IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Derrick Thomas, *On behalf of himself and those similarly situated*, Plaintiff, v. Papa John's International, Inc., et al, Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiff hereby moves this Court for leave to amend his Complaint. The reasons justifying the amendment are more fully set forth in the attached memorandum in support. A proposed amended complaint is attached as Exhibit 1.

Prior to filing this Motion, Plaintiff's Counsel contacted Defendants' Counsel on September 25, 2020 to determine if Defendants intend to oppose this Motion. To date, Defendants have not responded to state their position on the Motion. Because time is of the essence, Plaintiff is filing his Motion now. If Defendants later inform Plaintiff that they do not intend to oppose the Motion, Plaintiff will so notify the Court. As of now, Plaintiff assumes the Motion will be opposed.

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MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

1. Introduction

Plaintiff seeks leave of Court to file his First Amended Complaint. A copy of the proposed Amended Complaint is attached as Exhibit 1. Plaintiff's sole purpose for seeking leave to amend his Complaint is to add James "Chip" Phelps as a named individual Defendant.

Mr. Phelps was deposed on September 16, 2020. Based on his testimony, Plaintiff alleges that Mr. Phelps has been an "employer" of Plaintiff, the opt-in Plaintiffs, and the putative Rule 23 class under the Fair Labor Standards Act ("FLSA") and Ohio wage and hour law during all relevant times, and should be added as a Defendant to this lawsuit. Plaintiff asks for leave to amend his Complaint so that he can add Mr. Phelps as a Defendant in this action.

2. Background and Procedural History

Plaintiff Derrick Thomas is a former pizza delivery driver at a Papa John's franchise store in Cincinnati, Ohio. On June 16, 2017, Plaintiff filed this lawsuit alleging Papa John's violated state and federal minimum wage law because they failed to adequately reimburse their minimum wage pizza delivery drivers for the costs associated with providing their automobiles to make Defendants' deliveries. Doc. 1; *see, e.g., Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2019 WL 5725403, at *7 (S.D. Ohio Nov. 5, 2019). In addition to asserting claims against Papa John's International, Inc. ("PJI"), Plaintiff's original Complaint also asserted claims against the franchise operators of nine Cincinnati-area Papa John's stores—It's Only Pizza, Inc., It's Only Downtown

Pizza, Inc., It's Only Downtown Pizza II Inc., It's Only Papa's Pizza, LLC, and the owner of these entities, Michael Hutmier (the "It's Only Defendants").

On September 17, 2017, Defendants filed a Motion to Dismiss, Transfer the Case to the Southern District of New York, or Stay the Case. Doc. 10 ("Motion to Dismiss").

On October 20, 2017, Plaintiff filed a Motion to Conditionally Certify an FLSA Collective Action and to Authorize Notice. Doc. 24 ("Motion for Conditional Certification").

Around the same time, Plaintiff attempted to begin the discovery process. Because Defendants opposed doing any discovery until the Court ruled on their Motion to Dismiss, the parties immediately reached an impasse, and presented their discovery dispute to the Court. On November 2, 2017, the Court ruled that briefing on Plaintiff's Motion for Conditional Certification would be held temporarily, and instructed PJI to formally file a Motion to Stay or Strike the Motion for Conditional Certification. *See* Minute Entry.

On November 3, 2017, PJI and the It's Only Defendants moved to either strike or stay the Motion for Conditional Certification, reiterating their argument that the case should be dismissed or transferred to New York. Doc. 25.

On September 30, 2018, the Court issued an Opinion and Order denying Defendants' Motion to Dismiss. Doc. 40. Additionally, the Court held that PJI's Motion to Strike or Stay Plaintiff's Motion on Conditional Certification was moot. Finally, the Court issued a scheduling outline for any responses on the Conditional Certification Motion.

On November 6, 2018, the parties submitted a joint Rule 26(f) Report to the Court. Thereafter, the parties again disagreed about the scope of proper discovery, as the Court had not

yet granted Plaintiff's Motion for Conditional Certification, and also disagreed regarding whether requested documents should be marked as confidential.

