

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

Aisha Barnard, Complainant,
vs.
Midwest Delivery Service, Inc.,
Respondent.

ORDER

On October 8, 2002, the Complainant filed a Motion seeking to amend her charge of discrimination to include a claim of reprisal discrimination. The Respondent filed its written reply to the Motion on October 18, 2002.

Complainant is represented by Sonja Dunnwald Peterson, Esq., 1150E Grain Exchange Building, 412 South 4th Street, Minneapolis, MN 55415. Respondent is represented by Thomas Lehmann, Esq., Lehmann & Lutter, P.A., 1380 Corporate Center Curve, Suite 214, Eagan, MN 55121.

Based upon all of the records and files herein,

IT IS HEREBY ORDERED: That Complainant's Motion to amend her charge to include a claim of reprisal is GRANTED.

Dated this 22nd day of October 2002.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

The Complainant seeks to amend her charge of race discrimination to include a claim of reprisal discrimination. Generally, when issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised in the pleadings.^[1] Additionally, when a claim arises out of an occurrence set forth in the original pleading, the amendment is regarded as relating back to the date of the original pleading.^[2] Demonstration of implied consent to try an issue does not present a very high hurdle. If a party fails to object to evidence about a new claim during the hearing, it may be found to have impliedly consented to including the claim.^[3]

The Respondent opposes this motion and argues that it will suffer prejudice. The prejudice must be other than having to defend against a new claim. It points to the fact that it first had notice of this claim after two days of hearing. It suggests that it has not consented to an amendment of the pleadings. However, the Respondent has failed to demonstrate sufficient prejudice to defeat the motion. The hearing in this matter is not yet complete. The Respondent may, therefore, present additional testimony. The Respondent does not need to recall witnesses since testimony concerning this issue involves the Respondent's principals, Pat and David Webber. Additionally, the issue and the related facts are relatively simple. They are easily addressed at this stage of the proceeding.

The amendment of a complaint or a charge in discrimination cases is not unusual. In *Howze v. Jones & Laughlin Steel Corp.*^[4] the Court found that it would be proper to amend a complaint alleging race discrimination by adding a claim of retaliation. The Court held that the district court could assume jurisdiction over additional charges, if they were reasonably within the scope of the Complainant's original charges, unless the non-moving party will be prejudiced. It noted that delay alone is an insufficient ground upon which to deny a Motion to amend. In the case at bar, the Complainant's original charge alleged that she could have adjusted her schedule in order to accommodate the Respondent's need to staff customer service representatives during the morning hours. She noted that the Respondent told her that she would be called back when business picked up in March or April of 2001, but that she was not called back.^[5] The charge was filed on June 19, 2001 and the Respondent hired part-time employees in August and September of 2001 without calling the Complainant.

Generally, leave to amend a complaint shall be freely given when justice so requires.^[6] Given the evidence developed at the hearing, and the failure to object to receipt of the evidence, and the lack of showing of prejudice, it is appropriate to grant the motion to amend the charge to include a claim of reprisal.

G.A.B.

^[1] Minn. Rules Civ. Proc. 15.02.

^[2] Minn. Rules Civ. Proc. 15.03.

^[3] *In Re Thomas Casey, Sr., P.A.*, 540 N.W. 2d 854, 858 (Minn. Ct. App. 1995) Aff'd 542 N.W. 2d 96 (Minn. 1996).

^[4] 750 Fd. 2d 1208, 1212 (3rd Cir. 1984).

^[5] In the case cited by Respondent, *Thomas v. Honeywell, Inc.*, 1994 WL 495087, the facts underlying the reprisal claim were different from those underlying the original defamation claim. In this case they are related.

^[6] Minn. Rules Civ. Proc. 15.01.