LAW OFFICE OF EUGENE LEE
Eugene D. Lee (SB#: 236812)
555 West Fifth Street, Suite 3100
Los Angeles, CA 90013
Phone: (213) 992-3299
Fax: (213) 596-0487
email: elee@LOEL.com

Attorney for Plaintiff
DAVID F. JADWIN, D.O.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

DAVID F. JADWIN, D.O.,

Plaintiff,

v.

COUNTY OF KERN, et al.,

Defendants.

Civil Action No. 1:07-cv-00026 OWW TAG

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Date: October 3, 2008
Time: 10:00 a.m.
Courtroom: U.S. District Court, Crtrm. 3
2500 Tulare St, Fresno, CA
Complaint Filed: January 6, 2007
Trial Date: December 2, 2008

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on October 3, 2008, at 10:00 a.m., or as soon thereafter as the parties may be heard, Plaintiff DAVID F. JADWIN, D.O. will and hereby does move this Court U.S. Dist. Ct., Bankr. Crtrm., 1300 18th St., Bakersfield, CA, for leave to file the Second Amended Complaint.

For the reasons set forth in the accompanying Memorandum of Points and Authorities and Declaration of Eugene Lee, Plaintiff respectfully requests that this Court grant it leave to file the Second Amended Complaint, and for such other relief as may be just.

RESPECTFULLY SUBMITTED on September 2, 2008.

/s/ Eugene D. Lee
LAW OFFICE OF EUGENE LEE
555 West Fifth Street, Suite 3100
Los Angeles, CA 90013
Phone: (213) 992-3299
Fax: (213) 596-0487
email: elee@LOEL.com
Attorney for Plaintiff DAVID F. JADWIN, D.O.

MEMORANDUM OF POINTS & AUTHORITIES

I. BACKGROUND

Plaintiff has attempted without success to obtain Defendants' stipulation to file the Second Amended Complaint ("SAC") and the revised Second Amended Complaint ("RSAC").

On January 6, 2007, Plaintiff filed the Complaint initiating this action.

On April 24, 2007 and on June 13, 2007, Plaintiff supplemented the Complaint to reflect events occurring after the date of the last-filed Complaint.

On January 4, 2008, Plaintiff sent the draft Third Supplemental Complaint ("TSC") –almost identical to the SAC – to Defendants for their review. Defendants never responded.

On January 22, 2008, Plaintiff noted Defendants had not responded. Defendants replied that they were inclined not to so stipulate but would reconsider subject to certain conditions.

On April 17, 2008, after further discussion between the parties, Plaintiff again sent the draft TSC to Defendants for their review. Defendants never responded.

On May 4, 2008, Plaintiff again requested Defendants' stipulation to filing the TSC. On May 5, Defendants refused and stated "the pleadings are done."

On June 30, 2008, Plaintiff filed with this Court his notice of withdrawal of motion for leave to file the TSC, stating:

> Unless Defendants stipulate otherwise, Plaintiff intends to file a motion for leave to file and serve the Second Amended Complaint, naming the County of Kern . . . as defendants in their personal and official capacities under Count Ten [sic] of Plaintiff's Complaint (42 U.S.C. 1983 procedural due process).
> Doc. 159, 1:24 – 2:1.

On July 1, 2008, Plaintiff requested Defendants' stipulation to filing the SAC. Later that day, Defendants stated that they refused.

Discovery in this action closed on August 18, 2008, except for depositions per the stipulation and order of the parties.

On August 29, during the deposition of Philip Dutt, the parties met and conferred regarding withdrawal of Plaintiff's prior motion for leave to file the Second Amended Complaint so that Plaintiff could further add additional claims arising out of facts which were newly discovered during the course of Plaintiff's depositions. Defendants refused to stipulate to the filing of the revised Second Amended Complaint. Plaintiff therefore had no choice but to bring this motion seeking leave to file the second

amended complaint.

II. ARGUMENT

Plaintiff seeks to effect the following items with the filing of the SAC:

A. Item 1: Supplement the Complaint regarding events that occurred after the filing of Plaintiff's second supplemental complaint.

1. Requested Change

Plaintiff filed the Second Supplemental Complaint on June 13, 2007. Plaintiff now seeks to supplement the Complaint regarding events occurring subsequently, including: (a) Defendant County's lifting of Plaintiff's home restriction on April 30, 2007, (b) Defendant County's non-renewal of Plaintiff's employment contract on October 4, 2007 and (c) Plaintiff's exhaustion of administrative remedies. Accordingly, Plaintiff seeks to make additions to the Complaint including the following:

> 20. Just before Thanksgiving of 2006, Plaintiff confided to Gilbert Martinez, the Laboratory Manager at KMC, that he intended to blow the whistle on KMC to appropriate outside agencies. Days later, Defendant Harris met with Philip Dutt, M.D., Interim Chair of the Pathology Department at KMC ("Dutt"), to discuss what steps the Pathology Department should take in anticipation of Plantiff's whistleblowing to these outside agencies.
>
> 27. On April 30, 2007, Defendant County sent a letter to Plaintiff notifying him of its decision to lift the home restriction. To date, Plaintiff has received no formal explanation for the involuntary leave or the restriction to his home.
>
> 28. On May 1, 2007, Defendant County sent an email to Plaintiff notifying him of its decision not to renew Plaintiff's employment contract, which was not due to expire until October 4, 2007, and to "let the contract run out". To date, Plaintiff has received no formal explanation for the decision not to renew his contract.
>
> 29. On October 4, 2007, Defendant County failed to renew Plaintiff's employment contract, which therefore expired.
>
> 30. On August 15, 2008, Ray Watson, Chair of the Board of Supervisors of Defendant County, testified in deposition that Defendant County had decided during the course of several KMC Joint Conference Committee meetings not to renew Plaintiff's employment contract because he had filed the instant lawsuit.
>
> 138. On October 4, 2007, Defendant County failed to renew Plaintiff's employment contract, which therefore expired.
>
> 142. During the time that Defendants placed Plaintiff on involuntary full-time leave, including the period from December 7, 2006 to October 4, 2007, Defendants effectively denied Plaintiff the opportunity to earn Professional Fees as set forth in Article II of the Second Contract.
>
> 149. On October 10, 2007, Plaintiff again filed a supplemented Tort Claims Act complaint with the County of Kern, supplemented to reflect events occurring after filing of the supplemented Tort Claims Act complaint on April 23, 2007.

153. On October 16, 2007, Plaintiff again filed a supplemented complaint with the DFEH, supplemented to reflect events occurring after filing of the supplemented complaint with the DFEH on April 23, 2006.

154. On September 2, 2008, Plaintiff again filed a supplemented complaint with the DFEH, supplemented to reflect additional claims for retaliation for opposing practices made unlawful under CFRA and FEHA which arose after evidence was newly discovered subsequent to the filing of the supplemented complaint with the DFEH on October 16, 2007.

2. Why It Should be Permitted

Rule 15(d) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

A supplemental pleading is used to allege relevant facts occurring after the original pleading was filed. *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467, 468. A supplemental pleading is designed to bring the action "up to date" and to set forth new facts affecting the controversy that have occurred since the original pleading was filed. *Manning v. City of Auburn* (11th Cir. 1992) 953 F.2d 1355, 1359–1360. A supplemental pleading may properly allege events occurring after the original complaint was filed and identify any new parties involved therein. Rule 15(d) "plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary." *Griffin v. County School Board* (1964) 377 U.S. 218, 226–227. Supplemental pleadings can only be filed with leave of court and upon such terms as are just. *Glatt v. Chicago Park Dist.* (7th Cir. 1996) 87 F.3d 190, 194. However, supplemental pleadings are favored because they enable the court to award complete relief in the same action, avoiding the costs and delays of separate suits. Therefore, absent a clear showing of prejudice to the opposing parties, they are liberally allowed. *See Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467, 473; *Quaratino v. Tiffany & Co.* (2nd Cir. 1995) 71 F.3d 58, 66. The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as is possible. *LaSalvia v. United Dairymen of Arizona*, 804 F.2d 1113, 1119 (9th Cir. 1986), *cert. denied*, 482 U.S. 928 (1987).

The supplements sought by Plaintiff promote a complete and efficient adjudication of the disputes between the existing parties to this action. Item 1 – Plaintiff's proposed supplements – allege a series of adverse employment actions taken by Defendants against Plaintiff that were first referenced in

Plaintiff's original and subsequent complaints. For instance, Plaintiff's Second Supplemental Complaint had alleged in pertinent part:

> 102. On or about December 7, 2006, Culberson sent a letter addressed to Plaintiff informing him that he was being placed on involuntary paid administrative leave "pending resolution of a personnel matter".
>
> 104. On April 4, 2007, Plaintiff placed Defendant County on notice that (i) he still had yet to be provided any explanation for his involuntary leave or any indication as to whether or when it would end so that he could return to work, (ii) the involuntary leave requiring him to remain at home by his phone during working hours was threatening to erode his pathology skills, jeopardizing his employability and career as a pathologist, (iii) the involuntary leave was denying him the opportunity to earn income from professional fee billing, and (iv) part-time work was deemed therapeutic for him by his physician and that the confinement to his house during working hours was having the opposite effect of severely exacerbating his depression.
>
> 105. To date, Plaintiff remains on involuntary leave, with no explanation therefore or any indication as to whether or when it will end.

Plaintiff alleges that these actions constituted a continuing violation and/or a pattern and practice of discrimination, harassment, and/or retaliation taken against Plaintiff because of his protected characteristics and activities. If Plaintiff is denied leave to file the SAC, Plaintiff would be forced to file a new law suit re-alleging most of the same claims contained in this action based on these new adverse actions. Permitting the supplement would result in a more efficient use of scarce judicial resources.

More importantly, there is no risk of prejudice or surprise to Defendants. First, the supplements comprise allegations of continuing injury or continuation of the wrongful conduct already alleged in Plaintiff's original or supplemental complaints. Second, Plaintiff has **repeatedly** apprised Defendants of his desire to make the foregoing supplements to his complaint since January 4, 2008, when Plaintiff first sent Defendants the draft TSC. Defendants initially refused to respond at all, then ultimately refused to stipulate.

Third, Plaintiff served on Defendants copies of the supplemented complaint he filed with the Department of Fair Employment & Housing on October 16, 2007 and supplemented Tort Claims Act claim he filed with the County of Kern on October 10, 2007, each detailing the same supplemental allegations which Plaintiff now proposes in the SAC.

Fourth, Plaintiff's Initial Disclosure contained a Rule 26 report issued by Plaintiff's forensic economist which fully disclosed the harm that Plaintiff suffered and expected to suffer because of the events which Plaintiff now seeks to supplementally allege.

Defendants cannot in good faith claim to be surprised or prejudiced by Plaintiff's proposed supplements.

B. Item 2: To include an element of Plaintiff's Count VI for disability discrimination added to Plaintiff's Prima Facie Case by a decision of the California Supreme Court issued after the filing of this lawsuit.

1. Requested Change

Plaintiff seeks to add Paragraph 125 to allege Plaintiff's ability to perform the essential functions of his job, which the California Supreme Court found to be an element of Plaintiff's disability discrimination claim in *Green v. State of California*, issued by the California Supreme Court on August 23, 2007. Paragraph 125 reads as follows:

> 125. At all times material here, excluding a portion of the time when he was out on voluntary full-time medical leave, Plaintiff has been able to perform the essential functions of the employment positions he held with Defendants and each of them, with reasonable accommodation.

2. Why It Should be Permitted

Rule 15 provides the parties with flexibility in presenting their claims and defenses. It assures that cases will be heard on their merits and avoids injustices which sometimes resulted from strict adherence to earlier technical pleading requirements. *Foman v. Davis* (1962) 371 U.S. 178, 182; *Slayton v. American Express Co.* (2nd Cir. 2006) 460 F.3d 215, 228. Rule 15 reflects the limited role assigned to federal pleadings: i.e., their purpose is simply to provide the parties with fair notice of the general nature and type of the pleader's claim or defense. As long as such notice has been provided, the pleadings should not limit the pleader's claims or defenses. *Ibid.*; see also *Grier v. Brown* (N.Dist. Cal. 2002) 230 F.Supp.2d 1108, 1111.

Plaintiff's proposed correction of an omission does not allege any new facts; it arises out of the same exact nucleus of facts alleged in Plaintiff's original and supplemental complaints filed with the Court. Simply put, it merely seeks to correct the omission of a legal pleading element required for Plaintiff's Counts VI through VIII for violation of California's disability discrimination laws. Defendants cannot claim to have been denied fair notice of the general nature of Plaintiff's disability discrimination claims or the alleged facts from which they arise. Permitting the correction would not prejudice Defendants in any way. Conversely, denying the correction may prevent consideration of Plaintiff's disability discrimination claims on their merits and result in injustice.

C. Item 3: Add already-named and existing Defendants, the County of Kern and Irwin Harris, to Plaintiff's Count IX for 42 U.S.C. 1983 due process violation claim, based upon events which were already alleged in the Complaint.

1. Requested Change

Plaintiff seeks to amend Count IX (See Paragraph 207 of the SAC) to add Defendants County of Kern and Irwin Harris to that count. Both Defendants are already named and existing parties and no joinder of new parties is required under Rule 19. Rather, joinder of a claim against an existing party is required under Rule 18.

2. Why It Should be Permitted

Rule 15 requires that leave to amend should be freely given "when justice so requires." Fed. R. Civ. Proc. 15(a)(2); see *Lone Star Ladies Invest. Club v. Schlotzsky's Inc.* (5th Cir. 2001) 238 F.3d 363, 367 (policy favoring leave to amend "a necessary companion to notice pleading and discovery".) This policy is to be applied with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.* (9th Cir. 2003) 316 F.3d 1048, 1051; *Moore v. Baker* (11th Cir. 1993) 989 F.2d 1129, 1131 ("justifying reasons must be apparent for denial of a motion to amend"). Absent prejudice, or a strong showing of any of the other reasons for denying leave to amend, "there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.* (9th Cir. 2003) 316 F.3d 1048, 1052. While "leave to amend should not be granted automatically," the circumstances under which Rule 15(a) "permits denial of leave to amend are limited." *Ynclan v. Department of Air Force* (5th Cir. 1991) 943 F.2d 1388, 1391.

The opposing party may claim "prejudice" from any amendment, such as the expense of responding to the amended pleading and possible delay in getting to trial; however, expense and delay are probably not enough by themselves to deny leave to amend. There must be some showing of inability to respond to the proposed amendment. Likewise, the need for additional discovery is insufficient by itself to deny a proposed amended pleading. See *U.S. v. Continental Illinois Nat'l Bank & Trust* (2nd Cir. 1989) 889 F.2d 1248, 1255; *Genentech, Inc. v. Abbott Laboratories* (N.Dist. Cal. 1989) 127 F.R.D. 529, 531.

Rule 18(a) expresses a philosophy of great liberality toward entertaining the broadest possible scope of action consistent with fairness to parties; joinder of claims, parties, and remedies is strongly encouraged. *Lanier Business Products v Graymar Co.* (1972, Dist. Md.) 342 F.Supp 1200. A party

should be able to join all claims he has against his opponent as matter of course to avoid a multiplicity of litigation and possible claims of *res judicata* at later date. *Ibid.*

Joinder of Plaintiff's Count IX for 42 U.S.C. 1983 due process violations against Defendants County and Harris should be permitted. Both Defendants are already named in several of Plaintiff's Counts and are existing parties in this action. Joinder of Defendant County in County IX is clearly warranted under *Monell v Dept. of Social Services* (1978) 436 U.S. 658 and would avoid multiplicity of litigation and claims of *res judicata* at a later date. Joinder of Harris became warranted in light of the deposition testimony of David Culberson, former Interim CEO of KMC, on August 21, 2008 wherein Plaintiff learned for the first time of the extent of Dr. Harris's participation in Defendant County's decision to place Plaintiff on administrative leave on December 7, 2006 and, subsequently, not to renew Plaintiff's employment contract.

There is no risk of prejudice or surprise to Defendants. Defendants have had fair notice of the nucleus of facts underlying Defendant County's and Harris's liability under Count IX – e.g., demotion of Plaintiff and reduction of his base salary, placement of Plaintiff on involuntary administrative leave with home restriction, and non-renewal of Plaintiff's contract – since at least January 2008 when Plaintiff sent the draft TSC to Defendants. On June 30, 2008, Plaintiff filed with this Court his notice of withdrawal of motion to file the TSC, expressly stating therein Plaintiff's intention to seek joinder of Count IX against Defendant County (Doc. 159). On July 1, 2008, Plaintiff again gave Defendants notice, providing them a copy of the SAC along with a proposed stipulation (which Defendants rejected). With discovery in this action due to close on August 18, 2008, Defendants had more than a month to conduct whatever additional discovery they deem necessary in light of the SAC – although no additional discovery should conceivably be necessary to parse out a *Monell* analysis.

