

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 02-20982-CIV-MORENO/GARBER

SANDALIO GONZALEZ

Plaintiff,

vs.

**JOHN ASHCROFT, Attorney General,
U.S. Department of Justice,
in his official capacity,**

Defendant.

_____ /

**PLAINTIFF'S SECOND RULE 15(d) MOTION
TO FILE SUPPLEMENTAL PLEADING**

COMES NOW, Plaintiff, SANDALIO GONZALEZ, by and through undersigned counsel, and respectfully moves this Honorable Court to file a supplemental pleading pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, and as grounds states as follows:

BACKGROUND

1. On April 1, 2002, Plaintiff filed his original complaint to remedy allegations of discrimination on the basis of national origin (Hispanic), for the terms, conditions, and privileges of employment, and to remedy retaliation against an employee for activity protected under Title VII, all in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et. seq.*; the Civil Rights Act of 1991, 42 U.S.C. § 1981a; for declaratory relief, damages and other appropriate legal and equitable relief as sought pursuant to 42 U.S.C. § 2000e [D.E. 1].

2. On May 9, 2002, Plaintiff filed an amended complaint basically adding some additional facts that were uncovered while doing discovery in a companion case Juan J. Perez v. John Ashcroft, Case No. 01-1010-Civ-SEITZ/BANDSTA [D.E. 4].

3. On September 27, 2002, Plaintiff filed the Third Amended Complaint [D.E. 25] in response to the Court granting Defendant's Motion to Strike and Dismiss the Second Amended Complaint and gave Plaintiff until September 30, 2002, in which to file his Third Amended Complaint [D.E. 23].

4. On March 27, 2003, this Court entered an Order Granting Defendant's Motion for Judgment on the Pleadings [D.E. 53] in favor of the Defendant, essentially dismissing all 14 counts cited in the Third Amended Complaint.

5. Plaintiff appealed the Court's decision and on April 30, 2004, the Eleventh Circuit Court of Appeals issued a decision affirming in part, reversing in part, and remanding for further proceedings the Court's Order Granting Defendant's Motion for Judgment on the Pleadings.

6. On August 11, 2004, Plaintiff filed his first Rule 15(d) motion to file a supplemental pleading, along with the supplemental pleading [D.E. 85 & 86].

7. On April 16, 2004, this Court issued an order granting Plaintiff's Rule 15(d) motion to file a supplemental pleading [D.E. 87].

8. More recently Plaintiff learned of more allegations of retaliatory conduct perpetrated on Plaintiff by his employer, in that they are related to occurrences that gave rise to the original pleading, and that the Defendant's actions are reoccurring and ongoing, and fairness would weigh in favor of the Plaintiff filing a supplemental pleading.

9. On or about August 2003, Defendant did not consider Plaintiff for the position of Special Agent in Charge of the Special Operations Division, Defendant had knowledge that Plaintiff was interested in a Headquarters position, and Plaintiff was clearly more qualified than the person selected for this position who was promoted to the Senior Executive Service (SES) with less than a year in grade as a GS-15 in violation of an agreement between DEA and the Plaintiff Class for Black

Special Agents that was approved by the U.S. District Court for the District of Columbia.

10. On or about October 17, 2003, Defendant did not consider Plaintiff for the position of Special Agent in Charge for the DEA Washington, D.C. Field Division, Defendant had knowledge that Plaintiff was interested in this position, and Plaintiff was clearly more qualified than the person selected for this position.

11. On or about October 31, 2003, Defendant did not consider Plaintiff for the position of Deputy Assistant Administrator for Intelligence at DEA Headquarters, Defendant had knowledge that Plaintiff was interested in a position at Headquarters, and Plaintiff was clearly more qualified than the person selected for this position.

12. On or about November 17, 2003, Defendant did not consider Plaintiff for the position of Special Agent in Charge for the DEA Atlanta Field Division, Defendant had knowledge that Plaintiff had requested a transfer to a duty post closer to Florida where his family resided, Plaintiff was clearly more qualified than the person selected for this position, and the person given the position, a similarly situated SES employee, was accommodated by Defendant by transferring her from the Dallas Field Division back to her home geographic area.

