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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

RON RAMIREZ,)	
)	
Plaintiff,)	2:12-cv-00639- JWS
)	
vs.)	ORDER AND OPINION
)	
CITY OF PHOENIX,)	[Re: Motion at Docket 23]
)	
Defendant.)	
)	

I. MOTION PRESENTED

At docket 23, plaintiff Ron Ramirez (“plaintiff” or “Ramirez”) requested leave to amend his complaint. Defendant City of Phoenix (“defendant” or “the City”) opposes the motion at docket 24. Plaintiff’s reply is at docket 25. Oral argument was heard on February 5, 2013.

1 **II. BACKGROUND**

2 Ramirez was employed by the City and served as president of the Administrative
3 Supervisory Professional and Technical Employees Association (“ASPTEA”), a labor
4 organization for City employees, and chairman of the Coalition of Phoenix City Unions
5 (“COPCU”), an organization representing all of the City’s unions. On March 23, 2011,
6 Ramirez was asked to speak to members of the Laborers’ International Union of North
7 America (“LIUNA”) who were gathering at the state capitol. Ramirez alleges that he
8 attended the gathering during his lunch break.
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11 At the gathering, Ramirez identified himself as chairman of COPCU and stated,
12 “We know that we have one rogue Councilman right now and we’ve got to get rid of him
13 . . . [y]ou have to vote; you have to also recall.”¹ The City became aware of plaintiff’s
14 remarks when a video was posted on YouTube.
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16 City Administrative Regulation 2.16 requires that City “[e]mployees not engage in
17 activities that are inconsistent, incompatible, in conflict with, or harmful to their duties as
18 City employees.” Among the prohibited actions are “use [of] any official City authority or
19 influence for the purpose of interfering with or affecting the results of an election,”
20 “engag[ing] in political activities involving City . . . municipal elections, including recall
21 elections for Mayor and City Council,” and “use [of] an official City title or designate
22 employment with the City in political . . . endorsements, or speeches.”²
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¹Doc. 1 at 3.

28 ²A.R. 2.16.

1 Plaintiff was issued a written reprimand for violating A.R. 2.16. Plaintiff filed suit
2 in federal court, asserting one claim pursuant to 42 U.S.C. § 1983 based on an alleged
3 violation of his First Amendment rights.
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5 The City filed a motion to dismiss. It argued that plaintiff's § 1983 claim should
6 be dismissed because his statements were not made in his capacity as a private citizen.
7 The court denied the motion to dismiss the § 1983 claim based on the allegations in the
8 complaint. The City also argued plaintiff's Title VII claim should be dismissed. The
9 plaintiff conceded that it did not intend to bring a Title VII claim, and the court concluded
10 that, based on plaintiff's admission and the complaint itself, plaintiff did not bring such a
11 claim. The City also argued that plaintiff is not entitled to declaratory or injunctive relief
12 or punitive relief, but plaintiff then admitted that he was not seeking such relief. The
13 court acknowledged this admission in its order at docket 17. Plaintiff filed a motion for
14 summary judgment, and the court denied it at docket 17, concluding that it could not
15 determine whether plaintiff spoke as a private citizen or public employee given that the
16 scope of plaintiff's responsibilities as a public employee and the details surrounding his
17 invitation to speak at the gathering were unclear based on the record before it.
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21 Plaintiff then filed the motion to amend. Plaintiff's proposed amendments include
22 removing the reference to Title VII, and removing his request for punitive damages,
23 injunctive relief, and declaratory judgment.

24 His proposed amendments also include removing references to his role as an
25 official of ASPTEA in various places in the complaint. In the original complaint, Ramirez
26 alleged that he "was at all relevant times, an employee of the City of Phoenix and was
27 an official participating in, representing, speaking on behalf of, and engaging in
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1 associational freedoms with the [ASPTEA].”³ He wants to remove the language that
2 states he was “an official participating in, representing, and speaking on behalf of, and
3 engaging in associational freedoms with ASPTEA.” In paragraph 16 of the original
4 complaint he states that, as an official of ASPTEA and chairman of COPCU, it is his
5 duty to promote the interests of the City’s union members,⁴ and in paragraph 21 of the
6 original complaint he states that his participation in ASPTEA and COPCU provided the
7 “sole, substantial and/or motivating factor for engaging in the protected speech at
8 issue.”⁵ He wants to remove the reference to ASPTEA in those two paragraphs.
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11 The City responds that an amendment removing the Title VII claim and the
12 request for certain damages is moot given the court’s order at docket 17. It also argues
13 that the proposed retractions of plaintiff’s admissions regarding the role Ramirez’s
14 status as an official of ASPTEA played in making the statements at issue are made in
15 bad faith or with a dilatory motive because the retractions are inconsistent with the facts
16 alleged in the original complaint. It also argues that the proposed amendment unduly
17 prejudices it because the language plaintiff seeks to retract has formed the basis of the
18 defenses in its answer.
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26 ³Doc. 1 at 2, ¶5.

27 ⁴Doc. 1 at 4.

28 ⁵Doc. 1 at 5.

1 **III. STANDARD OF REVIEW**

2 Under Rule 15(a), if outside the allotted time in which to file an amendment as a
3 matter of course, “a party may amend its pleading only with the opposing party’s written
4 consent or the court’s leave.”⁶ “The court should freely give leave when justice so
5 requires.”⁷ Rule 15 provides for a very liberal amendment policy.⁸ The decision to
6 permit or deny a motion for leave to amend rests within the sound discretion of the trial
7 court.⁹ In deciding whether to grant leave to amend under Rule 15(a), courts generally
8 consider the following factors: undue delay, bad faith by the moving party, prejudice to
9 the opposing party, futility of amendment, and whether the party has previously
10 amended his pleadings.¹⁰ “Generally, this determination should be performed with all
11 inferences in favor of granting the motion.”¹¹ The party opposing amendment bears the
12 burden of demonstrating a permissible reason for denying the motion to amend.¹²
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19 ⁶Fed. R. Civ. P. 15(a)(2).

20 ⁷*Id.*

21 ⁸*Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

22 ⁹See *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185-86 (9th Cir. 1987) (citing
23 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)).

24 ¹⁰See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bonin v. Calderon*, 59 F.3d 815, 845
25 (9th Cir. 1995).

26 ¹¹*Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citing *DCD
27 Programs*, 833 F.2d at 186).

28 ¹²*DCD Programs*, 833 F.2d at 187; see *Richardson v. United States*, 841 F.2d 993, 999
(9th Cir. 1988) (stating that leave to amend should be freely given unless the opposing party
makes “an affirmative showing of either prejudice or bad faith”).

1 **IV. DISCUSSION**

2 As noted above the court will consider the following factors in deciding whether
3 an amendment is appropriate: undue delay, bad faith by the moving party, prejudice to
4 the opposing party, futility of amendment, and whether the party has previously
5 amended his pleadings.¹³ As to the factor addressing abuse of the amendment
6 procedure, this is plaintiff's first request to amend his complaint, and therefore, the City
7 does not raise this factor as a reason for denying the motion.
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10 The City does, however, assert that plaintiff was not diligent in bringing the
11 motion because it should have been filed after the City filed its motion to dismiss and
12 before plaintiff filed his response and his own motion. The court disagrees. In plaintiff's
13 response to the City's motion to dismiss, Plaintiff considered the wording of the
14 complaint and argued that it did not contain an admission that he was speaking on
15 behalf of the City when he made the comments at issue.¹⁴ Plaintiff is not suddenly
16 switching positions by requesting an amendment after the initial early motion practice.
17 Furthermore, the motion to dismiss was filed before the City filed its answer, and so the
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21 ¹³See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bonin v. Calderon*, 59 F.3d 815, 845
22 (9th Cir. 1995).

23 ¹⁴Doc. 8 at 3 ("Central to the Defendant's Motion is the assertion that at all times during
24 the speech, which is under scrutiny in this action, the Plaintiff was acting in his official capacity
25 for the City of Phoenix. Apparently, the Defendant believes that the Plaintiff's Complaint states
26 such a fact. The Complaint does not, and if the Defendant believes otherwise, it is mistaken. . . .
27 It is pointed out by the Defendant that Plaintiff's Complaint states that the Plaintiff's speech was
28 engaged in as a result of his participating in ASPTEA and COPCU, as though that is some kind
of confession that Plaintiff was acting in his official duties and responsibilities on behalf of the
City at the time that he uttered the expression which is under scrutiny here. That is not so; in
fact, the Plaintiff could not have stated more clearly in the complaint that he was on his own
time, speaking as a citizen and the COPCU president.").

