUSTEES OF BOSTON UNIVERSITY.

CIVIL ACTION NO. 13-12294-RGS

PERRY J. FORGIONE,

v.

TRUSTEES OF BOSTON UNIVERSITY.

MEMORANDUM AND ORDER

October 17, 2013

STEARNS, D.J.

BACKGROUND

On September 17, 2013, this court entered an Electronic Order (Docket No. 5) finding it unclear why plaintiff Perry J. Forgione (Forgione) filed the second action (*Forgione v. Trustees of Boston University*, Civil Action No. 13-12294-RGS) as a new action rather than as a supplement or amendment to the Complaint filed in his earlier lawsuit, *Forgione v. Trustees of Boston University*, Civil Action No. 13-11934-RGS. In light of this uncertainty, this court directed Forgione to demonstrate good cause by October 8, 2013 why this second case should not be consolidated with the prior lawsuit, and/or why his Complaint should not be construed as an Amended Complaint in that earlier lawsuit. Additionally, the defendant Trustees of Boston University was permitted an opportunity to file its position statement with respect to consolidation and/or construction of Forgione's Complaint as an Amended Complaint.

DISCUSSION

Forgione has not filed a timely response with respect to the consolidation issue as directed. The Trustees of Boston University has filed a Response (Docket No. 7) contending that this case should be consolidated with Civil Action No. 13-11934-RGS and the Complaint in Civil Action No. 13-12294-RGS should be deemed to be a “supplement” to the Complaint rather than an Amended Complaint.

This court agrees with the Trustees of Boston University. Accordingly, Civil Action No. 13-12294-RGS shall be CONSOLIDATED with the Lead Case, Civil Action No. 13-11934-RGS. Civil Action No. 13-12294-RGS shall be closed on the court’s dockets, and all further filings by the parties shall be made only in Civil Action No. 13-11934-RGS.

Further, in light of the consolidation of the two actions, the Motion to Dismiss for Failure to State a Claim (Docket No. 8) will be DENIED without prejudice. The Trustees of Boston University may renew a Motion to Dismiss with respect to all claims, including claims set forth in the Complaint in Civil Action No. 12294-RGS, within 21 days from the date of this Memorandum and Order.

Should a renewed motion be filed based on grounds of res judicata, the Trustees of Boston University shall explain how res judicata can apply to Forgione’s claims of violation of federal discrimination statutes, where his lawsuit in the Suffolk Superior Court commenced on October 18, 2012, but the U.S. Equal Employment Opportunity Commission did not adopt the conclusions of the Massachusetts Commission Against Discrimination until almost seven (7) months later, May 13, 2013 (which established exhaustion of administrative remedies and gave Forgione the right to sue in court). In other words, the Trustees of Boston University shall address how Forgione could have brought his federal claims in the state court action, where the federal claims had not been administratively exhausted. Similarly, the Trustees of Boston University must explain why res judicata should be applied Forgione’s claims in Civil Action No. 13-12294-RGS, where it has

argued that the claims are not viable at this time because Forgione has not exhausted his administrative remedies.

Finally, in any response to a renewed Motion to Dismiss, Forgione shall address the argument that he is unable to establish a causal connection between the alleged refusal to reinstate or rehire and the alleged discrimination or retaliation where, per Order of the Suffolk Superior Court based on a statutory calculation under worker's compensation law, he was legally deemed to be incapacitated from work until December, 2014. Forgione also shall address the contention that he is foreclosed from arguing the date of presumed incapacity because of a miscalculation by the Suffolk Superior Court by using the net amount of settlement rather than the gross amount.

CONCLUSION

Based on the foregoing, it is hereby Ordered that:

1. Civil Action No. 13-12294-RGS is CONSOLIDATED with the Lead Case, Civil Action No. 13-11934-RGS.
2. Civil Action No. 13-12294-RGS shall be closed on the court's dockets, and all further filings by the parties shall be made only in Civil Action No. 13-11934-RGS.
3. Defendant's Motion to Dismiss for Failure to State a Claim (Docket No. 8 in Civil Action No. 13-11934-RGS) is DENIED without prejudice to renew within 21 days of the date of this Memorandum and Order.

SO ORDERED.

/s/ Richard G. Stearns
RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE