

statements attributed to them in the Factual Return,” did not require Respondents to search beyond the documents compiled by JIG and OARDEC, but now having raised the issue, and even though the Court shall not order a search outside of these documents, if Respondents’ counsel already has knowledge of such responsive documents outside of this compilation, they shall also be produced to Petitioner; and it is further

**ORDERED** that the Court shall not convert the February 20, 2009 deadline for producing discovery into a date for a status report. If Respondents need additional time to comply with their discovery obligations in this case for reasons that are specific to this case, they are required to file a Motion for an Extension pursuant to the Court’s January 7, 2009 Scheduling Order

**SO ORDERED.**



**Andrei SMITH, Plaintiff,**

v.

**CAFÉ ASIA, Defendant.**

**Civil Action No. 07–0621 (RWR).**

United States District Court,  
District of Columbia.

Feb. 20, 2009.

**Background:** Former employee brought action against his former employer, alleging sexual harassment and discrimination based on sexual orientation in violation of District of Columbia Human Rights Act (DCHRA), and assault and battery. Employee moved to amend complaint and to enlarge or extend discovery.

**Holdings:** The District Court, Richard W. Roberts, J., held that:

(1) proposed amendment was not futile;

(2) hardship employee would suffer if motion were denied outweighed hardship employer would suffer if motion were granted; and

(3) employee’s request to take 13 additional depositions was unsubstantiated.

Motion granted in part and denied in part.

**1. Federal Civil Procedure** ¶839.1

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits, and therefore should be permitted to amend complaint. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

**2. Federal Civil Procedure** ¶834, 840, 851

Undue delay, undue prejudice to the defendant, or futility of the proposed amendments are factors that may warrant denying leave to amend complaint. Fed. Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

**3. Federal Civil Procedure** ¶849

The defendant has the burden of showing why leave to file an amended complaint should not be granted. Fed. Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

**4. Federal Civil Procedure** ¶842

When considering motion for leave to amend complaint, courts generally consider the relation of the proposed amended complaint to the original complaint, favoring proposed complaints that do not radically alter the scope and nature of the case. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

**5. Civil Rights** ¶1113

**Federal Civil Procedure** ¶392

Individual defendants that former employee sought to add as defendants in action against former employer for alleged sexual harassment and discrimination based on sexual orientation in violation of District of Columbia Human Rights Act

(DCHRA) could be classified as employers under DCHRA, and thus amendment was not futile; individual defendants were managers who acted in interest of employer, who either perpetrated or witnessed and failed to stop alleged discriminatory acts, or to whom employee complained without success about alleged acts. Fed.Rules Civ. Proc.Rule 15(a)(2), 28 U.S.C.A.; D.C. Official Code, 2001 Ed. §§ 2-1401.02, 2-1402.11.

#### **6. Federal Civil Procedure** ⇔851

An amendment is futile if the proposed claim would not survive a motion to dismiss by failing to plead enough facts to state a claim to relief that is plausible on its face. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

#### **7. Federal Civil Procedure** ⇔828.1

Decision to grant or deny leave to amend is committed to the sound discretion of the district court. Fed.Rules Civ. Proc.Rule 15(a)(2), 28 U.S.C.A.

#### **8. Civil Rights** ⇔1735

District of Columbia Human Rights Act (DCHRA) does not preclude a claim against individual and supervisory employees involved in committing the allegedly discriminatory conduct. D.C. Official Code, 2001 Ed. §§ 2-1401.02, 2-1402.11.

#### **9. Federal Civil Procedure** ⇔392

Hardship former employee would suffer if motion for leave to amend complaint against former employer for alleged violations of District of Columbia Human Rights Act (DCHRA), by adding individual managers as defendants and claims for disparate treatment against them, were denied outweighed hardship employer would suffer if motion were granted, warranting grant of leave to amend; although granting motion would extend discovery and prolong case, denial would result in statute of limitations precluding claims against managers in subsequent action, and basis for those claims was not discov-

ered until after original complaint was filed. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.; D.C. Official Code, 2001 Ed. § 2-1403.04(a).

#### **10. Federal Civil Procedure** ⇔834

To determine if the threat of prejudice to the opposing party is great enough to warrant denying leave to amend, courts consider the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

#### **11. Federal Civil Procedure** ⇔1261

Former employee's request to take 13 additional depositions after amendment to complaint against former employer for violations of District of Columbia Human Rights Act (DCHRA), was unsubstantiated, and thus, discovery deadline would be extended to allow him to take only two additional depositions; employee failed to identify six additional non-defendant witnesses, explain why he needed to depose them or why he did not do so before. D.C. Official Code, 2001 Ed. § 2-1401.01 et seq.

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#### **MEMORANDUM OPINION AND ORDER**

RICHARD W. ROBERTS, District Judge.

Plaintiff Andrei Smith brings this action against his former employer, defendant

Café Asia, for sexual harassment and discrimination based on sexual orientation in violation of the D.C. Human Rights Act (“DCHRA”), and for assault and battery. Smith has moved to amend his complaint by adding several defendants and counts of sex discrimination and negligent supervision, and to extend and enlarge discovery. Because Smith has shown good cause to amend, and defendant has not shown that Smith’s amended complaint is futile, but not all of the discovery sought is warranted, Smith’s motion will be granted in part and denied in part.

#### BACKGROUND

Smith filed this action against Café Asia, his previous employer, alleging claims of sexual orientation discrimination in violation of the DCHRA and assault and battery. (Compl. at ¶¶ 28–35.) Smith’s allegations were based upon incidents that occurred during his employment as a host and waiter with Café Asia between September 18, 2005 and the end of 2006. (*Id.* at ¶¶ 5–6.) Smith alleged that he has been subjected to verbal and physical assaults by other employees, that Case Asia’s management was made aware of the assaults, and that Café Asia’s management did not remedy the situation. (*Id.* at ¶¶ 2–27.)

Smith has moved to add six individual defendants, to add the corporate defendant

that operates through the trade name Café Asia, and to add two additional counts: one count of sex discrimination in violation of the DCHRA against each defendant, and one count of negligent supervision. He also seeks to extend the discovery period and to be allowed to take 13 more depositions, including those of the seven added defendants. Café Asia opposes Smith’s motion, arguing among other things<sup>1</sup> that Smith’s proposed amendment is futile, and that Smith’s motion to file an amended complaint was untimely and that it would unjustifiably delay discovery and trial.

#### DISCUSSION

[1–4] A plaintiff is allowed to amend his complaint after an answer has been filed “only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Fed.R.Civ.P. 15(a)(2). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Undue delay, undue prejudice to the defendant, or futility of the proposed amendment(s) are factors that may warrant denying leave to amend. *Atchinson v. Dist. of Columbia*,

1. The defendant argues that Smith failed to comply with Local Civil Rule 7(m) which provides, in relevant part:

Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good faith effort to determine whether there is any opposition to the relief sought, and, if there is opposition, to narrow the areas of disagreement. . . . A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.

The purpose of Rule 7(m) is to promote the resolution of as many litigation disputes as

possible without court intervention, or at least to create an opportunity for the parties to narrow the disputed issues that must be brought to the court. *Ellipso v. Mann*, 460 F.Supp.2d 99, 102 (D.D.C.2006). According to Café Asia’s counsel, the parties’ “entire ‘meet and confer’ [regarding this motion] is contained in the e-mails” attached to Café Asia’s opposition. (See Def.’s Opp’n at 1.) However, Smith’s counsel asserts that she “had a full conversation” about this motion with one of Café Asia’s attorneys, demonstrating that she complied with Rule 7(m) and that the parties had an opportunity to narrow the remaining areas of dispute. (Pl.’s Reply at 1.)

73 F.3d 418, 425 (D.C.Cir.1996). The defendant has the burden of showing why leave to file an amended complaint should not be granted. *LaPrade v. Abramson*, Civil Action No. 97-10(RWR), 2006 WL 3469532, at \*3 (D.D.C. Nov. 29, 2006). Courts generally consider the relation of the proposed amended complaint to the original complaint, favoring proposed complaints that do not “radically alter the scope and nature of the case.” *Miss. Ass’n of Coops. v. Farmers Home Admin.*, 139 F.R.D. 542, 544 (D.D.C.1991); see also *Childers v. Mineta*, 205 F.R.D. 29, 32-33 (D.D.C. 2001).

