UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO and
DAVID H. PICKUP,

Plaintiffs,

v.

CITY OF TAMPA, FLORIDA,

Defendant.

CASE NO. 8:17-cv-02896-CEH-AAS

DEFENDANT, CITY OF TAMPA'S, RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND VERIFIED COMPLAINT

Defendant, City of Tampa ("City"), opposes Plaintiffs' Motion for Leave to Amend Verified Complaint and, in support thereof, alleges as follows:

Factual Background

1. On April 6, 2017, the Tampa City Council passed Ordinance No. 2017-47 ("the Ordinance") relating to conversion therapy and, on April 10, 2017, Mayor Buckhorn approved the Ordinance.

2. On December 4, 2017, Plaintiffs filed a Complaint (Doc. 1) and Motion for Preliminary Injunction. (Doc. 3).

3. On January 12, 2018, the City filed a Motion to Dismiss the Complaint with Prejudice (Doc. 22), and a Response and Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction. (Doc. 23).

4. On January 12, 2018, Equality Florida filed an Amended Response in Opposition to Plaintiffs' Motion for Preliminary Injunction. (Doc. 31), and an Amended

Memorandum of Law in Support of its Motion to Dismiss (Doc. 34).

5. On March 19, 2018, the Court, through the Courtroom Deputy, contacted the parties and Equality Florida to schedule a telephonic hearing to address the scheduling of a hearing on the pending motion for preliminary injunction and motions to dismiss.

6. On April 2, 2018, the telephonic hearing was held before the Court concerning the scheduling of a hearing on the motion for preliminary injunction and motions to dismiss. "During the telephonic hearing on April 2, 2018, the parties and Equality Florida stated no additional evidence will be submitted (Doc 58); therefore, the hearing will consist of oral argument only." (Doc. 59, p.1). Immediately after the telephonic hearing, the Court provided the parties and Equality Florida with dates in April and June to have the hearing.[1] Plaintiffs' counsel then advised counsel for the City and Equality Florida that Plaintiffs were available on June 6, 7, and 8, with a preference of June 7, 2018. In response thereto, Equality Florida and the City agreed to the June 7, 2018 date, and Plaintiffs' counsel then advised the Court that the parties had conferred and would like the hearing to be scheduled for June 7, 2018. Thereafter, on April 2, 2018, the Court issued an Order scheduling oral argument on the motion for preliminary injunction and motions to dismiss for June 7, 2018. (Doc. 59).

7. On April 18, 2018, a Case Management Report was filed with the Clerk of Court which reflects the divergent positions of the parties regarding proposed deadlines for motions to add parties or to amend pleadings. (Doc. 62, p.1). The Case Management

[1] The Court offered the parties and Equality Florida the following dates for the preliminary injunction and motion to dismiss hearing: April 16th, 17th, 18th, 23rd, 24th, 26th, and 27th; and June 6th, 7th, 8th, 11th, 12th, and 13th.

Report that was filed with the Clerk of Court reflects that the City proposed a date of May 18, 2018 as the deadline for motion to add parties or to amend pleadings. (Doc. 62, p.1). In contrast, Plaintiffs proposed a date of June 18, 2018 as the deadline for motions to add parties or to amend pleadings. (Doc. 62, p.1).

8. On May 9, 2018, the Court entered its Case Management and Scheduling Order wherein the Court identified the date of June 18, 2018 as the deadline for motions to add parties or to amend pleadings. (Doc. 63, p.2).

9. On May 17, 2018, the City served Plaintiffs with its Initial Disclosures pursuant to Fed. R. Civ. P. 26(a)(1), and on May 18, 2018, Plaintiffs served the City with their Initial Disclosures.

10. On the evening of May 25, 2018, the Friday before Memorial Day Weekend, Plaintiffs filed their Motion for Leave to Amend Verified Complaint. (Doc. 71). The City was not provided with a copy of the proposed amended complaint prior to the filing of Plaintiffs' Motion for Leave to Amend Verified Complaint.

11. On May 31, 2018, as a result of the filing of the Motion for Leave to Amend Verified Complaint, the Court entered an Order cancelling the hearing scheduled for June 7, 2018 on the motion for preliminary injunction, and motions to dismiss. (Doc 72).

Legal Argument

Federal Rule of Civil Procedure 15(a)(2) provides, in relevant part, that: "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

The case law is well established that undue prejudice to the opposing party is one

of the factors to be considered by the Court in deciding whether to grant leave to file an amended pleading. *In Bryant v. Dupree,* 252 F. 3d 1161, 1163 (11th Cir. 2001), a case cited by Plaintiffs, the Eleventh Circuit Court of Appeals stated:

> We review for abuse of discretion a district court's denial of a motion to amend. *Henson v. Columbus Bank & Trust Co.,* 770 F.2d 1566, 1574 (11th Cir. 1985). A district court's discretion to dismiss a complaint without leave to amend "is 'severely restrict[ed] by Fed. R. Civ. P. 15(a), which directs that leave to amend 'shall be freely given when justice so requires.'" *Thomas v. Town of Davie,* 847 F.2d 771, 773 (11th Cir. 1988) (citation omitted). Generally, "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). **A district court need not, however, allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile.** See *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

(Emphasis supplied.) *See also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) wherein the court stated:

> As this circuit and others have held, it is the **consideration of prejudice to the opposing party that carries the greatest weight**. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185, (9th Cir. 1987)). **Prejudice is the 'touchstone of the inquiry under Rule 15(a).'** *Lonestar Ladies Inv. Club v. Schlotzsky's, Inc.*, 238 F. 3d 363, 368, (5th Cir. 2001); *Howey v. United States*, 481 F. 2d 1187, 1190 (9th Cir. 1973) (stating that "**the crucial factor is the resulting prejudice to the opposing party**")....

(Emphasis supplied.) In the matter at hand, the City will be unduly prejudiced by the proposed amendments to the Complaint in numerous respects as follows:

(1) The addition of another party plaintiff - Soli Deo Gloria International, Inc. d/b/a New Hearts Outreach Tampa Bay, individually and on behalf of its members, constituents and clients - would unduly prejudice the City by complicating the discovery

process, introducing new issues into the litigation, adding witnesses, delaying the discovery process, lengthening the time for trial, and consuming additional resources of the City. The City would also note in this regard that this Court, in denying Equality Florida's Motion to Intervene as a Party Defendant, was concerned about prejudicing the adjudication of the original parties' rights by complicating the discovery process and consuming additional resources of the original parties and the Court if Equality Florida were permitted to intervene as a party defendant. (Doc. 52, p. 10-11).[2] This same analysis should also apply here as it relates to considering the impact of permitting the inclusion of an additional plaintiff. Indeed, it would be consistent, appropriate, and even-handed with the Court's earlier ruling - denying Equality Florida's Motion to Intervene as Party Defendant - to also deny Plaintiffs' wish to add the proposed additional plaintiff.

The City would further note that the proposed additional plaintiff lacks standing to assert claims on behalf of its members, constituents and clients. Accordingly, it would be futile to permit the proposed amendment as it relates to the assertion of claims by the proposed additional plaintiff on behalf of its members, constituents and clients.[3] In *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014) *cert. den.* 135 S. Ct. 2048 (2015), the Third Circuit, in concluding that plaintiffs lacked standing to pursue claims on behalf of their minor clients, held that "Plaintiffs have failed to establish that their clients are 'hindered' in their ability to bring suit themselves.... Further, we note that

[2] The Report and Recommendation of the United States Magistrate Judge (Doc. 52) was adopted, confirmed, and approved by the United States District Judge on April 4, 2018. (Doc. 60).
[3] A district court need not allow an amendment where the amendment would be futile. *Bryant v. Dupree*, 252 F.3d at 1163.

minor clients have been able to file suit pseudonymously in both *Pickup* and *Doe v. Christie,* - F. Supp.3d-, 2014 WL 3765310 (D.N.J. July 31, 2014)...." 767 F.3d at 244. In reaching that conclusion, the Third Circuit first addressed the limited circumstances in which one can obtain third-party standing and stated in relevant part:

> "It is a well-established tenet of standing that 'a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed.2d 411 (1991)). "Yet the prohibition is not invariable and our jurisprudence recognizes third-party standing under certain circumstances." *Id.* (citations omitted.) To establish third-party standing, a litigant must demonstrate that (1) she has suffered an "injury in fact" that provides her with a sufficiently concrete interest in the outcome of the case in dispute"; (2) she has a "close relation to the third party"; and (3) there exists "some hindrance to the third party's ability to protect his or her own interests. "*Powers,* 499 U.S. at 411, ...

767 F.3d at 243. In the case at bar, the proposed amended complaint fails to allege each of the elements necessary for the proposed additional plaintiff to assert claims on behalf of its members, constituents, and clients.

(2) The addition of another party defendant, Sal Ruggiero, in his official capacity as Manager of the City of Tampa Neighborhood Enforcement Division, would also unduly prejudice the City by complicating the discovery process, and consuming additional resources of the City. This Court's concerns in denying Equality Florida the opportunity to intervene as a party defendant, because of its potential to complicate the discovery process and consume additional resources of the original parties and the Court (Doc. 52, p.10-11), should also apply here as it relates to the prejudice and impact of permitting the inclusion of an additional defendant in the form of Sal Ruggiero, in his

official capacity as Manager of the City of Tampa's Neighborhood Enforcement Division.

(3) The inclusion of an additional count - under the Religious Freedom Restoration Act of 1998[4]- will also unduly prejudice the City by adding a new theory of recovery. *See Tampa Bay Water v. HDR Engineering, Inc.,* 731 F.3d 1171, 1186 (11th Cir. 2013) ("prejudice 'is especially likely to exist if the amendment involves new theories of recovery or would require additional discovery,' 3 James Wm. Moore et al., *Moore's Federal Practice* ¶15.15[2].") In *Tampa Bay Water,* moreover, the Eleventh Circuit, in concluding that the district court did not abuse its discretion in denying a motion to amend complaint to include two new claims, stated that the district court concluded that plaintiff knew many of the facts supporting its two new claims before plaintiff filed its initial complaint. 731 F.3d at 1186.[5] Similarly, in the case at bar, Plaintiffs have alleged in their motion to amend their complaint that the proposed new count "is based on the same set of operative facts as the other counts, and in fact, is substantially similar to two existing counts." (Doc. 71, p.7). Accordingly, based upon Plaintiffs' representations, it would appear that many of the facts supporting the new count - under the Religious Freedom Restoration Act of 1998 - were known by Plaintiffs Vazzo and Pickup at the time the original complaint was filed.

(4) The addition of numerous allegations regarding sexual orientation change

---

[4] Plaintiffs' motion refers to this act as the "Florida Religious Freedom Restoration Act" (Doc. 71, p.2). An examination of Fla. Stat. § 761.01 states, however, that "This act may be cited as the "Religious Freedom Restoration Act of 1998."

[5] In *Tampa Bay Water*, the Eleventh Circuit also stated that: "a district court may find undue delay when the movant knew of facts supporting the claim long before the movant requested leave to amend, and amendment would further delay the proceedings. *See e.g., Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) (The facts upon which the claims … were based were available at the time the complaints were filed.'). *Nat'l Serv. Indus. Inc.*, 694 F.2d at 249."

efforts, or "SOCE" counseling, and specific SOCE counseling Plaintiffs may seek to provide in Tampa, will also unduly prejudice the City by generating additional discovery. Moreover, there is no explanation as to why these additional allegations could not have been included when the complaint was originally filed. The City would also note, as articulated in *King v. Governor of the State of New Jersey*, 767 F.3d 216, 238 (3d Cir. 2014),[6] that:

> we do not review a legislature's empirical judgment *de novo* – our task is merely to determine whether the legislature has 'drawn reasonable inferences based on substantial evidence.' *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 117 S. Ct. 1174, 137 L.Ed.2d 369 (1997) ....
>
> We conclude that New Jersey has satisfied this burden. The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm. Among others, the American Psychological Association, the American Psychiatric Association, and the Pan American Health Organization have warned of the 'great' or 'serious' health risks accompanying SOCE counseling, including depression, anxiety, self-destructive behavior, and suicidality....
>
> We conclude that this evidence is substantial. Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review ....

(Emphasis in original.) Accordingly, in applying this legal principle to the matter at hand, the additional allegations which Plaintiffs seek to add concerning SOCE counseling should not be relevant to the Court's analysis to the extent that this Court does not review the City Council's empirical judgment *de novo;* and this Court merely determines whether the

[6] The *King* case was recently cited in *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia,* 2018 WL 2010596 (E. D. Pa. 2018) (Doc. 67).

Tampa City Council has drawn reasonable inferences based on substantial evidence.

(5) The addition of numerous allegations regarding the purported vagueness of the Ordinance will also unduly prejudice the City by creating additional discovery. Moreover, there is no explanation as to why these allegations could not have been included in the original complaint. In addition, the proposed allegations do not cure the deficiencies in the complaint.

(6) The inclusion of additional allegations regarding the status of Plaintiff Pickup will also unduly prejudice the City by creating additional discovery. Moreover, these additional allegations do not cure the lack of standing of Plaintiff Pickup.

(7) Finally, it should be noted that Plaintiffs' proposed amended complaint – which adds approximately 90 additional paragraphs to the complaint[7] including an additional plaintiff, an additional defendant, and an additional count – does not cure the deficiencies of the existing complaint; and that the proposed amended complaint unduly prejudices the City as described above.

Conclusion

For all of the aforesaid reasons, it is respectfully requested that this Honorable Court deny Plaintiffs' Motion for Leave to Amend Verified Complaint.

[7] The Complaint contains 214 paragraphs whereas the proposed Amended Complaint includes 303 paragraphs.

/s/ Robert V. Williams
Robert V. Williams, Esquire
Florida Bar No.: 144720
Primary: rwilliams@burr.com
Secondary: pturner@burr.com
BURR & FORMAN LLP
201 N. Franklin Street, Ste. 3200
Tampa, Florida 33602
Telephone: (813) 221-2626
Facsimile: (813) 221-7335
Attorneys for Defendant, City of Tampa

/s/Jerry M. Gewirtz
Jerry M. Gewirtz, Esquire
Florida Bar No. 0843865
Primary: Jerry.Gewirtz@tampagov.net
Secondary: Kimber.Spitsberg@tampagov.net
Robin Horton Silverman, Esquire
Florida Bar No. 0027934
Primary: Robin.Horton-Silverman@tampagov.net
Secondary: Laytecia.McKinney@tampagov.net
5th Floor, City Hall, 315 E. Kennedy Boulevard
Tampa, Florida 33602
Telephone: (813) 274-8996
Facsimile: (813) 274-8809
Attorneys for Defendant, City of Tampa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of Court. Service will be effectuated on all counsel of record via the Court's ECF/Electronic Service System.

By: /s/ Robert V. Williams