

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>KATHERINE MORGAN,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<b>No. 2:15-cv-107-GZS</b>
	)	
<b>CAROLYN W. COLVIN, Acting</b>	)	
<b>Commissioner of Social Security,</b>	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM DECISION AND ORDER ON MOTION TO AMEND**

The plaintiff in this employment discrimination action seeks leave to amend her complaint to add a factual allegation and expand the scope of her retaliation claim. *See* Amended Motion To Amend Complaint (“Motion”) (ECF No. 21) at 1-2; [Proposed] First Amended Complaint and Demand for Jury Trial (“Proposed Complaint”) (ECF No. 21-1), attached thereto, ¶¶ 18, 26. The defendant objects, contending that the plaintiff was, or should have been, aware of this information when she filed her complaint and, thus, fails to show good cause for the requested belated amendment. *See* Defendant’s Opposition to Plaintiff’s Amended Motion To Amend Complaint (“Opposition”) (ECF No. 22) at 4-6. I conclude that the plaintiff demonstrates good cause to add the factual allegation but not the retaliation claim. Accordingly, I grant the Motion as to the factual allegation and otherwise deny it.

**I. Applicable Legal Standards**

Pursuant to Federal Rule of Civil Procedure 15(a)(2), “[t]he court should freely give leave [to amend a pleading] when justice so requires.” Fed. R. Civ. P. 15(a)(2). Leave to amend should be granted in the absence of reasons “such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue

prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . .” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The First Circuit has explained:

A motion to amend a complaint will be treated differently depending on its timing and the context in which it is filed. . . . As a case progresses, and the issues are joined, the burden on a plaintiff seeking to amend a complaint becomes more exacting. Scheduling orders, for example, typically establish a cut-off date for amendments (as was apparently the case here). Once a scheduling order is in place, the liberal default rule is replaced by the more demanding “good cause” standard of Fed. R. Civ. P. 16(b). This standard focuses on the diligence (or lack thereof) of the moving party more than it does on any prejudice to the party-opponent. Where the motion to amend is filed after the opposing party has timely moved for summary judgment, a plaintiff is required to show “substantial and convincing evidence” to justify a belated attempt to amend a complaint.

*Steir v. Girl Scouts of the USA*, 383 F.3d 7, 11-12 (1st Cir. 2004) (citations, internal quotation marks, and footnotes omitted).

The plaintiff filed a motion to amend on October 19, 2015, *see* ECF No. 20, that she amended on October 30, 2015, to correct misstatements, *see* Motion at 1. Both the motion and the amended motion were filed well after the parties’ August 7, 2015, deadline to amend pleadings, *see* ECF No. 6, but well before any summary judgment motion practice, *see* ECF No. 25 (setting January 15, 2016, as the parties’ deadline to file notices of intent to seek summary judgment). Hence, the “good cause” standard applies.

“Assuming the Court finds that good cause exists for setting aside the Scheduling Order’s deadline, Rule 15(a)(2) instructs the Court to freely give leave to amend when justice so requires, and gives the court extensive discretion.” *McGowen v. Four Directions Dev. Corp.*, No. 1:12-cv-00109-JAW, 2013 WL 2455977, at \*4 (D. Me. June 6, 2013) (citations and internal quotation marks omitted). Nonetheless, the court “may deny leave to amend when the request is characterized by undue delay, bad faith, futility, [or] the absence of due diligence on the movant’s

part . . . [or] would serve no useful purpose.” *Id.* (quoting *Calderón-Serra v. Wilmington Trust Co.*, 715 F.3d 14, 19 (1st Cir. 2013)).

## **II. Factual Background**

On March 18, 2015, the plaintiff filed a three-count complaint seeking damages for the defendant’s alleged (i) retaliation against her based on her protected Equal Employment Opportunity (“EEO”) activity (Count I), (ii) discrimination against her based on her sex (Count II), and (iii) discrimination against her based on her age (Count III). *See* Complaint and Demand for Jury Trial (“Complaint”) (ECF No. 1) ¶¶ 25-53. She seeks to amend her complaint to add the following in her recitation of facts common to all claims:

Additionally, Stephanie Korupp, the Portland Office Manager, is empowered to, and did, take tangible employment actions against Plaintiff and is therefore her supervisor. At all times Korupp was aware of Plaintiff’s age, sex, and prior EEO activity.

Proposed Complaint ¶ 18. She also seeks to amend a paragraph within Count I summarizing her protected activity to include events predating December 2013, as follows:

This protected activity includes Plaintiff[’]s oral complaints to Judge Fletcher in June 2013 that she was subject to a hostile work environment based on her age, sex, and otherwise; emails to Judge Fletcher in August 2013; complaints to Judges Fletcher and Sax in December 2013; and Plaintiff[’]s official EEO complaint made in January 2014.

