

STATE OF MICHIGAN
COURT OF APPEALS

PHYLLIS CUNNINGHAM-ROUSE,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN-FLINT,

Defendant-Appellee.

UNPUBLISHED

March 11, 2003

No. 233090

Genesee Circuit Court

LC No. 98-064358

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order denying her motion for leave to amend her complaint following an eight-day jury trial that resulted in a verdict of no cause of action in this gender discrimination case. We affirm.

On appeal, plaintiff argues that her motion to amend her complaint to add an unlawful retaliation claim should have been granted because defendant had reasonable notice of the claim and would not have been prejudiced by the amendment. We disagree. A trial court's decision on a motion to amend a complaint will not be reversed absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

Generally, when justice requires, a motion to amend a complaint should be granted except when there has been undue delay, bad faith on behalf of the movant, a failure to cure deficiencies by prior amendments, or when amendment would be futile or unduly prejudicial to the nonmoving party. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). This Court has consistently held that delay without more, such as undue prejudice, does not mandate the denial of a motion to amend. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 343-344; 568 NW2d 847 (1997). "Prejudice to a defendant that will justify denial of leave to amend arises when the amendment would prevent the defendant from having a fair trial." *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). The prejudice must result from the fact that the new allegations are offered late and not because the defendant may lose on the merits. *Id.*

Here, plaintiff argues that her complaint gave defendant notice of her unlawful retaliation claim because a reference to retaliation was made in the factual section of the complaint. However, the brief reference to retaliation was included as part of a vague allegation that

defendant's conduct "created a sexually hostile work environment." The complaint failed to raise either a count of unlawful retaliation or a claim of hostile work environment sexual harassment. Instead, it alleged a count of sexual discrimination. Plaintiff failed to plead any of the elements of a prima facie claim of unlawful retaliation. The brief, general reference to retaliation was not specific enough to reasonably inform the adverse party of the nature of the claims against him, MCR 2.111(B)(1); accordingly, it did not provide reasonable notice to defendant. See *Dacon v Transue*, 441 Mich 315, 327-328; 490 NW2d 369 (1992). Similarly, plaintiff's brief, general references to "retaliation" during discovery were insufficient to provide defendant notice of an independent claim. See *Weymers, supra* at 664-665.

Further, we conclude that prejudice would result to defendant if plaintiff had been permitted to amend her complaint to add a claim of unlawful retaliation. This sexual discrimination case was filed on December 11, 1998, and the trial was scheduled for April 4, 2000. On March 24, 2000, plaintiff's counsel filed a motion to withdraw from representation, stating a breakdown in the attorney-client relationship. On June 8, 2000, the court entered an order allowing plaintiff's counsel to withdraw, and rescheduled the trial to August 15, 2000. On August 14, 2000, the trial court granted defendant's motion to dismiss the case premised on plaintiff's failure to abide by two court orders compelling discovery necessary for trial that was scheduled to begin the following day. On November 13, 2000, the trial court entered an order granting plaintiff's motion to set aside the dismissal and reinstating the case. The trial court granted an additional discovery period to end on January 1, 2001, and rescheduled trial for January 30, 2001.

On December 1, 2000, plaintiff filed her motion to amend her complaint to add sexual harassment and unlawful retaliation claims. Defendant opposed the motion and the trial court agreed with defendant, denying the motion to amend because defendant had no notice of the claim and plaintiff failed to bring the claim despite knowing of its existence for at least a year prior to bringing the motion. We conclude that the trial court's decision to deny plaintiff's request to amend her complaint, two years into the litigation, on the eve of the third rescheduled trial date, and without providing defendant reasonable notice of the new claim, would have been prejudicial to defendant and, thus, was not an abuse of discretion that resulted in injustice. See *Weymers, supra* at 659-661; *Phillips, supra*.

Finally, we reject plaintiff's claim that defendant "opened the door" to plaintiff's retaliation claim by admitting evidence, under MRE 404(b), of plaintiff's two other lawsuits alleging discriminatory treatment against her other employers. Defendant did not impliedly consent to such amendment and plaintiff did not move to conform the complaint to the evidence. See MCR 2.118(C); *Cremonte v State Police*, 232 Mich App 240, 248-249; 591 NW2d 261 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff