UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

JERRY COEN, Plaintiff, v. **WARDEN WALTER BERRY, *et al.*,** Defendants.	Civil Action No. 5:16-cv-353-MTT PLAINTIFF'S MOTION FOR LEAVE TO FILE REVISED SECOND AMENDED COMPLAINT Fed. R. Civ. Proc. 15, 20

INTRODUCTION

Plaintiff Jerry Coen respectfully moves the Court, pursuant to Rules 15 and 20 of the Federal Rules of Civil Procedure, for leave to file a Revised Second Amended Complaint, a copy of which is attached hereto as Exhibit A. Mr. Coen filed his complaint, *pro se*, on August 3, 2016. At the time, he was incarcerated in Central State Prison, in Macon, Georgia. Mr. Coen is Deaf. His language is American Sign Language ("ASL"). ASL is a completely different language from English, with distinct syntax, sentence structure, and grammar. ASL is not just English using hands. Mr. Coen, like many Deaf people, has extremely limited ability to read or write English. He filed his complaint without the assistance of an attorney or advocate who could translate between ASL and written English.

Mr. Coen prosecuted his case *pro se* to the best of his ability for almost two years while seeking an attorney. He has now retained the undersigned counsel. The proposed Revised Second Amended Complaint would clarify Mr. Coen's individual claims against Defendants. It would add new Plaintiffs, who – together with Mr. Coen – seek to represent a class of deaf and hard of hearing people incarcerated in prisons and subject to supervision in Georgia. It would clarify and join the appropriate Defendants for each claim, and would eliminate Defendants who do not need to be parties to the case. Under the liberal amendment standards of Rule 15, and the flexible joinder requirements of Rule 20, Mr. Coen's motion to amend should be granted.

PROCEDURAL HISTORY

Mr. Coen filed his *pro se* complaint on August 3, 2016. Doc. 1. On January 6, 2017, Mr. Coen, still incarcerated, and still proceeding *pro se*, filed an Amended Complaint. Doc. 8. Mr. Coen alleged that Georgia Department of Corrections officials violated his rights under the U.S. Constitution, the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*., the Rehabilitation

Act, 29 U.S.C. § 794 *et seq*., and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-2 *et seq*. On February 15, 2017, Magistrate Judge Stephen Hyles issued an order and recommendation advising that all of Mr. Coen's claims were sufficient to proceed to factual development. Doc. 9. District Judge Marc Treadwell adopted Magistrate Judge Hyles' recommendation on April 13, 2017. Doc. 11.

On September 8, 2017, Defendants filed a Motion to Dismiss the Amended Complaint, Doc. 14, and a Motion to Stay Discovery pending resolution of the Motion to Dismiss, Doc. 15. On September 13, 2017, Magistrate Judge Hyles issued a Notification of Pre-Answer Motion to Dismiss, advising Mr. Coen of his right to submit an opposition to the Motion to Dismiss, or to amend his complaint. Doc. 16. The same day, Magistrate Judge Hyles granted Defendants' Motion to Stay Discovery pending consideration of Defendants' Motion to Dismiss. Doc. 17. Accordingly, no discovery has occurred in this case. On April 17, 2018, Mr. Coen filed a Request for Permission to File a Second Amended Complaint. Doc. 26. At the time, Mr. Coen was in communication with the undersigned counsel, but had not yet retained them. On June 7, 2018, undersigned counsel Sean Young and Kosha Tucker submitted Notices of Appearance in this case. Docs. 27, 28. On June 12, 2018, Judge Treadwell issued an order requiring Mr. Coen to respond to Defendants' Motion to Dismiss, and requiring Defendants to respond to Mr. Coen's *pro se* Motion for Leave to File a Second Amended Complaint, within 14 days.[1] Doc. 29. Defendants have not yet responded to Mr. Coen's Request for Permission to File a Second Amended Complaint, and the Court has not ruled. This motion supersedes Docket No. 26.

[1] Promptly after Judge Treadwell's Order on June 12, 2018, Plaintiff's attorneys apprised Defendants' attorneys of Mr. Coen's intent to file this Motion to Amend. Plaintiff's attorneys expressed to Defendants' attorneys their willingness to amend the briefing schedule to extend Defendants' time to respond to this operative Motion to Amend and Proposed Revised Second Amended Complaint. Mr. Coen is also prepared to file a timely opposition to Defendants' Motion to Dismiss, Doc. 14.

