

NOT FOR PUBLICATION

CAPTAIN WILLIAM JOY, SERGEANT ANNETTE ROLON, and SERGEANT JOHN KARRAS,

Plaintiffs,

v.

HUDSON COUNTY SHERIFF JUAN PEREZ, CHIEF JOHN BARTUCCI, HUDSON COUNTY SHERIFF'S OFFICE, HUDSON COUNTY,

Defendants.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Hon. Dennis M. Cavanaugh

Civil Action No. 10-cv-01636 (DMC-JAD)

OPINION

This matter comes before the Court upon motion by plaintiffs Captain William Joy (“Joy”), Sergeant Annette Rolon (“Rolon”), and Sergeant John Karras (“Karras”) (collectively, Plaintiffs”) for leave to file an amended complaint to (1) add Thomas Mitchell (“Mitchell”) as a plaintiff, (2) add Lieutenant Jose Gonzales (“Gonzales”) as a defendant, and (3) to add three additional causes of action. Defendant Hudson County Sheriff Juan Perez, Chief Bartucci, Hudson County Sheriff’s Office, and Hudson County (collectively, “Defendants”) oppose the motion. Upon consideration of the parties’ submissions, and for the reasons stated below, Plaintiffs’ motion is **denied**.

I. BACKGROUND

On March 31, 2010, Plaintiffs filed a Complaint against Defendants asserting claims pursuant to 42 U.S.C. § 1983 and the First Amendment arising from Defendants’ alleged wrongful retaliation against Plaintiffs due to Plaintiffs’ political affiliation and expression of political free speech. (Compl., ¶ 2, ECF No. 1) Specifically, Plaintiffs allege that Hudson

County Sheriff Juan Perez (“Perez”) and Chief John Bartucci (“Bartucci”) have harassed, discriminated and retaliated against Plaintiffs as a result of Plaintiffs’ affiliation with former Hudson County Sheriff Cassidy, Perez’s predecessor who lost his bid for re-election against Perez in 2008, and support for Under Sheriff Frank Schillari’s candidacy for Hudson County Sheriff in 2010. *Id.* at ¶¶ 2, 19. By way of example, Plaintiffs allege that they were all transferred to less favorable and more burdensome positions; that Joy’s shift was changed to a less desirable time; and that Karras was denied an opportunity to attend a training seminar. *Id.* at ¶¶ 27, 28. Plaintiffs assert the following causes of action: (1) 42 U.S.C. § 1983 individual liability against defendants Perez and Bartucci; (2) 42 U.S.C. § 1983 municipal liability against defendants Hudson County Sheriff’s Office and Hudson County; (3) Constitutional Violations under New Jersey law against all Defendants; and (4) Violation of Public Policy against all Defendants. *Id.* at ¶¶ 32-46.

On September 13, 2010, the Court entered a RULE 16 Pretrial Scheduling Order which provides that any motion to add new parties and/or to amend pleadings “must be returnable not later than 10/29/10.” (Order, ¶¶ 13, 14, ECF No. 14) On November 16, 2010, Plaintiffs filed this motion for leave to amend the Complaint. In their proposed Amended Complaint, Plaintiffs seek to add Gonzales, the Commanding Officer of the Internal Affairs Bureau of the Hudson County Sheriff’s Office, as a defendant. (Amend. Compl., ¶ 12, ECF No. 22-2) Plaintiffs allege that Gonzales participated in Defendants’ practice of harassment of, discrimination and retaliation against Plaintiffs, and conspired and cooperated with Perez and Bartucci to cover up and perpetuate the wrongful conduct. *Id.* at ¶¶ 17, 18. Plaintiffs also allege that Gonzales, along with Perez and Bartucci, has selectively enforced the department’s Rules and Regulations to punish individuals who are deemed to be political opponents of Perez and to reward individuals

who support Perez. *Id.* at ¶ 17. Finally, Plaintiffs allege that despite receiving complaints of Perez and Bartucci's wrongful acts, Gonzales failed to take any corrective action. *Id.* at ¶ 37.