More importantly, Plaintiff is not a percipient witness having knowledge of any facts regarding Defendant County's liability under *Monell* or Dr. Harris's liability for his participation in adverse employment actions against him, other than what was revealed by Defendants' former and current employees themselves during their depositions. No further discovery needs to be conducted by Defendants in order to defend against the new claims proposed to be brought against Defendants County and Harris. Even if such were the case, Defendants have ready access to County witnesses and Harris himself – in contrast to Plaintiff who must engage in the formality of deposing them to access their

testimony.

Finally, under Cal. Gov't. C. 995 et seq., Defendant County is required to indemnify its employees against liability for violations alleged in Plaintiff's Count IX as set forth in Plaintiff's initial complaint filed on January 6, 2008. The joinder of Count IX against Defendant County simply adds direct liability where indirect liability for individually named employees under Count IX already exists.

D. Item 4: Joinder of new claims for CFRA retaliation (existing Count III), FEHA retaliation (Gov't C. 12940(h), new Count XI) and FMLA retaliation (29 U.S.C. § 2615(b), new Count X) against Defendant County and Does 1 through 10 based upon newly-discovered evidence.

1. Requested Change

Plaintiff seeks to amend the complaint to add new Counts X and XI and a new claim for CFRA retaliation under existing Count III against Defendant County and Does 1 through 10. Defendant County is an already named and existing party and no joinder of new parties is required under Rule 19. Rather, joinder of new claims against an existing party is required under Rule 18.

During the course of Plaintiff's deposition of Supervisor Ray Watson on August 25, 2008, Plaintiff for the first time heard testimony that Defendant County had decided not to renew Plaintiff's employment contract with the County due to the fact that Plaintiff had initiated this action. Based on this newly-discovered evidence, Plaintiff requests leave to join new claims against Defendant County and Does 1 through 10 for FEHA oppositional retaliation pursuant to Gov't C. 12940(h) (new Count XI), FMLA oppositional retaliation pursuant to 29 U.S.C. § 2615(b) (new Count X) and CFRA oppositional retaliation (Count III). Plaintiff alleges that Plaintiff's filing of this action on December 7, 2006 opposing practices made unlawful under FEHA, CFRA and FMLA has subjected him to retaliation in the form of non-renewal of his employment contract on October 4, 2007.

Moreover, based on newly-discovered evidence in the form of Supervisor Watson's foregoing testimony as well as the testimony of former Interim CEO David Culberson in deposition conducted on August 21, 2008, Plaintiff further alleges FEHA oppositional retaliation pursuant to Gov't C. 12940(h) (new Count XI) and CFRA oppositional retaliation (Count III) in that Defendants placed him on administrative leave on October 7, 2006 subsequent to his filing of a FEHA/CFRA complaint with the DFEH on July 31, 2006.

1. Why It Should be Permitted

See discussion in Section II.C.2 above.

Defendants will not be prejudiced by the joinder of the above new claims against existing Defendant County. Plaintiff is not a percipient witness having knowledge of any facts regarding Defendant County's liability for oppositional retaliation under FMLA, CFRA or FEHA, other than what was revealed by Supervisor Watson and Mr. Culberson themselves during their depositions. No further discovery needs to be conducted by Defendants in order to defend against the new claims proposed to be brought against Defendant County. Even if such were the case, Defendants have ready access to Mr. Watson and Mr. Culberson – in contrast to Plaintiff who must engage in the formality of deposing them to access their testimony.

III. CONCLUSION

The foregoing items which Plaintiff seeks to effect via the SAC would promote a complete adjudication of issues arising out of the same nucleus of transactions and occurrences and a resolution of disputes on their merits. At the same time, they do not pose any risk of prejudice or surprise to Defendants. Defendants have had fair notice of the proposed supplemental allegations, the general nature of Plaintiff's disability discrimination and due process claims, and the facts establishing Defendant County's liability thereunder, since at least January 2008. In light of Cal. Gov't. C. 995 et seq., the joinder of Count IX against Defendant County only adds direct liability where indirect liability already exists. There is no need for a continuance of any sort.

For the foregoing reasons, Plaintiff DAVID F. JADWIN, D.O., respectfully requests that this Court grant him leave to file the Second Amended Complaint.

RESPECTFULLY SUBMITTED on September 2, 2008.

/s/ Eugene D. Lee
LAW OFFICE OF EUGENE LEE
555 West Fifth Street, Suite 3100
Los Angeles, CA 90013
Phone: (213) 992-3299
Fax: (213) 596-0487
email: elee@LOEL.com
Attorney for Plaintiff DAVID F. JADWIN, D.O.