13. On or about November 25, 2003, Defendant did not consider Plaintiff for the position of Special Agent in Charge of the DEA Dallas Field Division, Defendant had knowledge that Plaintiff had asked for a transfer to a duty post closer to Florida where his family resided, and Plaintiff was clearly more qualified than the person selected for this position.

14. On or about January 15, 2004, Defendant did not consider Plaintiff for the position of DEA Policy Advisor to the Office of National Drug Control Policy in Washington, D.C., Defendant had knowledge that Plaintiff was interested in a position at Headquarters, and Plaintiff was clearly more qualified than the person selected for this position

15. On or about June 18, 2004, Defendant did not consider Plaintiff for the position of Associate Special Agent in Charge for the DEA Miami Field Division, Defendant had knowledge that Plaintiff was interested in this position, and Plaintiff was clearly more qualified than the person selected for this position.

16. On or about February 27, 2004, Defendant did not consider Plaintiff for the position of Special Agent in Charge of the DEA Houston Field Division, Defendant had knowledge that Plaintiff had asked for a transfer to a duty post closer to Florida where his family resided, and Plaintiff was clearly more qualified than the person selected for this position.

17. On or about May 13, 2004, Defendant did not consider Plaintiff for the position of Special Agent in Charge for the DEA New Orleans Field Division, Defendant had knowledge that Plaintiff had requested a transfer to a duty post closer to Florida where his family resided, Plaintiff was clearly more qualified than the person selected for this position, and the person given the position, a similarly situated SES employee, was accommodated by Defendant by transferring him from the St. Louis Field Division back to his home geographic area.

18. On or about May 28, 2004, Defendant did not consider Plaintiff for the position of Acting Chief of Intelligence at DEA Headquarters, Defendant had knowledge that Plaintiff was interested in a position at Headquarters, and Plaintiff was clearly more qualified than the person selected for this position.

19. Also on or about May 28, 2004, Defendant did not consider Plaintiff for the position of Interim Director of the Organized Crime Drug Enforcement Task Force Drug/Financial Fusion Center, Defendant had knowledge that Plaintiff was interested in a Headquarters position, and Plaintiff was clearly more qualified than the person selected for this position.

20. On or about July 30, 2004, for the second time in two years, Defendant did not

consider Plaintiff for the position of Chief of Domestic Operations in DEA Headquarters, Defendant had knowledge that Plaintiff was interested in a position at Headquarters, and Plaintiff was clearly more qualified than the person selected for the position who was promoted to the SES with barely a year of field experience as an Assistant Special Agent in Charge.

21. On August 20, 2004, Defendant continued to retaliate against Plaintiff for exercising his protected rights by issuing him a Performance Appraisal Record that was a downgrade from his previous outstanding appraisal due to Defendant's unfounded allegations that Plaintiff exercised "extremely poor judgment" when Plaintiff issued a letter to the Special Agent in Charge of the Bureau of Immigration and Customs Enforcement (ICE), El Paso, Texas Field Office, and the Office of the United States Attorney (USAO), Western District of Texas, expressing his "frustration and outrage" at the mishandling of an informant in a drug investigation that resulted in several preventable murders in Ciudad Juarez, Mexico and endangered the lives of DEA Special Agents and their families assigned to duty in Mexico.

22. In September 2004, Defendant did not consider Plaintiff for the newly created position of Chief of Enforcement Operations at DEA Headquarters, Defendant had knowledge that Plaintiff was interested in a position at Headquarters, and Plaintiff was clearly more qualified than the person selected for this position.

23. From October 2004 to December 17, 2004, the date Plaintiff announced his retirement from DEA, Defendant did not consider Plaintiff for the position of Special Agent in Charge for the DEA Miami Field Division, Defendant had knowledge that Plaintiff was interested in this position, and Plaintiff was clearly more qualified than the person ultimately selected for this position days after Plaintiff's retirement.

24. During the month of November, 2004, for the second time in two years, Defendant

did not consider Plaintiff for the position of Chief of International Operations at DEA Headquarters, Defendant had knowledge that Plaintiff was interested in a Headquarters position, and Plaintiff was clearly more qualified than the person selected for this position.

25. On January 8, 2005, Plaintiff had no choice but to retire after 26 years of service with the Agency when it became obvious his career was all but over due to the numerous acts of retaliatory conduct on the part of Defendant, essentially making it the same as a constructive discharge.