Plaintiffs also seek to add Mitchell, a Sergeant with the Hudson County Sheriff's Office, as a plaintiff. *Id.* at ¶ 9. Plaintiffs allege that Mitchell was also subject to Defendants' pattern of retaliation and harassment. *Id.* at ¶ 32. Specifically, Plaintiffs allege that Gonzales, with the approval of Perez and Bartucci, initiated baseless disciplinary proceedings against Mitchell without sufficient evidence, which resulted in Mitchell being demoted and subsequently terminated on October 4, 2010. *Id.* at ¶¶ 33, 34.

Finally, Plaintiffs seek to add the following causes of action: (1) violation of N.J.S.A. 34:19-1, et seq. by Defendants for retaliation against Mitchell and Karras after they complained of Perez and Bartucci's wrongful conduct; (2) 42 U.S.C. § 1983 individual liability of Perez, Bartucci and Gonzales for retaliation against Mitchell; and (3) 42 U.S.C. § 1983 municipal liability of the Hudson County Sheriff's Office and Hudson County for retaliation against Mitchell.

II. STANDARD OF REVIEW

Amendments of pleadings are governed by FED. R. CIV. PRO. 15 and FED. R. CIV. PRO. 16. A motion to amend a pleading that is filed before the deadline for amendments of pleadings has passed in a RULE 16 Scheduling Order will be governed by FED. R. CIV. PRO. 15(a) only. Pursuant to RULE 15(a), after a responsive pleading has been filed:

[A] party may amend its pleading only with the opposing party's written consent or the courts leave. The court should freely give leave when justice so requires.

RULE 15(a)(2).

"The grant or denial of leave to amend is a matter committed to the sound discretion of the district court." *Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174 (3d Cir. 1993). The

Third Circuit has adopted a liberal approach under to the amendment of pleadings RULE 15 to ensure that “a particular claim will be decided on the merits rather than on technicalities.” *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990) (internal citation omitted). The burden is generally on the party opposing the amendment to demonstrate why the amendment should not be permitted. *Foman v. Davis*, 371 U.S. 178 (1962).

Leave to amend a pleading may be denied where the court finds: (1) undue delay; (2) undue prejudice to the non-moving party; (3) bad faith or dilatory motive; or (4) futility of amendment. *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). Unfair prejudice is the most common factor used by courts to deny leave. Unfair prejudice is usually found when there has been a significant unjustified delay in moving to amend that creates an unfair disadvantage for the defendant. Delay alone will not justify denying a motion to amend. *See Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir.2001) (holding that mere passage of time does not require that a motion to amend a complaint be denied on grounds of delay). Only where delay becomes “ ‘undue,’ placing an unwarranted burden on the court, or ... ‘prejudicial,’ placing an unfair burden on the opposing party” is denial of a motion to amend appropriate. *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir.1984) (“The question of undue delay, as well as the question of bad faith, requires that [the Court] focus on the plaintiff[’s] motives for not amending [its] complaint to assert [the] claim[s] earlier; the issue of prejudice requires that [the Court] focus on the effect on the [defendant].”). Delay may become undue when there has been previous opportunity to amend the complaint. *See Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993) (finding that a three-year lapse between the filing of the complaint and the proposed amendment was “unreasonable” delay when plaintiff had previous opportunities to amend). In

such cases, the Court must focus on the moving party's reasons for not amending the pleading sooner. *USX Corp. v. Barnhart*, 395 F.3d 161, 168 (3d Cir.2004).

A proposed amendment will be denied as futile if it "would fail to state a claim upon which relief could be granted." *Shane v. Fauver*, 213 F.3d at 115. Thus, "[i]n assessing 'futility' the District Court applies the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.* To survive dismissal under Rule 12(b)(6), a complaint "must contain sufficient factual matter accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

After the deadline in a court's RULE 16 Scheduling Order for amendments of pleadings has passed, however, a motion for leave to amend will be governed by both RULE 15 and RULE 16. RULE 16(b)(4) provides that "[a] schedule may be modified only for good cause and with the judge's consent." As such, a party must first demonstrate "good cause" to amend the RULE 16 Scheduling Order in order to extend the deadline to amend pleadings. *Stallings v. IBM Corp.*, 2009 WL 2905471, at *15 (D.N.J. Sept. 8, 2009). Only once the party has shown sufficient "good cause" to amend the RULE 16 Order, will the Court then evaluate the proposed amendment under RULE 15(a).

