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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF ARIZONA

11 Michelle Montgomery Flunder,  
12 Plaintiff,

No. 12-CV-01668-PHX-JAT

13 v.

**ORDER**

14 People First Rehabilitation, subsidiary  
15 of Kindred Rehabilitation Services Inc.,  
16 Defendant.

17

18 Pending before the Court is Defendant's Motion to Dismiss Plaintiff's Amended  
19 Complaint (Doc. 13). Plaintiff has filed a Response to the motion to dismiss and a Motion  
20 for Leave to File a Second Amended Complaint (Doc. 16). Defendant has filed a Reply  
21 opposing Plaintiff's motion (Doc. 17). The Court will deny Defendant's motion and grant  
22 Plaintiff's motion for the following reasons.

23 **I. BACKGROUND**

24 On August 6, 2012, Plaintiff filed a complaint in this Court as a *pro se* litigant  
25 alleging three counts of racial discrimination against her former employer—Defendant  
26 People First Rehabilitation ("People First"). (Doc. 1). On August 10, 2012, the Court  
27 entered an Order directing Plaintiff to complete and return the service packet to the Clerk  
28 of the Court by September 10<sup>th</sup>. (Doc. 6). Plaintiff failed to complete and return the

1 service packet within the requisite time period. On September 24, 2012, the Court entered  
2 an Order directing Plaintiff to appear in person before the Court on October 17, 2012, and  
3 show cause why this case should not be dismissed due to Plaintiff's failure to return the  
4 service packet as required. (Doc. 7). On October 11, 2012, Plaintiff filed a first amended  
5 complaint (the "Amended Complaint") alleging three counts of racial discrimination and  
6 one count of hostile work environment against People First. (Doc. 8). At the hearing on  
7 October 17, 2012, Plaintiff represented to the Court that she forwarded the service packet  
8 for the Amended Complaint on the day she filed the Amended Complaint, October 11<sup>th</sup>.  
9 (Doc. 10). Following the hearing, the Court granted an extension allowing an extension of  
10 service. (*Id.*). On November 11, 2012, Plaintiff gave notice to the Court that she had  
11 retained counsel to represent her. (Doc. 11). Plaintiff's counsel did not draft the  
12 Amended Complaint. Defendant filed the pending motion to dismiss the Amended  
13 Complaint on December 14, 2012. (Doc. 13). Plaintiff's counsel filed the pending motion  
14 to file a Second Amended Complaint on January 14, 2013. (Doc. 16).

15 In the Amended Complaint, Plaintiff alleges four claims against People First.  
16 (Doc. 8). Counts One and Two are alleged violations of Title VII of the Civil Rights Act  
17 of 1964, as amended 42 U.S.C. § 2000, et seq. ("Title VII"), and Counts Three and Four  
18 are alleged violations of 42 U.S.C. § 1981. (*Id.* at 17-20).

19 Defendant argues that Plaintiff's Amended Complaint should be dismissed with  
20 prejudice because it does not meet the requirements of Federal Rule of Civil Procedure 8  
21 as it fails to give a "short and plain statement of the claim showing that the pleader is  
22 entitled to relief." (Doc. 13 at 3) (quoting Fed. R. Civ. P. 8(a)(2)). Defendant explains  
23 that the facts alleged in the Amended Complaint span 14 pages and close to 60 numbered  
24 paragraphs that are largely narratives of irrelevant background facts, which Plaintiff has  
25 not tied to the specific claims she made. (*Id.* at 4-7). Plaintiff has merely incorporated by  
26 reference all of the preceding paragraphs in each claim she made against Defendant.  
27 Defendant argues that it should not be required to scour the Amended Complaint to  
28 discern what facts relate to each claim. (*Id.* at 7).

1 In the Response, Plaintiff has not addressed the merits of Defendant’s argument in  
2 the motion to dismiss. Instead, Plaintiff has merely requested that in order to resolve  
3 Defendant’s objections the Court grant leave to file a Second Amended Complaint  
4 because the preceding two complaints were filed *pro se*. Plaintiff argues that she is  
5 entitled to the request because the Ninth Circuit Court of Appeals has said that motions to  
6 amend should be freely granted with “extreme liberality.” (Doc. 16 at 1-2) (citing *Owens*  
7 *v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)).

## 8 **II. ANALYSIS**

9 A district court’s denial of leave to amend is subject to an abuse of discretion  
10 standard of review. *See Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir.  
11 2010). The Court has “an obligation where the petitioner is *pro se*, particularly in civil  
12 rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of  
13 any doubt.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting *Bretz v.*  
14 *Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en banc)). “A district court should not  
15 dismiss a *pro se* complaint without leave to amend unless ‘it is absolutely clear that the  
16 deficiencies of the complaint could not be cured by amendment.’” *Id.* (quoting *Schucker*  
17 *v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir. 1988) (per curiam)).