On September 29, 2019, the Court entered an Order granting Plaintiff's Motion and conditionally certifying the FLSA Collective Action. Doc. 51. Plaintiff then disseminated notice to approximately 700 delivery drivers, and approximately 114 opted in to the case as plaintiffs. *See* Docket.

Early in 2020, the parties engaged in discovery. Plaintiff attempted to schedule a Rule 30(b)(6) deposition for February 4, 2020, and the deposition was ultimately re-scheduled for March 31, 2020. However, when the COVID-19 shutdown came about, the parties agreed to hold off conducting the deposition, and, instead, Defendants agreed to provide class-wide settlement data so that the parties could attempt to negotiate a settlement.

On May 19, 2020, the parties attended a status conference with Judge Barrett. The parties discussed their proposed schedule for the case, and also enlisted the Court's assistance in attempting to facilitate a resolution to the case. Pursuant to the Court's instructions during the status conference, the parties exchanged data for settlement purposes so that Plaintiff could present a class-wide demand.

On June 16, 2020, the Court issued a Calendar Order. It set a schedule requiring all motions relative to the Pleadings, including a motion for leave to file an Amended Complaint, to be submitted by August 3, 2020. The Order also set a status conference for July 8, 2020.

Thereafter, the parties attended two additional status conferences with the Court to discuss the prospect of settlement, on July 8 and August 18, 2020. During the August 18, 2020 status

conference, the parties agreed to submit settlement position statements to facilitate the settlement discussions.

After the COVID-19 shutdown had been lifted, Plaintiff scheduled a deposition with James "Chip" Phelps, who was identified in the Initial Disclosures as a shareholder of the It's Only Defendants, but about whom Plaintiff was not able to find any other public information about his role within the company. The deposition took place on September 16, 2020. During the deposition, Mr. Phelps testified to facts that Plaintiff believes render him an "employer" under the wage and hour laws. Plaintiff therefore moves to amend his complaint to include these allegations against Mr. Phelps.

3. Argument

Rule 15(a) of the Federal Rules of Civil Procedure governs amendment of pleadings and provides that "leave [to amend pleadings] should be freely given when justice so requires." The grant or denial of leave to amend is committed to the sound discretion of the district court. *Wallace Hardware Co., Inc. v. Abrams*, 223 F.3d 382, 409 (6th Cir. 2000) (affirming district court decision to allow plaintiff to file amended complaint twenty-one months after filing its initial complaint). The trial court's discretion is, however, "limited by Fed.R.Civ.P. 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits." *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir.1987) (citation omitted). Indeed, leave to amend the pleading is only denied in situations where there is undue delay, bad faith, dilatory motive on the part of the movant, or undue prejudice to the opposing party by virtue of allowing the amendment. *Foman v. Davis*, 371 U.S.178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Seals v. Gen. Motors Corp.*, 546 F.3d

766, 770 (6th Cir. 2008); *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996, 1001 (6th Cir. 2005).

3.1. There is good cause to allow this deviation from the Court's scheduling order.

As a preliminary matter,[1] Plaintiff states that there is good cause to allow an Amended Complaint after the deadline placed in the Calendar Order. Federal Rule of Civil Procedure 16 (b)(4) allows for modification of a scheduling or calendar order "for good cause and with the judge's consent." "The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." *Inge v. Rock Financial Corp.*, 281 F.3d 613, 625 (6th Cir. 2002) (quoting *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001) (citations omitted)). "In other words, '[t]he party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines.'" *E.E.O.C. v. AutoZone, Inc.*, 248 F.R.D. 542, 543 (W.D. Tenn. 2008) (quoting *Shrieve v. Daimler Chrysler Corp.*, No. 2:05-CV-0446, 2006 WL 1526878, at *1 (S.D. Ohio May 31, 2006) (quoting *Deghand v. Wal-Mart Stores, Inc.*, 904 F.Supp. 1218, 1221 (D. Kan. 1995)) (internal quotation marks omitted)).[2]

Plaintiff has been diligent in seeking discovery. Obviously, the Court's Calendar Order issued on June 16, 2020 states that any motions for leave to file an amended complaint should be filed by August 3, 2020. However, the information leading to the Plaintiff's request for amendment was not provided to Plaintiffs until the deposition of Chip Phelps on September 16, 2020.[3] For the first two years of this case, discovery was largely on hold while Defendants' Motion

[1] "When the court has issued a scheduling order setting a deadline for motions to amend the pleadings, [] a subsequent motion for leave to amend must *first* be analyzed under Rule 16(b) before determining whether the motion satisfies Rule 15(a)." *Cooke v. AT&T Corp.*, No. 2:05-cv-374, 2007 WL 188568, at *1 (S.D. Ohio Jan. 22, 2007).

[2] Diligence is more of a concern in this decision, rather than the procedural posture of the case. "An amendment coming late in discovery should not be denied as a penalty to the moving party when the factual basis for the amendment was not disclosed until late in discovery." *Id.* at *2.

[3] Defendants disclosed that Mr. Phelps is a "shareholder" in their Initial Disclosures, but Plaintiff did not know until

to Dismiss was pending, and, later, the scope of discovery was in dispute while Plaintiff's Motion for Conditional Certification was pending. When discovery began in earnest in late 2019, Plaintiff promptly issued Notices for Depositions pursuant to Fed. R. Civ. P. 30(b)(6). However, those depositions were delayed because the parties agreed, with the assistance of the Court, to instead direct their efforts to settlement discussions. It was also delayed because of the COVID-19 shutdown. The deposition of Mr. Phelps ultimately took place on September 16, 2020. It is based upon the answers Mr. Phelps provided at this deposition that has led Plaintiff to allege that Mr. Phelps was an FLSA employer at the It's Only Defendants' stores. Given that this information was unknown to Plaintiff before the Calendar deadline,[4] and the Plaintiff has exercised due diligence in pursuing discovery in this case, there is good cause for allowing the deviation from the Calendar Order and permitting an amended Complaint to be filed by Plaintiff.

3.2. Plaintiff's requested Amendment otherwise comports with Rule 15(a).

Leave to amend the pleading should only be denied, in the Court's discretion, in the context of the movant's undue delay, bad faith, or dilatory motive or undue prejudice to the opposing party by virtue of allowing the amendment. *Foman v. Davis*, 371 U.S. at 182; *Seals*, 546 F.3d at 770; *Brumbalough*, 427 F.3d at 1001. "The thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings." *Teffts v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982) (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (abrogated on other grounds by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The rules "provide a liberal

his deposition that Mr. Phelps, for example, hired workers and set reimbursement rates.

[4] *See TERA II, LLC v. Rice Drilling D, LLC*, Case No. 2:19-CV-02221-SDM, 2020 WL 4333295, at *2 (S.D. Ohio July 28, 2020) ("Plaintiffs moved to amend once they believed they had the necessary information to support a proposed claim."); *see also Discovery Bank v. New Vision Fin., LLC*, No. 2:03-CV-686, 2005 WL 1865369, at *3 (S.D. Ohio Aug. 1, 2005) (where "discovery apparently confirmed [Plaintiffs'] suspicions sufficiently so that the company could assert claims against the three parties it seeks to add in good faith.").

standard for allowing amendments of complaints early in litigation." *Agrisales Dynamix, LLC v. Recon Technologies, LLC*, Case No. 1:11-cv-1293, 2012 WL 13027093, at *1 (W.D. Mich. June 20, 2012). In *Agrisales Dynamix*, Defendants sought to amend their counter-complaint to add a third-party defendant. *Id*. The Defendants stated that, although they knew of a prior relationship with the third-party defendant, "they did not become aware of the terms of the business relationship between them until May 2012;" the District Court's order was issued in June of 2012 and there was, therefore, little time between the discovery of information that led to the requested amendment. *See id*. at *2.

Here, Plaintiff notes that within 10 business days of the deposition in question, and before obtaining the transcript, Plaintiff has diligently sought Leave to add the deponent as a named Defendant. Thus, like in *Agrisales Dynamix*, Plaintiff did not delay or postpone filing pleadings related to the newly discovered information. "The necessity to amend a pleading may not be apparent until the completion of discovery or even until the completion of testimony at trial." *Joe Powell & Associates, Inc. v. International Tel. and Tel. Corp.*, 23 B.R. 329, 333 (E.D. Tenn. 1982). "It would be unreasonable to restrict a party's ability to amend to a particular stage of the action inasmuch as the need to amend may not appear until after discovery has been completed or testimony has been taken at trial." *Id*. (quoting Wright & Miller, Federal Practice and Procedure: Civil § 1488 (1971)). The movant did not exercise any undue delay. Plaintiff here has acted promptly in reacting to the information obtained in the normal course of discovery.[5]

[5] Contrast to *Leary v. Daeschner*, 349 F.3d 888, 907-08 (6th Cir. 2003). There, Plaintiffs asked to amend their Complaint "nine months after the district court's grant of summary on Plaintiffs' First Amendment retaliation claims, eight months after the district court dismissed most of the claims in the first amended complaint, seven months after we issued an opinion in this case agreeing with the district court that Plaintiffs received sufficient pre-deprivation process, one month after the district court dismissed the interference and emotional distress claims from the first amended complaint, and one month after Daeschner filed his last summary judgment motion to dismiss Plaintiffs' sole remaining claim for punitive damages." *Id*. at 907. The amendment was also filed "almost two years after the

Plaintiffs do not seek leave with bad faith or based upon a dilatory motive. Plaintiffs seek to hold their "employers" responsible for the wage violations they endured while working for the Defendants. Thus, when Plaintiffs discovered that there is another "employer" involved, justice requires that this party be added to share in the responsibility of these violations. There is no bad faith or dilatory motive here. Plaintiffs are simply seeking to hold the culpable parties accountable to the requirements that federal and state law have placed upon them.

Plaintiff's requested amendment will not unduly prejudice the Defendants. Even though this case has been pending for over three years, there have been a number of starts and stops, and various discovery disputes were delayed pending the Court's rulings on the Motion to Dismiss and the Motion for Conditional Certification. As a result, discovery in this case began this year, and has been further delayed by the parties' and Court's efforts to facilitate a resolution to the case. Thus, there is no undue prejudice in amending the Complaint at this time. This is not a situation where "discovery is completed, [and] the burden imposed on the defendant by allowing an amendment is greater, since the defendant likely will have begun trial preparation based on the issues aired in the discovery process." *Berry v. Citi Credit Bureau*, No. 2:18-cv-2654-SHL-dkv, 2019 WL 9103447, at *4 (W.D. Tenn. 2019) (quoting *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 618, 641 (6th Cir. 2018) (citation omitted)). Discovery has only begun; there is little, if any, prejudice to the Defendants by allowing the addition of a Defendant party. Any defenses that Defendants may want to pursue are still available to them, and not foreclosed by the additional proposed Defendant. Defendants are thus not prejudiced by the filing of the First Amended

scheduling order's discovery and dispositive motion deadlines had passed." *Id.* The Plaintiffs "were 'obviously aware of the basis of the claim for many months,' but nonetheless failed to pursue the claim until after it was brought to their attention by Daeschner's final summary judgment motion." *Id.* at 908 (quoting *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999)).

Complaint. The requested leave will also not require any other modifications to the Scheduling Order.

4. Conclusion

Based on the foregoing, Plaintiffs respectfully requests that this Court grant them leave to file the First Amended Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Andrew Kimble
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