ARGUMENT

I. The Proposed Revised Second Amended Complaint Is Proper Under Rule 15.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be "freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "The thrust of Rule 15(a) is to allow parties to have their claims heard on the merits, and, accordingly, district courts should liberally grant leave to amend." *In re Engle Cases*, 767 F.3d 1082, 1108 (11th Cir. 2014). A district court may deny leave to amend a complaint only where there is a "substantial reason" for doing so, such as "undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; . . . [if] allowing amendment would cause undue prejudice to the opposing party; or . . . [if] amendment would be futile." *Alhallaq v. Radha Soami Trading, LLC*, 484 Fed. App'x 293, 298 (11th Cir. 2012). Absent such a "substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319 (11th Cir. 1999) (internal quotations omitted). Indeed, "discretion may be a misleading term, for [R]ule 15(a) severely restricts the judge's freedom, directing that leave to amend shall be freely given when justice so requires." *Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (internal quotations omitted). Here, because there is no substantial reason to deny Plaintiff's motion to file the Proposed Revised Second Amended Complaint, the motion should be granted.

A. Permitting A Revised Second Amended Complaint Will Cause No Undue Delay.

"[T]he mere passage of time, without more, is an insufficient reason to deny leave to amend a complaint." *Hester v. Int'l Union of Operating Eng'rs*, 941 F.2d 1574, 1578-79 (11th Cir. 1991). Undue delay is typically found "where both the parties and the court were fully prepared for trial," *Burger King Corp.*, 169 F.3d at 1319, and where the proposed amendment

would have postponed trial already scheduled, *Rhodes v. Amarillo Hosp. Dist.*, 654 F.2d 1148, 1154 (5th Cir. 1981). Here, although some months have passed since Mr. Coen first filed his complaint, the case remains in its nascent stages. Defendants have not yet filed a responsive pleading. *See Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993) (motion to dismiss is not a responsive pleading for purposes of Rule 15(a)). Discovery has not begun. There is no trial date. *Cf. Burger King Corp.*, 169 F.3d at 1319 (denying leave to amend offered "on the eve of trial"); *Rhodes*, 654 F.2d at 1154 (denying leave to amend three weeks before trial). At this early stage of the case, there is no undue delay in granting this motion and accepting the Proposed Revised Second Amended Complaint.

B. <u>There Is No Indication Of Bad Faith</u>.

Courts may decline to accept an amended complaint only where a showing of bad faith, such as "use of a motion to amend as a means to postpone a trial date, to impose additional expense on the opposing party, [or] to gain leverage in settlement negotiations," is apparent on the record. *Salter v. City of Brewton, Ala.*, No. 07-0081-WS-B, 2007 WL 2409819 at *4 (S.D. Ala. Aug. 23, 2007). Here, there is no indication of bad faith. Mr. Coen has demonstrated a complete good faith desire to have his claims promptly adjudicated. He has proceeded to the best of his ability, in spite of the significant obstacles posed by prosecuting an action *pro se* while incarcerated, in a language in which he is not proficient. He has shown consistent commitment to using his case to remedy discrimination against not just himself but others who are similarly situated. *See* Doc. 1, p. 6 ("This is a deliberate indifference to me and all other Deaf inmates here at Central State Prison."); Doc. 6 (*pro se* attempt to join Mr. Coen's case with that of a blind inmate at Central State Prison). He paid the full filing fee while proceeding *pro se*, even though the fee accounted for more than two-thirds of all funds available to him. Doc. 4,

p. 5. Mr. Coen's diligent prosecution of this case to the best of his ability, and his request to amend promptly after retaining attorneys, reveal no bad faith or dilatory motives.

