

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

CHRISTOPHER FAIN, *et al.*, individually and  
on behalf of all others similarly situated,

*Plaintiffs,*

v.

WILLIAM CROUCH, *et al.*,

*Defendants.*

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE  
SECOND AMENDED COMPLAINT**

Plaintiffs Christopher Fain, Shauntae Anderson, and Leanne James respectfully submit this memorandum of law in support of their motion for leave to file a Second Amended Complaint. Plaintiffs previously represented that they would seek leave to bring claims for Plaintiff Leanne James pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII") after she finished exhausting administrative remedies, ECF No. 109 at 2 n. 2, and they now seek leave to make that amendment.

**BACKGROUND**

Plaintiffs initiated this action on November 12, 2020 with the filing of a class action complaint (ECF No. 1), alleging that the exclusion of coverage for gender-confirming healthcare in West Virginia state health insurance plans violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116; and the comparability and availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A)-(B). Plaintiffs sought declaratory and injunctive relief and, in their individual capacities, damages.

The Scheduling Order in this matter set an October 8, 2021 deadline for the amendment of pleadings. ECF No. 75. Plaintiffs timely sought leave to file a First Amended Complaint before that deadline, and Plaintiffs Shauntae Anderson, a Medicaid participant, and Leanne James, a state employee, joined the suit after the Court permitted that amendment. ECF No. 140.

At the time Plaintiffs filed their First Amended Complaint, Ms. James was still exhausting administrative remedies for her claims under Title VII. ECF No. 140 ¶¶ 124-25. Ms. James subsequently received notice of her right to sue from the U.S. Equal Employment Opportunity Commission on December 23, 2021, and from the West Virginia Human Rights Commission on January 12, 2022. Decl. of Walt Auvil, Exs. A-D. Plaintiffs now seek leave to add Ms. James' Title VII claims to the complaint against her employer, Kanawha County Board of Education, and the Public Employees Insurance Agency ("PEIA") as an agent and joint employer. Ms. James also seeks leave to bring a claim against Kanawha County Board of Education under Title IX. Finally, Plaintiffs have made conforming changes to remove former Plaintiffs Brian McNemar and Zachary Martell, who have settled and dismissed their claims. ECF No. 180.

### **LEGAL STANDARD**

"Once the scheduling order's deadline for amendment of the pleadings has passed, a moving party first must satisfy the good cause standard of Rule 16(b). If the moving party satisfies Rule 16(b), the movant then must pass the tests for amendment under Rule 15(a)."

*Marcum v. Zimmer*, 163 F.R.D. 250, 254 (S.D.W. Va. 1995).

### **ARGUMENT**

Plaintiffs satisfy the standards under both Rules 15(a) and 16(b). Plaintiffs have good cause for their request, they seek to amend in good faith, and the requested amendments are not

futile. Plaintiffs' request for leave to amend is thus proper and should be granted.

The first step in the two-part test requires Plaintiffs to satisfy the good cause standard of Rule 16(b). *Wilson v. Appalachian Power Co.*, No. 3:10-cv-0445, 2011 WL 221656, at \*1 (S.D.W. Va. Jan. 24, 2011). This standard "primarily considers the diligence of the party seeking the amendment ... [and] the focus of the inquiry is upon the moving party's reasons for seeking modification." *Stewart v. Coyne Textile Servs.*, 212 F.R.D. 494, 496 (S.D.W. Va. 2003). Plaintiffs have demonstrated good cause for the proposed amendment. First, Plaintiffs' reason for the amendment is well-founded: as disclosed in their September 2021 motion for leave to file the prior amended complaint, ECF No. 109 at 2 n.2; ECF No. 140 ¶¶ 124-25, they seek to join Title VII claims to the suit that could not be raised until the requisite exhaustion of administrative remedies was completed. Additionally, Plaintiffs' diligence is reflected in their prompt motion to this Court. Plaintiffs have brought this motion without delay after receiving all right to sue letters, including letters from the state Human Rights Commission on January 12, 2022. Decl. of Walt Auvil, Exs. A-D.

Once the "moving party satisfies Rule 16(b), the movant then must pass the tests for amendment under Rule 15(a)." *Wilson*, 2011 WL 221656, at \*1. "Rule 15(a) establishes a liberal amendment policy." *Felman Prod., Inc. v. Indus. Risk Insurers*, No. CIV.A. 3:09-0481, 2010 WL 3119338, at \*2 (S.D.W. Va. July 28, 2010). "Generally, leave to amend a pleading should be granted unless it would result in prejudice to the opposing party, the motion was brought in bad faith, or permitting amendment would be futile." *Scott Hutchison Enterprises, Inc. v. Cranberry Pipeline Corp.*, No. CV 3:15-13415, 2016 WL 10789587, at \*1 (S.D.W. Va. Sept. 21, 2016). This principle "gives effect to the federal policy in favor of resolving cases on

the merits instead of disposing of them on technicalities.” *Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012).

There will be no prejudice to the opposing parties, given Plaintiffs’ transparency in prior filings about their intent to seek this amendment. ECF No. 109 at 2 n.2; ECF No. 140 ¶¶ 124-25. The factual basis for Ms. James’ claims remains the same as the conduct first alleged in Plaintiffs’ original complaint—*i.e.*, the exclusion of gender-confirming care in West Virginia’s state employee health plans. *See Labor v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (noting that a defendant is not prejudiced by an amendment adding new claims based on same actions giving rise to original claims). Ms. James seeks to raise these claims against parties properly named under Title VII, including her employer Kanawha County Board of Education, and PEIA as its agent and joint employer. But as Defendant Jason Haught represented in his briefing asking the Court to grant *Colorado River* abstention, he is “a literal arm of [PEIA as] the state agency he controls” and “the issues raised and remedies sought” in this suit and before the EEOC “are basically the same.” ECF No. 172 at 6; *see also* ECF No. 163 at 3 (reflecting Defendant Haught’s self-described understanding that Ms. James “will seek leave to amend her complaint to add a claim under Title VII once her claims have been exhausted before the EEOC”). Additionally, Plaintiffs have acted in good faith by satisfying the procedural prerequisites for Ms. James’ Title VII claims and seeking leave to amend promptly thereafter.

Finally, permitting leave to raise these claims would not be futile. “Leave to amend [...] should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face.” *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986). Here, Plaintiffs’ amendments are neither insufficient nor frivolous. Another district court in this Circuit has found the same Title VII and Title IX claims Ms. James seeks to raise here

viable at the motion to dismiss stage in a case challenging similar exclusions of gender-confirming care in North Carolina. *See Kadel v. Folwell*, 446 F. Supp. 3d 1, 14 (M.D.N.C. 2020), *aff'd sub nom. Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422 (4th Cir. 2021), as amended (Dec. 2, 2021) (finding plaintiffs had alleged a plausible Title IX claim against university employer's based on state employee health plan exclusion of gender-confirming care); *Kadel v. Folwell*, No. 1:19-cv-272, 2021 WL 848203, at \*6-9 (M.D.N.C. Mar. 5, 2021) (granting leave to amend complaint after Title VII exhaustion requirements had been met, including to add claims against plaintiffs' employers and against the state health plan as an agent under Title VII). In light of the lack of any prejudice to opposing counsel, and Plaintiffs' good faith in seeking to raise properly-exhausted and well-founded claims, this motion should be granted.

### **CONCLUSION**

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Leave to file a Second Amended Complaint.

\* \* \*

Dated: January 21, 2022

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### CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on January 21, 2022 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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