

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ALLEN SOUDER,	:	APPEAL NO. C-090427
Plaintiff-Appellant,	:	TRIAL NO. A-0103061
vs.	:	<i>JUDGMENT ENTRY.</i>
THE BUSCHMAN COMPANY,	:	
Defendant-Appellee.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant Allen Souder worked for the defendant-appellee, The Buschman Company (“Buschman”), for over 34 years. In May 2000, Souder suffered a heart attack while working at Buschman. One month later in June 2000, while Souder was recuperating, Buschman eliminated Souder’s position and terminated his employment.

In response, Souder filed a civil suit against Buschman in May 2001. Souder’s complaint, in part, alleged age discrimination. Buschman moved to dismiss Souder’s age-discrimination claims, and the trial court granted the motion in September 2001.

At this point, for reasons not made clear, the case became inactive. It was not until September 2005, nearly four years after the trial court had dismissed Souder’s age-discrimination claims, that anything was filed with the court in relation to this

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

case. In September 2005, Souder filed a motion to compel discovery. This prompted the court to issue a scheduling order in October 2005. The scheduling order did not list a trial date, but it required that “discovery will be completed by January 31, 2006” and established a dispositive-motion deadline of March 17, 2006.

On March 17, 2006, Buschman filed a motion for summary judgment. Prior to filing a memorandum in opposition to Buschman’s motion, and approximately two and one-half months after the end of discovery, Souder filed a motion to amend his complaint to add a federal claim under the Family and Medical Leave Act (“FMLA”).² Buschman opposed Souder’s motion to amend. Eventually, the trial court overruled Souder’s motion to amend, but it did not rule on Buschman’s motion for summary judgment. Once again, for unknown reasons, the case became inactive.

In April 2009, nearly three years after the trial court had overruled Souder’s motion to amend, the court reactivated the case. The court set a jury-trial date of April 6, 2010; but this date became moot two months later when the court granted Buschman’s March 17, 2006, motion for summary judgment. Souder has timely appealed, asserting one assignment of error.

Souder does not contest the trial court’s granting of Buschman’s summary-judgment motion. Rather, he argues that the trial court erred when it denied his motion to amend his complaint to add the FMLA claim. Souder believes that his motion to amend should have been granted “in the interests of fairness and justice” under Civ.R. 15(A), and that the trial court’s denial of his motion constituted an abuse of discretion that resulted in prejudice to him.³ Souder also states that courts should determine cases on the merits, not on technicalities such as pleading

² Section 2601 et seq., Title 29, U.S.Code.

³ *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113.

deficiencies.⁴ He goes on to argue that the FMLA claim was viable, timely, and made in good faith, and had been newly discovered through the ongoing discovery process.⁵ In addition, he asserts the new FMLA claim would not have prejudiced Buschman because it did not arise out of any new set of facts, and because it was not intended to cause any undue delay (as it was filed approximately three years prior to the court setting a trial date).

Civ.R. 15(A) provides that a party may amend his pleading by leave of court, and that “leave shall be freely given when justice so requires.” However, we have previously held that “[a] denial of leave to amend a complaint will not be disturbed on appeal without a showing of an abuse of discretion, which ‘connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’ ”⁶ Further, “although the grant or denial of leave to amend a pleading is discretionary, where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered *timely* and in good faith and *no reason is apparent or disclosed for denying leave*, the denial of leave to file such amended complaint is an abuse of discretion.”⁷

When the trial court overruled Souder’s motion to amend, the court specifically noted that Souder’s motion had not been timely filed. As we have previously stated, the motion to amend was filed approximately two and one-half months after the court’s January 31, 2006, discovery cut-off date, and approximately one month after Buschman’s summary-judgment motion. The trial court also noted that Souder’s motion was not based on recently discovered facts, but rather was, in

⁴ Id.

⁵ Id.

⁶ *Wille v. Hunkar Laboratories, Inc.* (1998), 132 Ohio App.3d 92, 109, 724 N.E.2d 492, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

⁷ *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113 (emphasis added).

Souder's own words, "merely an alternative legal theory based on the operative facts already asserted."

We fail to see how the trial court abused its discretion when it denied Souder's motion to amend his complaint, considering both that Souder's motion was filed multiple months after the discovery cut-off⁸ and multiple weeks after Buschman's summary-judgment motion,⁹ and that the motion was not based upon newly discovered evidence.¹⁰

We hold that the trial court did not improperly overrule Souder's motion to amend his complaint. Therefore, Souder's lone assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 17, 2010

per order of the Court _____
Presiding Judge

⁸ See *Meadors v. Zaring Co.* (1987), 38 Ohio App.3d 97, 99, 526 N.E.2d 107; *Samas v. Holliman*, 10th Dist. No. 02AP-947, 2003-Ohio-1647, at ¶23.

⁹ See *Abou-Ghantous v. Weisman* (Apr. 16, 1986), 1st Dist. No. C-850406; *Priddy v. Edelman* (C.A.6, 1989), 883 F.2d 438, 446.

¹⁰ See *Samas v. Holliman*, *supra*, at ¶21.