

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,
individually and on behalf of all others similarly
situated,**

Plaintiffs,

vs.

**Case No.: 3:20-cv-00740
Judge Robert C. Chambers**

**WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM, in his official
capacity as Director of the West Virginia Public
Employees Insurance Agency; and THE
HEALTH PLAN OF WEST VIRGINIA, INC.,**

Defendants.

**DEFENDANT TED CHEATHAM'S RESPONSE TO
PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

Defendant Ted Cheatham, in his official capacity as Director of the West Virginia Public Employees Insurance Agency ("this Defendant"), by and through counsel, Perry W. Oxley, David E. Rich, Eric D. Salyers, Christopher K. Weed, and the law firm of Oxley Rich Sammons, PLLC, hereby submits his Response to Plaintiffs' Motion for Leave to File First Amended Complaint. *See* ECF 106-109. In support of his Response, the Defendant states the following:

I. PROCEDURAL FACTS

On September 23, 2021, the Plaintiffs' filed a Motion for Leave to File First Amended Complaint. See ECF 106-108. They later supplemented this Motion with a similar Motion that included the proposed amended complaint. See ECF 109.

The "Plaintiffs" seek to add two new plaintiffs to the suit. See ECF 106-109. The current "Plaintiffs" are not seeking to amend their claims, but rather, two additional parties are seeking to join the lawsuit via an amendment to the Complaint. See ECF 106-109. Specifically, the two newly proposed plaintiffs are Shauntae Anderson, a Medicaid participant, and Leanne James, a PEIA member. See ECF 106-109.

II. LEGAL STANDARD

Rule 15 of the *Federal Rules of Civil Procedure* governs the amendment of a pleading. While leave to amend a pleading is generally given, such leave should be denied when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile. *U.S. v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000); *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). Indeed, the general and oft-cited rule is that leave sought should be freely given, "in the absence of any apparent or declared reason— such as undue delay, bad faith or dilatory motive on the part of the movant, ... undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc..." *Forman*, 371 U.S. at 182. Prejudice results where the proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party. *Johnson*, supra.

Further, a court may properly deny a motion for leave to amend where such amendment would be futile, for example where, even with the amendments, the complaint fails to state a claim upon which relief may be granted. See *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (affirming district court’s denial of motion to amend on grounds of futility where proposed amended complaint failed to state a claim); *In re PEC Solutions, Inc. Securities Litigation*, 418 F.3d 379, 391 (4th Cir. 2005).

III. ARGUMENT

A. **The newly added proposed plaintiffs are non-parties, and thus have no right to amend a complaint in this action.**

Rule 15 of the *Federal Rules of Civil Procedure* only allows current parties to amend a pleading, and it does not provide the mechanism to add new plaintiffs to the litigation. See Fed.R.Civ.P. 15(a). Non-parties have no authority to seek an amendment. See *United States ex rel. Little v. Triumph Gear Systems, Inc.*, 870 F.3d 1242 (10th Cir. 2017) (“[T]he right to amend lies solely with “[a] party.”); see also *Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 169 (4th Cir. 2001) (“Rule 15 allows liberal amendment by parties, not nonparties....”).

The Plaintiffs proposed amended complaint is not seeking to amend their own claims, but to add two new plaintiffs to the cause of action. Thus, in reality, it is the two newly proposed plaintiffs seeking an amendment of the Complaint, and not the currently named Plaintiffs. As a result, this is improper procedurally, because the new proposed plaintiffs as non-parties have no right to seek amendment of the Complaint. Therefore, the Motion for Leave to file an Amended Complaint must be denied.

B. The correct procedural mechanism to add new plaintiffs is a motion to intervene under Rule 24.

Ordinarily a would-be plaintiff seeking to join a case must timely move to intervene in accordance with Rule 24. Fed.R.Civ.P. 24 (a & b) (“Upon timely application anyone [1] shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action ... [or 2] may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common.”). If a motion to intervene is untimely, it “must be denied.” *See NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973). This seems only fair because, if permitted, intervention may expose a defendant to additional liability. *Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 169 (4th Cir. 2001).

Here, the newly proposed plaintiffs have not sought to intervene in this matter, nor have they attempted to file a new complaint and then seek consolidation of the matters. Rather, they have improperly sought an amendment of the Complaint, which they have no right to do. As a result, the Motion must be denied.

C. The proposed amended complaint is prejudicial to the Defendant.

The proposed amended complaint seeks to add Leanne James, a PEIA member, as a party plaintiff. The inclusion of Ms. James adds new legal theories to the case that alters the discovery that must take place, the amount of discovery necessary, and the defenses that must be raised by this Defendant. Without Ms. James in the lawsuit, Defendant Cheatham’s only role in the case was related to his relationship with The Health Plan and their policies, as there was no PEIA member as a plaintiff. By including Ms. James as a party plaintiff, she would alter the class allegations against this Defendant as a direct member of PEIA. Moreover, Ms. James seeks to bring a Title VII claim, a claim that no other plaintiff has in this action, which would clearly alter the legal

theories and defenses in this case. *See* ECF 106-109. As indicated by Ms. James, she has a pending complaint with the United States Equal Employment Opportunity Commission, and at least at this time, seeking to plead a Title VII claim against Defendant Cheatham would be futile and prejudicial to this Defendant.¹ Moreover, the Defendant would have to defend the pending complaint with the United States Equal Employment Opportunity Commission while simultaneously defending the same set of facts in a federal lawsuit, which is clearly prejudicial. As a result, the Motion for Leave should be denied.

IV. CONCLUSION

Based upon the foregoing, the Motion seeking leave to once again amend the Complaint to add new party plaintiffs must be denied.

**TED CHEATHAM, in his official
capacity as Director of the West Virginia
Public Employees Insurance Agency,**

BY COUNSEL

s/Perry W. Oxley

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¹ The Defendant believes there are other arguments regarding the claims of Ms. James and expressly reserves the right to defend those claims by way of a 12(b)(6) motion or any other method available to the Defendant moving forward.

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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing “**Defendant Ted Cheatham’s Response to Plaintiffs’ Motion for Leave to File First Amended Complaint**” on this **8th** day of **October, 2021**, with the Clerk of the Court using the CM/ECF system, which will send notification of filing, and a copy of the same, to the following CM/ECF participants:

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