1 parties were still in the pleading stage of litigation when the plaintiff realized that he
2 wanted to make changes in the complaint to clarify his position. Plaintiff filed the motion
3 to amend early in the litigation, well in advance of the deadline for filing motions to
4 amend set in the scheduling order. Thus, there has not been undue delay in requesting
5 an amendment.
6

7 Defendant asserts that allowing the amendment would result in unfair and undue
8 prejudice. It argues that the admissions plaintiff made formed the basis for its defenses
9 and responses and that plaintiff's retraction of certain facts unfairly affects those
10 defenses. It argues that it has spent time and money filing a motion to dismiss based
11 on the allegations as they were asserted in the original complaint. This court concludes
12 that defendant is not unduly prejudiced by the proposed amendment. It is still early in
13 the litigation; plaintiff filed the motion to amend within the deadline set for such motions;
14 and discovery is not set to be completed until July of 2013. Defendant will have the
15 opportunity to respond to the amended complaint and will have time to alter any
16 defense thereto, and thus, the court cannot conclude that defendant will suffer any
17 substantial prejudice or negative effect.¹⁵
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21 Defendant's primary argument is that the amendment is sought in bad faith or
22 with a dilatory motive because the proposed amendment is inconsistent with the original
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26 ¹⁵See *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)
27 (finding substantial prejudice due to a proposed amendment where the claims sought to be
28 added "would have greatly altered the nature of the litigation and would have required
defendants to have undertaken, at a late hour, an entirely new course of defense").

1 complaint, citing to *Reddy v. Litton Industries, Inc.*¹⁶ In *Reddy*, the court stated that
2 despite Rule 15's liberal amendment policy, an amended complaint may only allege
3 “other facts consistent with the challenged pleading.”¹⁷ In *Reddy*, the plaintiff alleged
4 he was wrongfully discharged because he refused to cover up his employer’s
5 conspiracy. In addition to state claims, the plaintiff brought federal claims against his
6 employer under the Racketeer Influenced and Corrupt Organizations Act (RICO). The
7 court concluded that the plaintiff did not have standing to bring the RICO claims against
8 the employer because the harm he suffered was not caused by the predicate acts of
9 racketeering but by the discharge, which itself is not a predicate racketeering act. The
10 role of the discharged employee was peripheral, not central to, the existence of the
11 conspiracy.¹⁸ The court went on to hold that it would not be possible for the plaintiff to
12 amend his complaint to allege a completely new injury apart from the termination that
13 would confer standing to sue based on RICO without contracting the allegations of his
14 original complaint.¹⁹

18 The court concludes that this case is distinguishable from *Reddy*. Plaintiff does
19 not seek to add an entirely new injury that is inconsistent with his original complaint or to
20 otherwise add new facts that contradict his theory of the case. Rather, plaintiff seeks to
21 remove some allegations and clarify internal inconsistencies in the original complaint.
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23 ¹⁶912 F.2d 291, 297 (9th Cir. 1990).

24 ¹⁷*Id.* (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401
25 (9th Cir. 1986)).

26 ¹⁸*Id.* at 294-95.

27 ¹⁹*Id.* at 296-97.
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1 He alleges in the original complaint that his position as president of ASPTEA and
2 his position as chairman of COPCU prompted the invitation to give the speech. He
3 wants to remove the reference to ASPTEA in this allegation, which still leaves the
4 reference to COPCU. Such a change narrows the allegation, but it is not inconsistent;
5 thus, the assertion that he was invited to speak because of his position as chairman of
6 COPCU is not a new one. He also states in the original complaint that his duty in both
7 positions was to promote the interests of the City's union members. He now wants to
8 allege that promoting the interests of the union members was his duty as chairman of
9 COPCU. Again, that does not present a new inconsistent fact; it only narrows the
10 assertion.
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13 In the section describing the parties, plaintiff states that he "was at all relevant
14 times, an employee of the City of Phoenix and was an official participating in,
15 representing, speaking on behalf of, and engaging in associational freedoms with the
16 [ASPTEA]."²⁰ Plaintiff seeks to remove the portion that refers to speaking on behalf of
17 ASPTEA. While defendant reads that sentence as a clear admission that the speech
18 was given in his role as president of ASPTEA, the general allegations section in the
19 complaint contradicts such an admission. In that section, he states that he gave the
20 speech as a private citizen during his lunch break and alleged that he introduced
21 himself as the chairman of the COPCU before the speech. Thus, the pleading is
22 internally inconsistent. The proposed amendment attempts to clear up these
23 inconsistencies to avoid further disputes that may arise regarding the extent and scope
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27 ²⁰Doc. 1 at 2, ¶5.
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1 of his admissions. This is not a case where the plaintiff attempts to put forth an entirely
2 new injury that is completely different from the injury in the original complaint to
3 overcome a jurisdictional issue, as was the case in *Reddy*. Nor does plaintiff seek to
4 allege a set of facts that presents an entirely new theory of the case to keep it alive.
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6 Even if the proposed amendment is inconsistent, the rationale for disallowing an
7 amendment that presents inconsistent facts is to prevent prejudice to the defendant and
8 prevent further delay that would be necessitated by the need for new discovery.²¹ As
9 noted above, the case is still in the early stages and any inconsistency presented is not
10 likely to lead to substantial additional discovery.
11