III. DISCUSSION

Defendants argue that Plaintiffs' motion must be denied because (1) Plaintiffs' have not shown good cause to amend the Pretrial Scheduling Order to extend the deadline for amendments of pleadings; (2) Plaintiffs' proposed causes of action are futile; and (3) Plaintiffs' application does not include a brief and therefore fails to satisfy L. CIV R. 7.1(d)(1).¹

¹ L. CIV. R. 7.1(d)(1) requires that every motion be supported by "a brief, prepared in accordance with L.Civ.R. 7.2." L. CIV. R. 7.1(d)(4) further provides that "[i]n lieu of filing any brief pursuant to L.Civ.R. 7.1(d)(1), (2), or (3), a party may file a statement that no brief is necessary and the reasons therefor." A motion that is not accompanied by either a brief or a statement that no brief is necessary may be rejected by the court. *Lamberty v.*

1. Plaintiffs have not shown good cause to amend the Complaint

Pursuant to the September 13, 2010 Pretrial Scheduling Order, all motions to amend and/or to add parties were to be returnable on or before October 29, 2010. (Order, ¶¶ 13, 14, ECF No. 14) Plaintiffs filed the instant motion on November 16, 2010.

Accordingly, Plaintiffs are required to show “good cause” to amend the RULE 16 Pretrial Scheduling Order to extend the deadline to amend pleadings before the Court can address Plaintiffs’ motion for leave to amend under RULE 15(a). *See Stallings*, 2009 WL 2905471, at *15. However, Plaintiffs address only the liberal standard under RULE 15 and completely ignore the heightened additional standard under RULE 16. Plaintiffs merely argue generally without any factual support that the proposed amended complaint contains claims similar to those originally filed in the original Complaint, and that Mitchell’s claims arise from the same “core facts and circumstances as the original complaint.” (Certification of Louis A. Zayas (“Zayas Cert.”), ¶ 5, ECF No. 22-1) Plaintiffs further state that because written discovery has not been completed and no depositions have been taken, Defendants will not be prejudiced if the Complaint is amended. *Id.* at ¶ 6.

Setting aside the fact that these conclusory statements fail to demonstrate that Defendants will not be prejudiced if the amendment is allowed, Plaintiffs make no attempt – and therefore fail - to demonstrate any “good cause” to amend the Pretrial Scheduling Order to extend the deadline to file a motion to amend the Complaint. Because Plaintiffs have not shown “good

Rosenberg, 2008 U.S. Dist. LEXIS 25873, at *2 (D.N.J. Mar. 31, 2008) However, a notice of motion that indicates that the relief sought is supported by an affidavit that is attached may be accepted as satisfying the requirements under L. CIV. R. 7.1(d)(1). *See Damiano v. Sony Music Entertainment, Inc.*, 168 F.R.D. 485, 489 (D.N.J. 1996) In Plaintiffs’ Notice of Motion, Plaintiffs expressly state that “in support of said motion, Plaintiff [sic] will rely on the attached counsel certification by Louis A. Zayas, Esq.” (Notice of Motion 1, ECF No. 22) Accordingly, while Plaintiffs submitted a Certification and not an Affidavit, and while the Certification fails to set forth sufficient basis to permit an amendment of the Pretrial Scheduling Order or an amendment of the Complaint, this Court will consider Plaintiffs’ application.

cause,” the Court need not – and, in fact, cannot – proceed to an analysis of whether prejudice exists and whether to grant leave to amend the Complaint under RULE 15(a).

