

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY DONNELLY,
Plaintiff,
v.
SKY CHEFS, INC.,
Defendant.

Case No. [16-cv-03403-JD](#)

**ORDER RE MOTION TO AMEND
COMPLAINT**

Plaintiff Mary Donnelly seeks leave to file a First Amended Complaint clarifying her claim against Defendant Sky Chefs, Inc., under the California Labor Code Private Attorneys General Act, section 2698, et seq. of the California Labor Code (“PAGA”). Dkt. No. 6. Plaintiff also moves to amend to correct a handful of typographical errors and, since this case has been removed to federal court, bring her class action allegations within Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 1. Sky Chefs opposes the amended complaint, contending that plaintiff failed to comply with the administrative requirements and the applicable statute of limitations with respect to her PAGA claim. Dkt. No. 7. The motion is granted.

LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that a party may amend its pleading once as a matter of course within 21 days after the pleading is served if no responsive pleading is allowed, or 21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1); *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 748 (9th Cir. 2011). “In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The Court should “freely give leave when justice so requires.” *Id.*

1 Courts typically consider four factors when determining whether to grant leave to amend:
2 (1) bad faith on the part of the movant; (2) undue delay; (3) prejudice to the opposing party; and
3 (4) futility of the proposed amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lockheed*
4 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). The burden of
5 showing prejudice is on the party opposing leave to amend. *Dunbar v. Google, Inc.*, No. 5:12-cv-
6 3305-LHK, 2012 WL 6202797, at *8 (N.D. Cal. Dec. 12, 2012).

7 **DISCUSSION**

8 None of these factors support a bar to amendment. Sky Chefs says it “will suffer
9 substantial prejudice if Plaintiff is able to circumvent the statute of limitations and amend her
10 complaint,” Dkt. No. 7 at 2, but offers nothing in the way of substance to explain why. And while
11 Sky Chefs contends plaintiff should have amended between June 17, 2016 (when Sky Chefs
12 answered Plaintiff’s Complaint) and July 6, 2016 (when they allege the statute of limitations
13 expired), they give no reason why filing the motion to amend on July 20, 2016, caused them
14 substantial prejudice. *Id.* at 2, 5.

15 Sky Chefs main argument is that plaintiff failed to file suit before the one-year statute of
16 limitations and tolling period ran, making the request to amend futile. *Id.* at 2-3, 5. This argument
17 is based on the interaction between PAGA’s administrative exhaustion requirements and statute of
18 limitations provisions. To pursue an action under PAGA, a plaintiff must first give written notice
19 to the Labor Workforce Development Agency “LWDA” and the employer of the specific
20 provisions of the California Labor Code alleged to have been violated and wait for a notice from
21 the LWDA of its intent not to investigate the alleged violations, or if no notice is received, wait 33
22 calendar days after providing notice before commencing a civil action. Cal. Lab. Code § 2699.3.
23 Plaintiffs must file suit within one year, although the statute of limitations period may be extended
24 by 33 days to allow the LWDA to respond. *Id.* at (a)(1), (a)(2)(A); *Moreno v. Autozone, Inc.*, No.
25 05-04432-MJJ, 2007 WL 1650942, at *2 (N.D. Cal. June 5, 2007). California Labor Code section
26 2699.3(a)(2)(C) also provides that “[n]otwithstanding any other provision of law, a plaintiff may
27 as a matter of right amend an existing complaint to add a cause of action arising under this part at
28 any time within 60 days of the time periods specified in this part.”

1 Plaintiff's employment with Sky Chefs was terminated on June 3, 2015, starting the one
2 year statute of limitations. Dkt. No. 7 at 3. Plaintiff sent the required administrative notice to the
3 LWDA on May 5, 2016, one day before filing the present action. *Id.* at 4. Defendant argues that
4 plaintiff's original PAGA claim was subject to dismissal for failure to properly exhaust the
5 administrative remedies. *Id.* at 5-6. And because she only had until July 6, 2016 to amend the
6 complaint (accounting for the one-year statute of limitations plus the 33 day tolling period), they
7 argue that the leave to amend filed on July 20, 2016 must be dismissed as futile. *Id.*

8 That is not persuasive. As plaintiff states, California courts have not held that the failure to
9 exhaust administrative remedies before initiating PAGA actions must lead to dismissal of the
10 PAGA claim. Dkt. No. 9 at 3-4; *see Bradescu v. Hillstone Restaurant Group, Inc.*, No. SACV
11 1301289-GW (RZx), 2014 WL 5312546, at *10-12 (C.D. Cal. Sept. 18, 2014). For statute of
12 limitation purposes, exhausted PAGA claims may be timely added to an amended complaint when
13 the claims relate back to the filing of the original complaint. *See Martinez v. Antique & Salvage*
14 *Liquidators, Inc.*, No. C09-00997-HRL, 2011 WL 500029, at *9-10 (N.D. Cal. Feb. 8, 2011);
15 *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013); *Waisbein v. UBS Fin.*
16 *Servs. Inc.*, No. C-07-2328-MMC, 2008 WL 753896, at *1 (N.D. Cal. Mar. 19, 2008). Leave to
17 amend the complaint is therefore not futile where Donnelly seeks to add additional facts to plead
18 compliance with the PAGA administrative exhaustion requirements.

19 Plaintiff may file an amended complaint by **November 18, 2016**. Defendant must respond
20 by **December 16, 2016**.

21 **IT IS SO ORDERED.**

22 Dated: October 25, 2016

23
24 
25 _____
26 JAMES DONATO
27 United States District Judge
28