## I. FUTILITY

[5-7] Defendant argues that Smith’s proposed amended complaint would be futile because the individual defendants cannot be held liable for discrimination under the DCHRA.<sup>2</sup> An amendment is futile “if the proposed claim would not survive a motion to dismiss.” *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C.Cir. 1996). A claim will not survive a motion to dismiss if it fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). A complaint must contain factual allegations that “possess enough heft to sho[w] that the pleader is entitled to relief.” *Amore v. Accor. N. Am., Inc.*, 529 F.Supp.2d 85, 94-95 (D.D.C.2008) (quoting *Twombly*, 127 S.Ct. at 1966). In addition, the court does not have to accept asserted inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. *Kowal v. MCI Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994). The decision to grant or deny leave to amend is committed to the sound discre-

tion of the district court. *Foman*, 371 U.S. at 182, 83 S.Ct. 227; *James Madison*, 82 F.3d at 1099.

The DCHRA provides, in relevant part:

(a) General.—It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived . . . sex [or] sexual orientation . . . of any individual:

(1) By an employer.—To . . . discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment . . . [.]

D.C.Code § 2-1402.11. The DCHRA defines “employer” as “any person who, for compensation, employs an individual . . . [and] any person acting in the interest of such employer, directly or indirectly. . . .” D.C.Code § 2-1401.02.

[8] Liability under the DCHRA may be imposed against individuals in certain circumstances when they meet the definition of “employer.” *Purcell v. Thomas*, 928 A.2d 699 (D.C.2007) held that the “text and purpose of the DCHRA” and case precedent do not “preclude a claim against individual and supervisory employees involved in committing the allegedly discriminatory conduct[.]” *Id.* at 715 (citing *Wallace v. Skadden Arps, Slate, Meagher & Flom*, 715 A.2d 873 (D.C.1998); *Mitchell v. Nat’l R.R. Passenger Corp.*, 407 F.Supp.2d 213, 241 (D.D.C.2005); and *MacIntosh v. Bldg. Owners & Mgrs.’ Ass’n*, 355 F.Supp.2d 223 (D.D.C.2005)). Although defendant argues that none of the additional defendants Smith seeks to add can be classified as employers, the amended complaint alleges that the additional individual defendants were managers who perpetrated, who witnessed and failed to

2. While defendant also argues that Smith failed to allege that any of the additional defendants committed assault or battery against Smith, the proposed amended complaint clearly alleges that defendant Abu Ba-

kar and “many members of the kitchen staff” committed multiple batteries against Smith (see Am. Compl. at ¶¶ 16, 18), and brings the claim of assault and battery against only the corporate defendants and Bakar.

stop, or to whom Smith complained without success about, the discriminatory acts. Smith argues moreover that the facts alleged regarding these supervisory management employees reflect that they acted in the interest of their employer and that they could be individually liable under the DCHRA definition of employer. (Pl.'s Reply at 6–8.) Whether the disputed facts will or will not show that the individual employees fit that definition is not to be resolved at this stage, and the defendant has not shown that the amendment to the complaint would be futile.

## II. PREJUDICE TO DEFENDANT

[9, 10] Defendant also argues that allowing Smith to amend the complaint would result in prejudice to the defendant by extending discovery and prolonging the case. A motion to amend may be denied where a defendant would have to conduct additional discovery and a plaintiff has filed an untimely motion to amend without demonstrating a good reason for the delay. *Hollinger-Haye v. Harrison Western/Franki-Denys*, 130 F.R.D. 1, 2 (D.D.C. 1990). To determine if the threat of prejudice to the opposing party is great enough to warrant denying leave to amend, courts consider “the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.” *Childers*, 205 F.R.D. at 32 (internal citations omitted).

[11] Here, Smith asserts that he failed to include the additional claims in his original complaint because the law regarding personal liability under the DCHRA was unclear before the opinion was issued in *Purcell*,<sup>3</sup> and the evidence involving the

allegations regarding “disparate treatment as to the handling of complaints on the basis of sex” was not discovered until after the original complaint was filed. (Pl.'s Reply at 5–6.) Smith also would bear significant hardship if his motion to file an amended complaint were denied because the statute of limitations would preclude Smith from bringing the claims of sex discrimination in a subsequent action. *See* D.C.Code § 2–1403.04(a) (one year limitation period for claims of discrimination under the DCHRA). Smith's motion appears to be made in good faith, and the hardship that Smith would bear if amendment is denied outweighs the burden that defendant would suffer if amendment is granted. However, Smith's request to take 13 additional depositions is unsubstantiated. Smith fails to identify who the six additional non-defendant witnesses are, why he needs to depose them, and why he did not do so before. Nor has he justified his failure to depose the bulk of the new individual defendants before now, most of whom were known to him and named in the original complaint, or the new corporate defendant whose identity was revealed as soon as the defendant removed this case from the Superior Court. *See* Notice of Removal at 1. He does not rebut defendant's assertion that instead, he used most of his allotted depositions to depose tangential staff who did not even witness the acts complained of. (*See* Def.'s Opp'n at 7–8.) The discovery deadline will be extended, and Smith may propound written discovery to the new defendants, but he will be allowed to take only two additional depositions.

## CONCLUSION AND ORDER

Because the defendant has not shown why leave to amend should not be granted,

3. The original complaint was filed on February 21, 2007, while *Purcell* was decided on

July 26, 2007.

Smith will be allowed to amend his complaint and conduct limited additional discovery. Accordingly, it is hereby

ORDERED that plaintiff's motion [48] for leave to file an amended complaint and to modify the scheduling order be, and hereby is, GRANTED in part and DENIED in part. Leave is granted to amend. The Clerk shall file the Amended Complaint [# 48-2] nunc pro tunc to February 21, 2007. It is further

ORDERED that the deadline for all discovery closing is extended to April 22, 2009. The number of additional depositions to which plaintiff shall be limited is two. The post-discovery status conference shall be held on April 24, 2009 at 9:45 a.m.



Emanuel JOHNSON, Jr., Plaintiff,

v.

Eric HOLDER<sup>1</sup> et al., Defendants.

Civil Action No. 04-1158.

United States District Court,  
District of Columbia.

Feb. 23, 2009.

**Background:** Federal Bureau of Investigation (FBI) special agent and employee of brought employment discrimination action against various federal and municipal employees, alleging that defendants discriminated against him when he was employed by the FBI and by the District of Columbia Office of the Inspector General (OIG). Following dismissal of claims against various defendants, 248 F.R.D. 347, remaining defendants moved to dismiss or, in the alternative, for summary judgment.

1. The court substitutes Eric Holder for his predecessor, Michael Mukasey, as Attorney General. FED.R.CIV.P. 25(d)(1); *Network Project v. Corp. for Pub. Broad.*, 398 F.Supp.

**Holdings:** The District Court, Ricardo M. Urbina, J., held that:

- (1) plaintiff failed to exhaust administrative remedies on his Title VII claims;
- (2) plaintiff's § 1981 claims were time-barred; and
- (3) equitable tolling was not warranted.

Motion granted.

### 1. Federal Courts ⇌5, 34

Federal courts are courts of limited jurisdiction and the law presumes that a cause lies outside this limited jurisdiction.

### 2. Federal Courts ⇌31

Because subject-matter jurisdiction is an Article 3 as well as a statutory requirement, no action of the parties can confer subject-matter jurisdiction upon a federal court. U.S.C.A. Const. Art. 3, § 2, cl. 1.

### 3. Federal Courts ⇌33, 34

On a motion to dismiss for lack of subject-matter jurisdiction, the plaintiff bears the burden of establishing by a preponderance of the evidence that the court has subject-matter jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

### 4. Federal Courts ⇌30, 32

Because subject-matter jurisdiction focuses on the court's power to hear the claim, the court must give the plaintiff's factual allegations closer scrutiny when resolving a motion to dismiss for lack of subject matter jurisdiction than would be required for motion to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(1), 6, 28 U.S.C.A.

1332, 1336 (D.D.C.1975) (explaining that "[s]ubstitution is appropriate when the original officer is replaced by an acting officer").