*Id.* ¶ 26.<sup>1</sup>

## **III. Discussion**

The plaintiff explains that she did not include in her complaint protected activity in which she allegedly engaged in June and August 2013 because, at the time, it appeared to her counsel that retaliatory actions taken against her were motivated solely by her December 2013 and January

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<sup>1</sup> The plaintiff, an Administrative Law Judge at the Social Security Administration’s Hearing Office, Office of Disability Adjudication and Review (“ODAR”), in Portland, Maine (“Portland Office”), *see* Complaint ¶ 3, identifies Judge Guy Fletcher as the Chief Administrative Law Judge of the Portland Office and her first-level supervisor, and Judge Carol Sax as Regional Chief Administrative Law Judge and her second-level supervisor, *see id.* ¶ 18.

2014 EEO activity. *See* Motion at 1. She asserts that, prior to receiving discovery produced in September 2015, she could not have known the extent of the defendant's primary retaliatory act, a baseless Office of Inspector General ("OIG") investigation initiated by an anonymous complaint. *See id.* at 2. She contends that only through that discovery did she learn the details of the confidential OIG investigation, in addition to confirming that the investigation had commenced in July 2013. *See id.* at 3. She adds that Korupp's ability to take adverse employment actions against her became clear only through the production of discovery. *See id.* at 2.

The defendant protests that the plaintiff fails to show good cause to add information about Korupp because she makes no effort to explain what tangible employment actions Korupp allegedly took against her or why she only became aware of them through the course of discovery, making unclear whether, through the exercise of due diligence, she could have learned these facts earlier. *See* Opposition at 4-5.

She adds that the plaintiff fails to show good cause to move back the date of her protected EEO activity because she knew of her own oral and written complaints to Judge Fletcher and knew by November 24, 2014, that a complaint had been made to the OIG fraud hotline in about July 2013. *See id.* at 5; Exh. A (ECF No. 22-1) thereto. She points out that, while the plaintiff mentioned the OIG investigation in her complaint, she characterized it as an act of harassment, not of retaliation. *See* Opposition at 6; Complaint ¶ 30. She argues that permitting the amendment at this late date would prejudice her because widening the scope of a plaintiff's retaliation claim to include an earlier instance of allegedly protected activity necessarily increases the scope of a defendant's potential liability. *See* Opposition at 6.

In response, the plaintiff elaborates on the impact of the September 2015 discovery. *See* Plaintiff's Reply Memorandum in Support of Amended Motion To Amend Complaint ("Reply") (ECF No. 23) at 2-5.

With respect to the OIG investigation, she states that, prior to receiving the discovery at issue, she knew only that an anonymous OIG complaint was filed against her in July 2013. *See id.* at 2. She asserts that, in the absence of knowledge of the nature, scope, or substance of the OIG investigation, there did not appear to be a rational, good-faith basis to argue that it was commenced in retaliation for EEO activity. *See id.* at 2-3. She states that, in September 2015, she received documents describing the allegations made against her, which provided a good-faith basis to allege that the filing of the OIG complaint itself was a retaliatory act in response to her documented complaints to Judge Fletcher of discriminatory acts and conduct by fellow Administrative Law Judges John Melanson and John Edwards. *See id.* at 3. She notes that, subsequent to the filing of the Motion, on November 13, 2015, she learned that Judge Edwards had initiated the anonymous OIG complaint. *See id.*

With respect to Korupp, she explains that she learned through discovery that Korupp kept an unofficial personnel file on her, filed anonymous complaints against her, and was instrumental in obtaining "information" and disseminating it to others that resulted either in Judge Edwards' filing of the OIG complaint or the alleged continuous harassment against her for imaginary time and/or attendance violations. *See id.* at 3-4 (quotation marks in original). She asserts that she did not receive the necessary documents to make this connection until September 2015. *See id.* at 4.

The showing made by the plaintiff suffices to demonstrate good cause for her failure to include the Korupp allegations in her March 18, 2015, complaint or seek to amend the complaint

to add them by the deadline of August 7, 2015.<sup>2</sup> The plaintiff could not have known, prior to obtaining the discovery at issue, that Korupp took actions that could colorably be described as adverse tangible employment actions against her. To the extent that the defendant's argument that it is prejudiced by the expansion of the retaliation claim applies to the Korupp allegations, *see* Opposition at 6, it does not counsel against the amendment pursuant to Rule 15(a)(2), *see, e.g.*, 6 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1487, at 723 (2010) (“[A] plaintiff typically will not be precluded from . . . adding a claim to an otherwise proper complaint simply because that amendment may increase [a] defendant’s potential liability.”) (footnote omitted).

