IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JIN ZHU, Plaintiff, v. NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT – ESD 171, Defendant.	**NO. 2:15-cv-183-JLQ** MOTION TO AMEND COMPLAINT Hearing Date: December 14, 2015 Without oral argument

I. INTRODUCTION, MOTION, & FACTUAL BACKGROUND

Introduction & Motion. Pursuant to Federal Rule of Civil Procedure 15 and 16, Plaintiff, Jin Zhu moves the Court for leave to amend his complaint to include a claim against ESD 171 for violation of Washington's Public Records Act, RCW 42.56. et. seq. Plaintiff respectfully requests that the Motion be heard on December 14, 2015, without oral argument. A copy of the proposed Amended Complaint is

attached to the Declaration of Matthew Crotty as Exhibit D.

Facts. On August 18, 2015, Plaintiff served Defendant with discovery seeking, among other things "each ESD 171 policy practice or procedure that relates to or is associated with discrimination, equal opportunity and/or retaliation that was in effect during the January 1, 2012 to May 1, 2013 time-frame." (Crotty Decl. ¶2 & Ex. A, at pg. 10 *citing* RFP 14) Plaintiff propounded the discovery requests on August 18, 2015, with the expectation that the Defendant would respond to said request within 30 days which, in turn, would allow Plaintiff time to review the documents and move to amend by the October 5, 2015 motion to amend deadline. *Id.* at ¶¶9-10.

Defendant did not respond to Plaintiff's first set of discovery within 30 days of August 18th. (Crotty Decl. ¶3) On September 23, 2015, and September 28, 2015, Plaintiff's counsel attempted to telephone Defendant's counsel in order to confer, as required under Rule 37; however, those calls went unanswered. (Crotty Decl. ¶4) On October 14, 2015, (and only after Plaintiff's counsel emailed Defense counsel and threatened a motion to compel) was Plaintiff's counsel able to meet and confer with Defense counsel about the late discovery responses. (Crotty Decl. ¶5) During that call Defendant's counsel conferred whereupon it was agreed that Defendant would respond to Plaintiff's first set of discovery on October 29, 2015. *Id.*

On October 29, 2015, Defendant responded to Plaintiff's discovery and also

provided its initial disclosures. (Crotty Decl. ¶6) Defendant's document production revealed the following:

- Plaintiff's January 13, 2014 public record request to Defendant seeking "a copy of North Central ESD programs (effective prior to June 21, 2012) that encouraged the school districts in North Central Washington to employ minority teachers and/or that *aim to increase minority staff in the NCESD*." (Crotty Decl. ¶7 & Ex. B, at pg. 26)(emphasis added).

- Defendant's February 27, 2014 response to Plaintiff's January 13 public record request in which Defendant employee Suzanne Reister informed Plaintiff that "there are no records responsive to your request. Educational Service Districts are not required to have affirmative action programs." (Crotty Decl. ¶8 & Ex. C, at pg. 28)

On October 29, 2015, Defendant in response to Plaintiff Request for Production 14, produced one "Affirmative Action" policy and one "Affirmative Action" administrative procedure. (Crotty Decl. Ex. A at pg. 15-18) By way of example, ESD 171's "Administrative Policy" states "[w]hen openings occur, due consideration will be given to promoting qualified minority…candidates within the agency." (*See* Crotty Decl. Ex. A, pg. 17)

Unquestionably those policies and procedures were *also* responsive to Plaintiff's January 13, 2014 public record request but were not produced to Plaintiff until October 29, 2015, and only after Plaintiff initiated this lawsuit.

Defendant's failure to produce the above-referenced policies pursuant to Plaintiff's January 13, 2014 record request violates Washington's Public Record

Act which requires, among other things, that a government agency produce responsive documents within five days of receiving such a document request.

Plaintiff respectfully requests that he be given leave to amend his complaint to include such a Public Record Act claim.

II. MEMORANDUM IN SUPPORT OF MOTION

A. STATEMENT OF THE ISSUE.

The issue is whether good cause exists to allow Plaintiff to amend his complaint to include a Washington State Public Record Act claim. Since Plaintiff seeks leave to amend after the October 5, 2015, Motion to Amend Deadline (ECF 015) the applicable requirements of Fed. R. Civ. P. 15 and 16 must be met.

B. PLAINTIFF MEETS THE RULE 15 MOTION TO AMEND STANDARD.

Under Fed. R. Civ. P. 15, "[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." Fed. Rule Civ. P. 15(a)(2). The requirement that leave be freely given is "[a] mandate . . . to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). As such, the Ninth Circuit Court of Appeals recognizes a "strong public policy permitting [leave for] amendment [of complaints]." *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1116 (9th Cir. 1975). Leave to amend is normally granted unless prejudice is found. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local*

Union, 883 F.2d 132, 145 (D.C. Cir. 1989). A party who seeks leave to amend a complaint does not have to prove the claims he or she seeks to add on the merits. *See Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000):

> Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a party's pleading "shall be freely given when justice so requires." Fed.R.Civ.Proc. 15. The Rule reflects two of the most important principles behind the Federal Rules: pleadings are to serve the limited role of providing the opposing party with notice of the claim or defense to be litigated, see *Conley v. Gibson*, 355 U.S. 41, 47–48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), and "mere technicalities" should not prevent cases from being decided on the merits, see *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). *See also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1471 (2d ed.1990). Thus, absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility, Rule 15's mandate must be obeyed. *Foman*, 371 U.S. at 182, 83 S.Ct. 227.

Plaintiff's amendment under Rule 15 is proper. Washington's Public Record Act - - "a strongly worded mandate for broad disclosure of public records" - - requires a local government agencies, like ESD 171, to "make available for public inspection and copying all public records, unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 730-731 (2007); RCW 42.56.070(1). Upon receipt of a citizen's record request a public agency must, within five days, promptly respond to that request by providing the

record, request an extension to produce the record, clarify the request, or deny the request. RCW 42.56.520. A denial must be accompanied by "a written statement of the specific reasons therefor." *Id.* A party that fails to produce a requested record is liable for wrongfully withholding the records and is subject to a per-day penalty for failing to disclose. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460 (2010). A party must file an action under the Public Records Act within one year of "the agency's claim of exemption *or* the last production of a record on a partial or installment basis." RCW 42.56.550(6).

Plaintiff's claim is proper under Rule 15 because it is (a) brought within one year of October 29, 2015, the day of the "last production of [the affirmative action policy] record[s]" and (b) establishes that Defendant wrongfully withheld its Affirmative Action policies even though those policies were subject to Plaintiff's January 13, 2014, request. In fact, Defendant implicitly denied the existence of the Affirmative Action policies in its February 27, 2014, response when, in fact, such policies undisputedly existed.

C. PLAINTIFF MEETS THE RULE 16 MOTION TO AMEND STANDARD.

Fed. R. Civ. P. 16(b)(4) states that when a party seeks leave to amend after a court-ordered deadline, the party seeking leave must establish "good cause." Fed. R. Civ. P. 16(b)(4). The "good cause" standard is a middle ground between Rule 15's "freely given" leave to amend standard and the "manifest injustice" standard which

applies to amendments following the issuance of a pre-trial order. *Sousa ex rel. Will of Sousa v. Unilab Corp. Class II (Non-Exempt) Members Grp. Benefit Plan*, 252 F. Supp. 2d 1046, 1058-59 (E.D. Cal. 2002) *aff'd sub nom. Sousa v. Unilab Corp. Class II (Non-Exempt) Members Grp. Benefit Plan*, 83 F. App'x 954 (9th Cir. 2003)("Unlike a final pretrial order that can only be modified to prevent manifest injustice, the court can easily modify a Joint Scheduling Order.").

To that end, "the good cause standard 'primarily considers the diligence of the party seeking the amendment' and that the district court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *C.F. v. Capistrano Unified Sch. Dist.*, 656 F. Supp. 2d 1190, 1194 (C.D. Cal. 2009) *aff'd sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975 (9th Cir. 2011). Additionally, the Ninth Circuit has found that "[w]here ... the court determines that refusal to allow a modification might result in injustice while allowance would cause no substantial injury to the opponent and no more than slight inconvenience to the court, a modification should ordinarily be allowed." *U.S. v. First Nat. Bank of Circle*, 652 F.2d 882, 887 (9th Cir.1981).

Plaintiff could not have met the October 5, 2015, because it did not receive, until October 29, 2015, the documents it needed to determine that ESD 171 violated Washington's Public Record Act. The documents produced on October 29th were the first documents produced in the case and were received 24 days after the

October 5, 2015, motion to amend deadline, despite Plaintiff's efforts to get the Defendant to produce those documents before October 5th. Upon receiving the documents Plaintiff diligently reviewed the initial disclosure and discovery documents and, within 15 days of receiving Defendant's discovery responses, promptly moved to amend the complaint, which, in turn, satisfies the "diligence" prong of the Rule 16 analysis.

Plaintiff's Motion to Amend should not significantly interfere with the Court's scheduling order as the discovery cut-off date is May 2, 2016, and the dispositive motion deadline is May 13, 2016. (ECF 015, p. 2) No depositions have occurred in this case. (Crotty Decl. ¶9) Further, no adjustments to the scheduling order should be necessary given that January 8, 2016, is the next court-scheduling order deadline and that is the deadline for disclosing Plaintiff's witnesses. (ECF 015, p. 2-3)

Additionally, Plaintiff, who was not represented by counsel at the time, sought (on January 13, 2014) certain ESD 171 policies germane to the advancement of minority employees. Not only did Defendant refuse (on February 27, 2014) to disclose those policies/procedures pursuant to Plaintiff's Public Record Request, it deliberately misled Plaintiff into believing that no such policies existed by inaccurately stating "there are no records responsive to your request. Educational Service Districts are not required to have affirmative action programs" when the

Defendant did, in fact, have two affirmative action policies/procedures. Disallowing Plaintiff's Public Record Act claim to proceed will allow the Defendant to escape its violation of Washington's public record law.

Since this is a case of where "refusal to allow a modification might result in injustice while allowance would cause no substantial injury to the opponent and no more than slight inconvenience to the court," Plaintiff's proposed modification of the scheduling order and motion to amend "should … be allowed." *First Nat. Bank of Circle*, 652 F.2d at 887.

III. CONCLUSION

Mr. Zhu's motion should be granted.

DATED this November 13, 2015.

s/ Matt Crotty
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CERTIFICATE OF SERVICE

I certify that on November 13, 2015 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties, if any, shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this November 13, 2015.

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