18 Under Ninth Circuit Court of Appeals precedent prior to the 2010 amendments to  
19 the Federal Rules of Civil Procedure, this Court would *sua sponte* grant leave to amend  
20 when granting a motion to dismiss under Rule 12(b)(6), unless a pleading could not be  
21 cured by the allegation of other facts. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927  
22 (9th Cir. 2012) (en banc) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).  
23 However, this precedent has been called into question in light of the 2010 changes to the  
24 Federal Rule of Civil Procedure 15, which now allows parties twenty-one days from  
25 responsive pleadings and motions to dismiss to amend once as a matter of course. *See id.*  
26 The United States Supreme Court has established that motions to amend should be granted  
27 unless the district court determines that there has been a showing of: (1) undue delay; (2)  
28 bad faith or dilatory motives on the part of the movant; (3) repeated failure to cure

1 deficiencies by previous amendments; (4) undue prejudice to the opposing party; or (5)  
2 futility of the proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see W.*  
3 *Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991). “Generally, this  
4 determination should be performed with all inferences in favor of granting the motion” to  
5 amend. *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citing *DCD*  
6 *Programs, LTD. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). Significantly, “[t]he  
7 party opposing amendment bears the burden of showing prejudice,” futility, or one of the  
8 other permissible reasons for denying a motion to amend. *DCD Programs*, 833 F.2d at  
9 187; *see Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988) (stating that leave  
10 to amend should be freely given unless opposing party makes “an affirmative showing of  
11 either prejudice or bad faith”).

12 Local Rule of Civil Procedure 15.1 provides that a “party who moves for leave to  
13 amend a pleading . . . *must* attach a copy of the proposed amended pleading as an exhibit  
14 to the motion . . . , which *must* indicate in what respect it differs from the pleading which  
15 it amends . . . .” LRCiv 15.1 (emphasis added). This requirement enables the Court to  
16 determine whether allowing amendment of Plaintiff’s claims would be futile. *See Sheriff*  
17 *v. Deutsche Bank Nat. Trust Co.*, CV-10-1328-PHX-JAT, 2011 WL 1496152, at \*4 (D.  
18 Ariz. Apr. 20, 2011).

19 In this case, neither party has met their burden. Defendant has not shown how the  
20 deficiencies of the Amended Complaint could not be cured by amendment. Defendant  
21 merely argues that Plaintiff’s Amended Complaint does not comply with Rule 8 and that  
22 Plaintiff’s counsel has failed to comply with Local Rule 15.1. (Doc. 17 at 2). Indeed,  
23 Plaintiff’s counsel did fail to abide by Local Rule 15.1 and attach a copy of the proposed  
24 amended pleading as an exhibit to Plaintiff’s motion to amend. Because Plaintiff did not  
25 attach a proposed Second Amended Complaint, Defendant cannot show and the Court  
26 cannot determine whether amendment of Plaintiff’s claims would be futile.

27 Defendant has not shown the four other factors as well. There has been no  
28 showing made that granting Plaintiff’s motion would cause undue delay, that Plaintiff has

1 acted in bad faith or with dilatory motives, or that Plaintiff has repeatedly failed to cure  
2 deficiencies by previous amendments. The Court also notes that Defendant will not be  
3 subjected to undue prejudice by granting Plaintiff's motion because the first two  
4 complaints were filed *pro se* and the Amended Complaint was filed before any  
5 meaningful defense was raised to the original complaint. Further, while acting *pro se*,  
6 Plaintiff filed an amended complaint which forfeited Plaintiff's counsel's opportunity to  
7 file an amended complaint as a matter of course under Federal Rule of Civil Procedure 15.  
8 Even though Plaintiff eventually retained counsel, Plaintiff has still essentially functioned  
9 as a *pro se* litigant up to this point and should not be treated more strictly at this juncture  
10 merely because she has retained counsel and before she receives substantive assistance  
11 from that representation. The Ninth Circuit Court of Appeals has directed the Court to  
12 grant *pro se* litigants leave to amend with extreme liberality, especially in civil rights  
13 claims. *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987). Accordingly, the Court  
14 grants Plaintiff's motion to amend.

15         However, the Court reminds Plaintiff's counsel that the Local Rules of Civil  
16 Procedure are to be followed. The Court has discretion to award attorney's fees to a  
17 prevailing defendant in a Title VII case. *E.E.O.C. v. Bruno's Rest.*, 13 F.3d 285, 287 (9th  
18 Cir. 1993) (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (“[A]  
19 district court may in its discretion award attorney's fees to a prevailing defendant in a Title  
20 VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without  
21 foundation, even though not brought in subjective bad faith.”)). While the Ninth Circuit  
22 has indeed granted leave to amend with extreme liberality, the extremely liberal policy in  
23 favor of amendments is subject to limitations. As explained above, the district court will  
24 not grant further motions to amend if the Court determines that there has been a showing  
25 of: (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3)  
26 repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the  
27 opposing party; or (5) futility of the proposed amendment. *Foman*, 371 U.S. at 182. In  
28 addition, the Court's discretion to deny further leave to amend is “particularly broad

1 where plaintiff has previously amended the complaint.” *Ascon Properties, Inc. v. Mobil*  
2 *Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). In fact, leave to amend “need not be given  
3 if a complaint, as amended, is subject to dismissal.” *Moore v. Kayport Package Exp.,*  
4 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

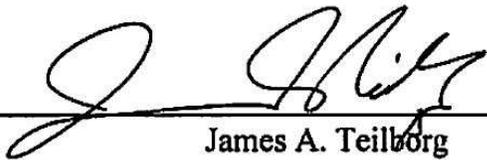
5 **III. CONCLUSION**

6 Based on the foregoing,

7 **IT IS ORDERED** that Defendant’s Motion to Dismiss (Doc. 13) is denied as  
8 moot without prejudice.

9 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Leave to File a Second  
10 Amended Complaint (Doc. 16) is granted. Plaintiff may file a second amended complaint  
11 within twenty-one (21) days from the date of this order; if Plaintiff fails to file a second  
12 amended complaint within this deadline, then Defendant may re-file the Motion to  
13 Dismiss that the Court has denied without prejudice within twenty-five (25) days from the  
14 date of this order.

15 Dated this 27th day of August, 2013.

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20 James A. Teilborg  
21 Senior United States District Judge  
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