However, I conclude that the plaintiff fails to demonstrate good cause to amend the complaint to add earlier instances of protected EEO activity. As of March 18, 2015, when the plaintiff filed her complaint, she knew that she had complained to Judge Fletcher in June and August 2013 about alleged harassment by Judges Melanson and Edwards (the protected EEO activity that she now wishes to set forth) and that an anonymous complaint had been made to the OIG about her sometime in July 2013. She also knew the general subject matter of the anonymous complaint and believed that it had been made by Judge Melanson, one of the two judges about whom she had complained to Judge Fletcher. *See* Complaint ¶ 30 (“Upon information and belief, Judge John Melanson, as part of his ongoing harassment of [the plaintiff], made an anonymous complaint to the OIG that [the plaintiff] was violating time and attendance rules or standards, and that she was an ‘outlier’ because she decided too many cases, decided too many cases in favor of Claimants, or both.”).

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<sup>2</sup> The defendant does not argue that the time that elapsed between the plaintiff’s receipt of the relevant discovery in September 2015 and her filing of the Motion in October 2015 constituted an undue delay. *See generally* Opposition.

This information, in my view, sufficed to enable the plaintiff to make a colorable claim that the OIG investigation was initiated in retaliation for her June and August 2013 protected activity. *See, e.g.*, Fed. R. Civ. P. 11(b)(2)-(3) (an attorney signing a pleading “certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,] . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . [and that] the factual contentions have evidentiary support or, if specifically so identified, *will likely have evidentiary support after a reasonable opportunity for further investigation or discovery*”) (emphasis added).

In any event, the plaintiff fails to explain how the discovery materials obtained in October 2015 permitted her, for the first time, to allege in good faith that she was subject to retaliation in the form of an allegedly baseless OIG investigation as a result of her summer 2013 complaints to Judge Fletcher. She represents that, in September 2015, the defendant produced a set of documents relevant to the OIG investigation, including the OIG complaint, which included a description of the allegations made against her. *See Reply* at 3. She asserts that, although many investigation details were still unclear at that time, “it became apparent that a good-faith basis existed to allege and argue that the filing of the OIG complaint itself was a retaliatory act” in response to her summer 2013 complaints to Judge Fletcher. *Id.* Yet, this begs the question of how the documents at issue provided the good-faith basis that previously had been missing. The plaintiff already knew the general nature of the complaint that had been made against her, and she already suspected that the complainant was one of the two judges about whom she had complained to Judge Fletcher (albeit Judge Melanson rather than Judge Edwards). *See Complaint* ¶ 30.

The plaintiff cites *Pettinaro Enters., LLC v. Continental Cas. Co.*, C.A. No. 09-139-GMS, 2010 WL 4274658, at \*3 (D. Del. Oct. 29, 2010), for the proposition that a party who is aware of some information relevant to an amended claim but lacks the specific details necessary to assert the claim until after the expiration of a deadline to amend pleadings can still satisfy the good cause standard. *See Reply* at 4-5. *Pettinaro* is distinguishable. In that case, plaintiff property owners sued their insurance company for breach of contract and a declaratory judgment regarding the denial of an insurance coverage claim for property damage resulting from two fires. *See Pettinaro*, 2010 WL 4275658, at \*1. The court held that, although the deadline to amend pleadings had passed, the plaintiffs had demonstrated good cause to amend their complaint to add claims for bad faith and breach of the implied covenant of good faith and fair dealing based on facts discovered during the deposition phase of discovery. *See id.* at \*1, \*3. The court noted that, although the plaintiffs had been aware that their insurer might have had communications with agencies investigating the cause of the fires, they did not learn until the deposition phase of discovery about the nature of the meetings. *See id.* at \*3. Based on that discovery, the plaintiffs alleged that shortly after the fires, but prior to the release of the investigation report, the defendant's representatives began to meet in secret with the agencies' representatives to discuss the status of the case and to improperly influence the agencies' investigation of the fire. *See id.* at \*1.

In this case, by contrast, the plaintiff does not explain how the discovery that she obtained in September 2015 revealed previously unknown information (as opposed to merely corroborating known information).

#### **IV. Conclusion**

For the foregoing reasons, the Motion is **GRANTED** with respect to the Korupp factual allegations, and otherwise **DENIED**. The plaintiff shall forthwith file on the ECF docket a version of her Amended Complaint that is consistent with this ruling.

#### **NOTICE**

*In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.*

*Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.*

Dated this 29<sup>th</sup> day of January, 2016.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge