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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THOMAS TABBERT,  
  
Plaintiff,  
  
v.  
  
HOWMEDICA OSTEONICS,  
  
Defendant.

No. 2:15-CV-00039-SMJ

**ORDER GRANTING IN PART  
AND DENYING IN PART  
PLAINTIFF'S MOTION TO  
AMEND**

10 Before the Court, without oral argument, is Plaintiff Thomas Tabbert's  
11 Motion to Amend Complaint , ECF No. 168. Plaintiff seeks leave to amend the  
12 Washington Law Against Discrimination (WLAD), Wash. Rev. Code §  
13 49.60.210, component of his complaint, ECF No. 1, to (a) include the claim that  
14 Howmedica's April 10, 2015 counter-claim against him was in retaliation for his  
15 February 9, 2015, WLAD discrimination lawsuit, and (b) to seek punitive  
16 damages to the extent allowed under the law. Defendant Howmedica Osteonics  
17 opposes the motion on both fronts.

18 **A. WLAD Retaliation Claim**

19 Under Federal Rule of Civil Procedure 15(a), "[t]he court should freely give  
20 leave [to amend] when justice so requires." The Ninth Circuit has instructed that

1 this policy is “to be applied with extreme liberality.” *Owens v. Kaiser Found.*  
2 *Health Plan*, 244 F.3d 708, 712 (9th Cir. 2001). In determining whether to grant  
3 leave to amend, a court considers “the presence of any of four factors: bad faith,  
4 undue delay, prejudice to the opposing party, and/or futility.” *Owens*, 244 F.3d at  
5 712. There is a presumption that leave to amend should be given in the absence of  
6 prejudice or a strong showing of one of the other factors. *Eminence Capital, LLC*  
7 *v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

8 Defendant argues the Court should deny Plaintiff’s motion to amend  
9 because amendment would be futile and prejudicial to the Defendants. However,  
10 Defendant has not shown prejudice or futility sufficient to overcome the strong  
11 policy in favor of trying a claim on its merits.

12 Defendant first argues that amendment should be denied because Plaintiff  
13 cannot state a claim under the WLAD upon which relief could be granted.  
14 Defendant contends that the WLAD does not recognize employer suits as  
15 retaliatory action and the statute therefore does not apply. The Federal Rules of  
16 Civil procedure allow a trial court to dismiss a claim on a Rule 12(b)(6) motion if  
17 the plaintiff can provide no set of facts that would entitle him to judgment on the  
18 merits. Courts applying this rule must be lenient, assuming all allegations in the  
19 complaint are true and drawing every inference in the light most favorable to the  
20 plaintiff. *See Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir.1998).

1 Here, Defendant asserts that the statute does not apply to the conduct at  
2 issue as a matter of law. The question of whether an employer's claim against a  
3 former employee may be considered a retaliatory action within the scope of the  
4 WLAD is unresolved. However, the WLAD contains a broad statement of public  
5 policy calling for liberal interpretation and construction of rights. *See* Wash. Rev.  
6 Code § 49.60.020. Although the Court is skeptical that Defendant's compulsory  
7 counterclaims constitute retaliatory action, it cannot say that there are no set of  
8 facts under which Plaintiff would be entitled to relief on the merits. Accordingly,  
9 the Court cannot deny Plaintiff's motion to amend on the basis of futility.

10 Defendant next argues that Plaintiff's proposed amendment should be  
11 denied because of his undue delay in filing the claim. Plaintiff asserts that he has  
12 viewed Howmedica's counterclaim as retaliatory for over two years. ECF No. 187  
13 at 7. Defendant argues that Plaintiff's failure to include this claim prior to the June  
14 16, 2017 deadline to amend his complaint constitutes undue delay. Defendant  
15 argues amendment will cause unnecessary hardship to the parties in complying  
16 with the deadline to file dispositive motions. Nonetheless, Plaintiff filed his  
17 amended complaint within the bounds set by the Court's scheduling order. *See*  
18 ECF No. 131. Defendant is therefore not prejudiced by the timing of the  
19 amendment.

1 The Court recognizes that the August 3, 2017 deadline for filing dispositive  
2 motions has come and gone without resolution of this motion to amend. The Court  
3 also notes the trial date will be continued from its original date in November.  
4 Accordingly, the Court will permit the parties to submit supplementary dispositive  
5 motions on this new claim no later than Monday, October 23, 2017. Hearings on  
6 any motions will be set for Tuesday, December 12, 2017, in Spokane.

7 **B. Punitive Damages**

8 Plaintiff also seeks to amend his complaint to seek punitive damages. The  
9 WLAD does not permit punitive damages. Accordingly Plaintiff's attempt to add  
10 such claims is futile. *Arthurs v. Whitman Cty.*, 24 F. Supp. 3d 1024, 1037 n.9  
11 (E.D. Wash. 2014) (noting that "[p]unitive damages are not available under the  
12 WLAD"). Plaintiff argues that he should be permitted to include punitive damages  
13 because Defendant claims punitive damages in its counterclaim. ECF No. 168 at  
14 7. However, Defendant has a basis in law to claim such damages because its  
15 counterclaim arises under a contract with a New Jersey choice of law provision  
16 and New Jersey law permits punitive damages for breach of contract claims in  
17 certain circumstances. *See Sandler v. Lawn-A-Mat Chem. & Equip. Corp.*, 358  
18 A.2d 811 (N.J. Super. Ct. App. Div. 1976) (noting that "[s]everal exceptions have  
19 been carved out to permit punitive damages in actions arising out of contract  
20 where the unusual relationship between the parties reflects a breach of trust

1 beyond the mere breach of a commercial contract”). Accordingly, Plaintiff’s  
2 motion to add punitive damages is denied.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 **1.** Plaintiff’s Motion to Amend Complaint, **ECF No. 168**, is  
5 **GRANTED IN PART AND DENIED IN PART.**

6 **A.** Plaintiff’s motion to amend the WLAD claim is **GRANTED.**

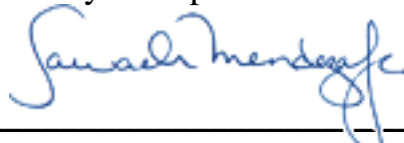
7 **B.** Plaintiff’s motion to include punitive damages is **DENIED.**

8 **2.** The deadline to file dispositive motions on this new claim is Monday,  
9 **October 23, 2017.** Responsive briefing shall comply with the  
10 deadlines set forth in Local Rule 7.1.

11 **3.** Hearings on any motions will be set for Tuesday, **December 12,**  
12 **2017, in Spokane at 9:00 A.M.**

13 **IT IS SO ORDERED.** The Clerk’s Office is directed to enter this Order  
14 and provide copies to all counsel.

15 **DATED** this 22<sup>nd</sup> day of September 2017.

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SALVADOR MENDOZA, JR.  
18 United States District Judge  
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