Notwithstanding Plaintiffs’ complete failure to address the RULE 16 requirements, the Court nevertheless finds that Plaintiffs would not be able to demonstrate “good cause.” The most common basis for finding a lack of good cause is the party’s knowledge of the potential claim before the deadline to amend has passed. *Stallings*, 2009 WL 2905471, at *16 (citing *Dimensional Commc'ns, Inc. v. Oz. Optics, Ltd.*, 148 Fed. Appx. 82, 85 (3d Cir. 2005) (defendant “could not satisfy Rule 16(b)’s good cause requirement because [it] was in possession of the facts underlying the proposed counterclaim well before the amendment deadline.”)); *Prime Ins. Syndicate v. United Risk Mgmt. Svcs.*, 2006 WL 2085388, at *5 (D.N.J. July 25, 2006) (“Plaintiff provided no reason for why it could not have asserted these new claims against [the defendant] within the requisite deadlines. In fact, in Plaintiff’s brief for this appeal, it acknowledges that it ‘had knowledge of [the allegations] since October 2004.’ ”); *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 469 (D.N.J. 1990) (“This is most definitely not a motion in which any of defendant’s six proposed new affirmative defenses arose from recent discovery in the case.”).

Nowhere in their papers do Plaintiffs state that they did not know of the proposed causes of actions and/or the existence of the new parties at the time they filed their Complaint -- or even prior to the October 29, 2010 deadline in the Pretrial Scheduling Order. In fact, a review of the Complaint and the proposed Amended Complaint demonstrates that Plaintiffs knew of the existence of the proposed parties and the facts forming a basis for the proposed claims well before October 29, 2010.

In Plaintiffs' Fifth Count, Karras and Mitchell assert a claim against Defendants for retaliation as a result of complaints Karras and Mitchell made regarding Defendants' wrongful conduct. (Amend. Compl., ¶¶ 57-59, ECF No. 22-2) Specifically, Plaintiffs allege that Karras was transferred "to less prestigious schedules and assignment [sic]" and that Mitchell was defamed. *Id.* at ¶ 58. However, the facts as they relate to Karras were already alleged in the original Complaint. Indeed, in their original Complaint, Plaintiffs allege that Karras was subjected to "three transfers that were less favorable and more burdensome assignments" and that, as a result, he made "complaints of unlawful retaliation in the workplace to his superiors and Department of Personnel." (Compl., ¶ 28, ECF No. 1) As such, it is undeniable that Plaintiffs knew of the facts forming a basis for this proposed cause of action at least as it relates to Karras at the time they filed the original Complaint.

In Plaintiffs' proposed Sixth and Seventh Counts, Plaintiffs assert claims against Defendants for unlawful retaliation against Mitchell. Specifically, Plaintiffs allege that after disciplinary charges were initiated against Mitchell, Bartucci defamed Mitchell during a telephone conversation overheard by several individuals, including plaintiff Joy. (Amend. Compl., ¶ 61, ECF No. 22-2)

For example, after Lieutenant Gonzalez initiated the baseless disciplinary charges against Officer Mitchell, Chief Bartucci phoned Assistant Director of Personnel Howard Moore. Unbeknownst to Chief Bartucci, P.B.A. President Mike Hester and Plaintiff Captain Joy were present. When Mr. Moore answered Chief Bartucci' [sic] telephone call and put him on speaker phone so Capt. Joy and Officer Hester can [sic] hear the conversation. In that conversation, Chief Bartucci began to defame referring to Officer Mitchell as a 'Thief' 'gambler' and 'wrote bad checks.'

Id. Plaintiffs further allege that Bartucci's defamatory remarks were the contributing factor to Mitchell's termination. *Id.* at ¶ 62.² Accepting these allegations to be true, it is evident that Joy - one of the original Plaintiffs - had knowledge of the alleged defamatory remarks since Plaintiffs admit that Joy participated in the telephone conversation at issue. *See Id.* at ¶ 61. The Hudson County Internal Affairs Unit filed a Preliminary Notice of Disciplinary Action against Mitchell on April 30, 2010. (Defendants. Hudson County Sheriff's Office and Hudson County ("Hudson Def.") Br. 2, Ex. A, ECF No. 25) A Departmental Hearing regarding the charges raised in the Disciplinary Preliminary Notice of Disciplinary Action was held on September 1, 2010, and Mitchell was terminated on October 4, 2010. *Id.* Accordingly, since - as Plaintiffs allege - the telephone call occurred after disciplinary charges against Mitchell were initiated, Joy must have heard and been aware of the defamatory remarks at the latest before September 1, 2010, and at least as early as April 30, 2010. Plaintiffs therefore had knowledge of the defamatory remarks and of Mitchell's termination - and thus had knowledge of the facts upon which Plaintiffs' proposed Fifth (as they relate to Mitchell), Sixth and Seventh Counts are based - well before the October 29, 2010 deadline for the return date of motions to amend pleadings.³