C. <u>There Is No Undue Prejudice To Defendants</u>.

A court may only find prejudice where the defendant can "demonstrate that its ability to present its case would be seriously impaired were the amendment allowed." *Air Prods. and Chems., Inc. v. Eaton Metal Prods. Co.*, 256 F. Supp. 2d 329, 332 (E.D. Pa. 2003); *accord Allstate Ins. Co. v. Regions Bank*, No. 14-0067-WS-C, 2014 WL 4162264, at *6 (S.D. Ala. Aug. 19, 2014) (quoting *Air Prods.*). A court may not find undue prejudice merely because an amendment adds additional expenses, as "[a]ny amendment to an original pleading necessarily involves *some* additional expense to the opposing party." *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 148 F.3d 1231, 1257 (11th Cir. 1998) (emphasis in original). Here, permitting the Revised Second Amended Complaint would impose no prejudice on any Defendant in this matter. To date, Defendants' only substantive engagement has been to file a Motion to Dismiss (which is still pending) and a Motion to Stay Discovery (which was granted). Docs. 14, 15. Permitting an amended complaint at this stage imposes no undue prejudice on Defendants.

D. <u>The Proposed Revised Second Amended Complaint Is Not Futile</u>.

To be properly rejected on futility grounds, a proposed amendment "must be so lacking in merit that the complaint as amended 'would necessarily fail.'" *Allstate Ins.*, 2014 WL 4162264 at *7 (quoting *Fla. Evergreen Foliage v. E.I. DuPont de Nemours and Co.*, 470 F.3d 1036, 1040 (11th Cir. 2006)). There is no basis for rejection based on futility here.

II. The Proposed Revised Second Amended Complaint Is Proper Under Rule 20.

Federal Rule of Civil Procedure 20 authorizes permissive joinder of plaintiffs and defendants. Persons may be joined as plaintiffs if: (1) they "assert a[] right to relief . . . arising

out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) "[a] question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1)(A)-(B). Similarly, defendants may be joined if: (1) "a[] right to relief is asserted against them . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) "a[] question of law or fact common to all defendants will arise in the action." *Id*. at (a)(2)(A)-(B). Joinder is "strongly encouraged," and "the rules are construed generously 'toward entertaining the broadest possible scope of action consistent with fairness to the parties.'" *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 839 (11th Cir. 2017) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966)).

A. <u>The Joinder Of Plaintiffs Is Proper.</u>

In considering the first prong of the permissive joinder standard, "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Alexander v. Fulton Cty., Ga.*, 207 F.3d 1303, 1323 (11th Cir. 2000), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (quoting *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926)). This "logical relation test is a loose standard which permits a broad realistic interpretation in the interest of avoiding a multiplicity of suits." *Plant v. Blazer Fin. Servs, Inc. of Ga.*, 598 F.2d 1371, 1361 (5th Cir. 1979); *see also Rhodes v. Target Corp.*, 313 F.R.D. 656, 659 (M.D. Fla. 2016). "The hallmark of this approach is its flexibility." *Plant*, 598 F.2d at 1361.

Here, Mr. Coen seeks to join thirteen Plaintiffs to this case, who – along with Mr. Coen – seek to represent a class of deaf and hard of hearing people who have been in the custody of Georgia Department of Corrections ("GDOC"), subject to the authority of Georgia Board of Pardons and Paroles ("GBOP") and/or subject to supervision by Georgia Department of

Community Supervision ("GDCS"). All Plaintiffs to be joined are deaf or hard of hearing. All are either currently in GDOC custody or subject to GDCS supervision. Those Plaintiffs in GDOC custody are subject to the parole or pardon power of GBOP. All Plaintiffs' claims to be joined concern the same or logically related occurrences. All Plaintiffs' claims are based on conduct, policies, procedures, and failures by state officials against deaf and hard-of-hearing people in the custody or supervision of the State of Georgia. Many claims by the new Plaintiffs are virtually identical to claims brought by Mr. Coen individually, including claims that GDOC routinely fails to provide videophones to deaf and hard of hearing inmates, that GDCS routinely refuses to provide interpreters and other auxiliary aids and services for deaf and hard of hearing people on supervision, and that GDOC officials have refused, for decades, to provide interpreters and other auxiliary aids to ensure effective communication with deaf and hard of hearing inmates. Plaintiffs' claims easily meet the "flexible," *Plant*, 598 F.2d at 1361, and "loose," *id.*, requirement that they share a "logical relationship" with those already pled. *Alexander*, 207 F.3d at 1301. For example, claims that GDOC fails to provide interpreters at education and substance use classes during incarceration are surely "logically related" to claims that the same actors fail to provide interpreters at meetings with counselors and disciplinary hearings.