26. Plaintiff has filed no less than six (6) EEO complaints with his employer, and the Defendant continues to retaliate against Plaintiff for exercising his protected rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3.

27. Defendant's actions are instances of a reoccurring and ongoing pattern of retaliatory conduct under Title VII. Retaliatory conduct is a major portion of the instant case.

28. Although Plaintiff has not exhausted his administrative remedy normally required before can add new allegations to this lawsuit, these are allegations of retaliatory conduct that have been committed by the Defendant that are like or reasonably related to the allegations referenced in the Third Amended Complaint [D.E. 25], and the Rule 15(d) Supplemental Pleading filed on August 11, 2004 [D.E. 86].

29. Plaintiff reserves the right to file another Rule 15(d) supplemental pleading once Defendant supplies Plaintiff with discovery material such as the complete list of all SES movement, including permanent changes of station, within the DEA dating back to Fiscal Year 1998, to include promotions, lateral transfers/reassignments, entry on duty (EOD) dates, and all notifications of personnel actions in their personnel records that Plaintiff requested in a discovery request made on or about October 24, 2004.

MEMORANDUM OF LAW

Rule 15(d) of the Federal Rules of Civil Procedure governs circumstances in which parties are permitted to supplement previous pleadings to encompass events that have occurred since the earlier pleadings were filed. Authority to file a supplemental pleading is obtained by filing a motion. Bornholdt v. Brady, 869 F.2d 57, 68 (2d Cir. 1989). Courts grant such leave when the supplemental pleadings will not unfairly prejudice other parties. Quarantino v. Tiffany & Co., 71 F.3d 58, 66 (2d Cir. 1995) (“Leave is normally granted, especially when the opposing party is not prejudiced.”)

In the instant case, if the Court denies the motion, then the Plaintiff would be prejudiced. If Plaintiff is not allowed to file his supplemental pleading then he will have to begin another law suit and address these new issues separately. Plaintiff would have to file additional complaints with the Agency and then wait 180 days before filing the new case. The Plaintiff, Defendant and the Courts would have to incur additional expense, time and resources. If only for the sake of efficiency, the supplemental pleading should be allowed.

If the issues addressed in a proposed supplemental pleading are related to the transaction or occurrence that gave rise to the original pleadings, and no other considerations of fairness weigh against hearing the supplemental pleading, courts generally permit the supplemental pleading. Kieth v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988), cert denied sub nom.; City of Hawthorne v. Wright, 493 U.S. 813, 110 S.Ct. 61 (1989) (noting that use of Rule 15(d) is favored).

Furthermore, in reference to Title VII actions, administrative exhaustion of retaliation claims is not required because the Court has ancillary (now referred to as supplemental) jurisdiction over such claims. Gupta v. East Texas State University, 654 F.2d 411, 413 (5th Cir. 1981), citing Pettway v. American cast Iron Pipe Co., 411 F.2d 998 (5th Cir.), rehearing and rehearing en banc denied, 415 F.2d 1376 (5th Cir. 1969). It is unnecessary for Plaintiff to exhaust administrative

remedies prior to urging a retaliation claim growing out of an earlier charge. Gupta, at 414. All claims of discrimination are cognizable under Title VII that are like or reasonably related to the allegations of the charge and growing out of such allegations. Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985).¹

The allegations included in Plaintiff's Rule 15(b) Supplemental Pleading are related to occurrences that gave rise to the original complaint in this case, in that the Defendant's actions are reoccurring and ongoing, and fairness would weigh in favor of the Plaintiff filing a supplemental pleading.

WHEREFORE, for the reasons stated above, Plaintiff respectfully requests this Honorable Court to grant his Rule 15(d) motion to file the attached supplemental pleading.

Respectfully submitted,

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¹ This issue was also addressed in the Appellate Court's decision in the instant case where Court held that there is an exception to Title VII's exhaustion requirement with retaliatory claims that are alleged to have grown out of timely filed charges.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic mail on this 17th day of February, 2005, to Lawrence Rosen, Assistant U.S. Attorney, 99 N.E. 4th Street, Suite 300, Miami, Florida 33131.

s/. _____
Donald Appignani, Esq.