Finally, Plaintiffs seek only now to add Gonzales as a defendant even though the allegations of the proposed Amended Complaint demonstrate that they knew of his existence and alleged wrongful conduct at the time they filed the Complaint - or at the very least well prior to the October 29, 2010 deadline. Plaintiffs allege that Gonzales actively and openly participated in the harassment of and retaliation against Plaintiffs since Perez took office in 2008.

² In addition, although Plaintiffs set forth the conclusory allegation that Gonzales "initiated the baseless disciplinary charges against Mitchell", Plaintiffs do not allege any facts to demonstrate that the disciplinary charges were, in fact, baseless. (Amend. Compl., ¶ 61, ECF No. 22-2) To the contrary, the fact that Mitchell was terminated after a hearing on the charges tends to show that the charges were not baseless.

³ In fact, Plaintiffs do not state in the Certification in support of their motion that they did not know about the facts giving rise to their proposed Fifth, Sixth and Seventh Counts prior to the October 29, 2010 deadline.

Throughout his administration, Sheriff Perez, Chief Bartucci and Lieutenant Gonzales and others openly and overtly engaged in retaliatory conduct toward the plaintiffs and others who were perceived to be anti-Perez.

(Amend. Compl., ¶ 20, ECF No. 22-2) (emphasis added).

Defendants Sheriff Perez, Chief Bartucci and Lieutenant Gonzales would routinely investigate and punish minor infractions involving plaintiff [sic] and others similarly situated employees while ignoring blatant and substantially more serious violations.

Id. at ¶ 27. Plaintiffs' proposed Amended Complaint also includes allegations of retaliation by Gonzales against Rolon and Karras, who are both original Plaintiffs.

Plaintiffs Sergeant Rolon and Officer Mitchell were subjected to selective enforcement of the police department's rules and regulations by Lieutenant Gonzales.

Id. at ¶ 33.

Instead of taking remedial action in response to Karras' complaints, Lieutenant Gonzales intentionally and maliciously caused Sergeant Karras' work schedule so to make it more burdensome and oppressive.

Id. at ¶ 38. Based on these allegations and those set forth above relating to Mitchell, Plaintiffs must have known of the facts forming a basis for Plaintiffs' claims against Gonzales well before the October 29, 2010 deadline. In fact, they do not state in their moving papers that they did not know of Gonzalez's wrongful conduct at the time they filed their original Complaint or before the October 29, 2010 deadline. However, Plaintiffs do not explain why they waited until now to add Gonzales as a defendant.⁴

⁴ Plaintiffs state in the Certification in support of their motion that the proposed Amended Complaint seeks to "add an indispensable party to this action." (Zayas Cert., ¶ 1, ECF No. 22-1) However, Plaintiffs fail to identify who the "indispensable party" is or why the party is indispensable. This conclusory statement supported by no factual allegations is insufficient to establish that Plaintiffs amendment is required to add an indispensable party.

Accordingly, Plaintiffs have not shown good cause to amend the Court's September 13, 2010 Pretrial Scheduling Order to extend the deadline for motions to amend pleadings to add these claims and/or to add parties.⁵

For the foregoing reasons, Plaintiffs' motion for leave to file an Amended Complaint is denied.



JOSEPH A. DICKSON, U.S.M.J.

Orig. Clerk's office
Cc: All Counsel of Record
Hon. Dennis M. Cavanaugh, U.S.D.J.

⁵ Since Plaintiffs have failed to show good cause pursuant to RULE 16, the Court need not conduct an analysis of the proposed amended pleading under RULE 15(a). For the same reason, the Court also need not conduct an analysis of futility of Plaintiffs' proposed causes of action. Nevertheless, the Court notes that Mitchell was terminated after a Departmental Hearing during which Mitchell was represented by counsel and had an opportunity to defend against the charges initiated by the Hudson County Internal Affairs Office. (Hudson Def. Br. 2, Ex. A, ECF No. 25)