The second prong of the permissive joinder standard is also easily met. Numerous questions of law or fact common to all Plaintiffs will arise in the action. For example, all Plaintiffs' claims will require the Court to consider whether all Defendants maintain policies and practices that discriminate against Plaintiffs by failing to ensure effective communication with deaf and hard of hearing people subject to Defendants' supervision. All Plaintiffs' claims will require the Court to analyze violations of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and the U.S. Constitution against Plaintiffs that arise from Defendants'

failure to provide interpreters and other auxiliary aids and services at important meetings and events while under Defendants' control and supervision.

B. The Joinder (And Deletion) Of Defendants Is Proper.

Mr. Coen seeks to join twelve Defendants to this case, including three institutional Defendants – GDOC, GDCS, and GBOP – and nine officials from those institutions who are sued in their official capacities. For the same reasons as the proposed joinder of Plaintiffs, the proposed joinder of Defendants is also proper. The joinder of these Defendants ensures that the correct[2] and proper parties are before the Court and able to provide complete relief. And the right to relief claimed against the Defendants to be joined concerns transactions or occurrences that are either the same as or logically related to those pled in the existing complaint.

Plaintiffs' Proposed Revised Second Amended Complaint details the common transactions and occurrences supporting joinder. Specifically, the conduct, failures, policies, and practices of GDOC, GDCS, GBOP, and their officers form a single, discriminatory process through which deaf and hard of hearing people are denied equal access and effective communication at every stage of custody and supervision. For example, Plaintiffs do not understand the terms of their sentences or their parole eligibility because GDOC fails to provide interpreters and auxiliary aids to communicate effectively with Plaintiffs when they are in GDOC custody. This means that Plaintiffs cannot advocate or prepare for parole consideration because they do not know when they are eligible for parole, or what they must do to improve their chances of parole. When Plaintiffs are eventually released from GDOC custody, most are subject to GDCS supervision. GDCS's failure to ensure effective communication with Plaintiffs

[2] Proceeding *pro se*, Mr. Coen named the individual employees of GDOC he encountered. But the proper Defendants are those named in the Proposed Revised Second Amended Complaint: the entity itself and those officials with decision-making authority. The Proposed Revised Second Amended Complaint would also drop the unnecessary employee Defendants.

on supervision means that Plaintiffs do not understand the terms of their release, and are at increased chance of re-incarceration (a return to GDOC custody) for failing to comply with rules that they never understood. This vicious cycle easily meets the "flexible," *Plant*, 598 F.2d at 1361, and "loose," *id.*, requirement that new claims share a "logical relationship" with those already pled. *Alexander*, 207 F.3d at 1301.

The proposed joinder of Defendants also meets the second requirement for permissive joinder under Rule 20. Numerous questions of law or fact common to all Defendants will arise in the action. For example, the Court will consider whether all Defendants maintain policies and practices that discriminate against Plaintiffs by failing to ensure effective communication with deaf and hard of hearing people subject to Defendants' custody and supervision. The Court will analyze violations of the ADA, the Rehabilitation Act, and the U.S. Constitution that arise from all Defendants' failures to provide interpreters and other auxiliary aids and services at important meetings and events while under Defendants' control and supervision.

III. Mr. Coen's Claims Against GDOC And Its Officials "Relate Back" To His Claims Against Individual GDOC Employees.

Under Rule 15(c)(1)(C), an amendment relates back to the date of the original pleading where the amendment changes parties when "the amendment asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading," Fed. R. Civ. P. 15(c)(1)(B); "the party to be brought in by the amendment received such notice of the action that it will not be prejudiced in defending on the merits"; and that party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity," *id*. at (c)(1)(C)(i)-(ii). Mr. Coen requests that this Court find that his individual claims against GDOC and GDOC officials relate back to the date of his original pleading.

Mr. Coen's claims against the current Defendant officials Gregory Dozier and Clinton

Perry, Jr.,[3] and against the proposed additional Defendants GDOC and GDOC officials as set out in the Proposed Revised Second Amended Complaint, arise out of the same conduct and occurrences that he pled in his original complaint. Mr. Coen has consistently claimed, in his original complaint, Amended Complaint, Second Amended Complaint (never deemed filed by the Court), and in this superseding Proposed Revised Second Amended Complaint, that GDOC as an institution, and its individual officials, has violated his rights under the ADA, the Rehabilitation Act, and the U.S. Constitution by failing to provide interpreters, telecommunication access, and meaningful communication during Mr. Coen's incarceration.

Moreover, at all relevant times, Defendant GDOC and its officials were on notice of Mr. Coen's claims. Mr. Coen named numerous GDOC employees as Defendants based on allegations of conduct that occurred as part of their work at GDOC. The named Defendants should have informed their superiors at GDOC that they were named Defendants in a lawsuit, and GDOC officials should, therefore, have been aware of the allegations in the complaint. The Defendants named in Mr. Coen's original complaint are represented by the same attorneys as GDOC itself. *See Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980). Thus, Defendant GDOC and its officials knew or should have known that it was "the beneficiary of a mere slip of a pen," based on Mr. Coen's mistake in failing to name GDOC as an institutional defendant. *Powers v. Graff*, 148 F.3d 1223, 1227 (11th Cir. 1998).

Indeed, courts in the Eleventh Circuit construe such *pro se* ADA claims against individual prison officials to be claims against the Department of Corrections. *See Owens v. Sec'y, Fla. Dep't of Corr.*, 602 F. App'x 475, 478 (11th Cir. 2015) (citation omitted) (reasoning that the plaintiff's ADA "claims against [three individuals] in their official capacities are simply

[3] When Mr. Coen filed his complaint in August 2016, the GDOC Commissioner was Homer Bryson and the Warden of CSP was Walter Berry. These positions are currently held by Defendants Gregory Dozier and Clinton Perry, Jr., respectively.

claims against the [Florida Department of Corrections]"); *Mazzola v. Davis*, No. 3:12-CV-1055-J-34JRK, 2017 WL 4310256, at *5 (M.D. Fla. Sept. 28, 2017) ("[L]iberally construing the [Third Amended Complaint], the Court considers Mazzola's ADA claim as a claim against the [Florida Department of Corrections] through Defendants Davis and Willis in their official capacities."); *Woody v. Bryson*, No. 5:16-CV-00467-LJA, 2017 WL 2126598, at *6 (M.D. Ga. May 16, 2017) (liberally construing ADA claims to find that "[c]laims against employees in their 'official capacities' are, in essence, against a 'public entity,' the Georgia Department of Corrections"); *see also Slaughter v. Bryson*, No. 5:15-CV-90, 2018 WL 1400976, at *3 (S.D. Ga. Mar. 20, 2018) ("The Court then directed the Clerk of Court to add the [GDOC] as a Defendant because ADA Title II claims are only cognizable against public entities, and Plaintiff had not named the [GDOC] in his Complaint.").

Here, Mr. Coen filed his Amended Complaint proceeding *pro se* in a language in which he is not proficient, and without the guidance or assistance of an attorney or advocate. Not surprisingly, Mr. Coen did not understand the specific, complex statutory and constitutional requirements concerning which Defendants should be named, and in what capacity, in order to obtain injunctive relief and damages under the ADA, the Rehabilitation Act, and the Constitution. Now represented by counsel, Mr. Coen names the Georgia Department of Corrections as the public entity defendant for his ADA and Rehabilitation Act claims in his Proposed Revised Second Amended Complaint. *See Hill v. U.S. Postal Serv.*, 961 F.2d 153, 156 (11th Cir. 1992) (finding that *pro se* plaintiff's amended complaint related back, where plaintiff named the U.S. Postal Service – rather than the Postmaster General – as a defendant). Because Mr. Coen's individual claims against GDOC and GDOC officials meet the Rule 15(c) criteria for relation back, this Court should treat these allegations against GDOC and its officers as though

they were pled in August 2016.

CONCLUSION

For the reasons stated, Plaintiff Jerry Coen requests that this Court grant this motion to file the Proposed Revised Second Amended Complaint under Rules 15(a) and 20. Mr. Coen further requests that the Court find that Mr. Coen's individual claims against GDOC and its officers relate back to the original filing of this case under Rule 15(c).

Respectfully submitted this 20th day of June 2018,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I electronically filed the foregoing Motion for Leave to File Revised Second Amended Complaint with the Clerk for the United States District Court for the Middle District of Georgia by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Claudia Center

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