12 Given that the purpose of Rule 15 is to facilitate a decision on the merits rather
13 than on the pleadings,²² an amendment to clarify plaintiff's § 1983 claim is appropriate
14 at this early stage of the litigation.
15

16 Defendant appears to object to the amendment based on the fairness of allowing
17 plaintiff to retract judicial admissions through an amendment. "Judicial admissions are
18 formal admissions in the pleadings which have the effect of withdrawing a fact from
19 issue and dispensing wholly with the need for proof of the fact."²³ To qualify as a judicial
20 admission, the admission must be "deliberate, clear, and unequivocal."²⁴ In this case,
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22 ²¹*Enzymotec Ltd. v. NBTY, Inc.*, 754 F. Supp. 2d 527, 538-39 (E.D.N.Y. 2010).

23 ²²*Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987).

24 ²³*American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (citations
25 omitted).

26 ²⁴*Heritage Bank v. Redcom Laboratories, Inc.*, 250 F.3d 319, 329 (5th Cir. 2001); see
27 also *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972) (noting that judicial
28 admissions are binding only when they are "unequivocal").

1 as discussed above, the language in the complaint is not unequivocal, and the court
2 cannot conclude that plaintiff's statements in the complaint regarding in what capacity
3 he gave the speech at issue are judicial admissions. Regardless, while factual
4 assertions in pleadings are considered judicial admissions conclusively binding on the
5 party who made them, they can be amended.²⁵ "Where ... the party making an
6 ostensible judicial admission explains the error in a subsequent pleading or by
7 amendment, the trial court must accord the explanation due weight."²⁶ In this case, the
8 plaintiff has maintained the position that the original complaint does not constitute a
9 clear admission that he was making the speech at issue on behalf of the City. He now
10 seeks an amendment to correct the error in drafting and remove any question as to
11 what plaintiff meant in his original complaint. The court accords that explanation due
12 weight.
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16 Defendant also argues that the motion to amend should be denied based on
17 judicial estoppel. "Judicial estoppel is an equitable doctrine that precludes a party from
18 gaining an advantage by asserting one position, and then later seeking an advantage by
19 taking a clearly inconsistent position."²⁷ A court "invokes judicial estoppel not only to
20 prevent a party from gaining an advantage by taking inconsistent positions, but also
21 because of 'general consideration[s] of the orderly administration of justice and regard
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24 ²⁵*American Title Ins. Co.*, 861 F.2d at 226 ("Factual assertions in pleadings and pretrial
25 orders, unless amended, are considered judicial admissions conclusively binding on the party
26 who made them.").

26 ²⁶*Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995).

27 ²⁷*Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).
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1 for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and
2 loose with the courts.'"²⁸ When determining whether to apply the doctrine of judicial
3 estoppel the court typically looks at whether the later position is clearly inconsistent with
4 the earlier position.²⁹ The court also typically considers "whether the party has
5 succeeded in persuading a court to accept that party's earlier position, so that judicial
6 acceptance of an inconsistent position in a later proceeding would create the perception
7 that the court had been misled somewhere."³⁰ A third consideration is what advantage
8 the party seeking the inconsistent position would receive or what detriment the opposing
9 party would suffer if estoppel is not applied.³¹

12 As noted above, the court concludes that the changes plaintiff proposes to his
13 complaint do not set forth a clearly inconsistent position but rather clarifies the internal
14 inconsistencies within the complaint. Furthermore, even if the proposed changes are
15 clearly inconsistent, the court has not accepted plaintiff's prior position that he was, in
16 fact, speaking at all times on behalf of the ASPTEA, and, as discussed above,
17 defendant is not unduly prejudiced by the proposed changes. Thus, the court
18 concludes that this is not a situation where the doctrine of judicial estoppel should be
19 applied.
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24 ²⁸*Id.* (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

25 ²⁹*New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

26 ³⁰*Id.*

27 ³¹*Id.*

