

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. GERARD NUOVO,	:	
	:	Case No. 2:09-cv-00312
Plaintiff,	:	
	:	Judge Frost
v.	:	
	:	Magistrate Judge Abel
THE OHIO STATE UNIVERSITY, et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR LEAVE FILE THIRD AMENDED COMPLAINT

Now comes Plaintiff Gerard Nuovo, by and through counsel, and moves this Court for leave to file his Third Amended Complaint pursuant to Fed. R. Civ. P. 15(a) and in accordance with this Court's Order dated October 29, 2010.

Respectfully Submitted,

s/ William W. Patmon III
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MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

This Court's Order of October 29, 2010 gave Plaintiff permission to amend his complaint on or before January 7, 2011 (Doc #97). The Third Amended Complaint, attached as Exhibit A, removes claims and cures pleadings defects and errors as to other claims in accordance with the Court's Opinion and Order dated July 16, 2010 and adds only two new claims and only one new defendant.

II. FED. CIV. R. P. 15(A) SHOULD BE LIBERALLY CONSTRUED AS TO PERMIT PLAINTIFF LEAVE TO AMEND HIS COMPLAINT

The courts have found that Fed. R. Civ. P. 15(a) should be applied liberally to permit a plaintiff leave to amend their complaint and that it is an abuse of the courts' discretion to deny a plaintiff's valid motion for leave to amend their complaint. See *Marks v. Shell Oil Co.*, 830 F.2d 68 (6th Cir. 1987). Moreover, a party is permitted under Rule 15 to amend a complaint after dismissal of a claim based on Fed. R. Civ. 12 (B) (6) if the amended pleading is not motivated by bad faith, dilatory tactics or the amendment would be futile. See, generally, *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973); *Simon v. Castello*, 172 F.R.D. 103 (S.D. N.Y. 1997); *Old Republic Ins. v. Hansa World Cargo Serv., Inc.*, 170 F.R.D. 361 (S.D. N.Y. 1997).

III. THE THIRD AMENDED COMPLAINT SHOULD BE PERMITTED BECAUSE THE PARTIES ARE STILL IN THE EARLIEST STAGE OF DISCOVERY

This action is still in its earliest stage. No depositions have been taken yet.¹ The only written discovery served was by Defendant OSU, which was directed at all claims

¹ Plaintiff has requested the depositions on multiple occasions of Defendants Gee, Alutto and Cloyd. Plaintiff has offered himself for deposition in February and March 2011 because of the demands of

against OSU and individual defendants before the Court's order dismissing several claims. (Doc. # 85). Further, Defendants have filed multiple motions to stay discovery. Accordingly, Defendants will suffer no undue prejudice if this Court grants leave to file the Third Amended Complaint.

IV. THERE IS NO EVIDENCE OF BAD FAITH, DELAY OR FUTILITY

Plaintiff's motion is motivated by a just desire to have his claims heard by a jury of his peers. The amendments to Plaintiff's complaint are in consideration of this Court's opinion and order dated July 2010. The additional claims of unjust enrichment, civil theft and fraud are based on newly discovered information, and the ethnic intimidation claim is appropriate claim given Barsky's history of derogatory statements toward Plaintiff and other staff persons demonstrating a pattern of ethnically and sexually offensive conduct by Barsky, as revealed by recently obtained information pursuant to a freedom of information request. Finally, many of the claims have been removed from this action based on this Court's July 2010 order and only one defendant, Dr. Steven Gabbe, has been added because of Defendant OSU's admission of his personal involvement in connection with the summary judgment motion filed on behalf of Defendant Gee.

Moreover, Plaintiff's First Claim for Relief, Violation of Ohio Public Policy was dismissed by this Court because Plaintiff failed to identify a public policy that applied to the private practice groups, OSUPI and OSUPS. A significant number of the women patients are victims of the misdiagnosis and unnecessary treatment and are Medicaid funded patients. Medicaid deems the practice groups, OSUPS and OSUPI, as the provider of medically unnecessary services and it requires that the providers comply with

research misconduct and tenure investigations, the fact that several members of his family have serious illness including terminal illness, and the fact that Plaintiff is working on \$60 million in research grant work.

professional standards. *See* Ohio Administrative Code § 5101:3-4-01. The retaliation against Plaintiff occurred because he discovered medically unnecessary treatment and over-utilized of the treatment, which is prohibited by Medicaid. *See* OAC § 5101:3-1-01 (A)(2), (3). Firing him and using their influence (by and through their agents) to cause frivolous, groundless investigations to be filed against Plaintiff jeopardized public policy. *See* 31 U.S.C. § 3730 (h). Accordingly, because of their Medicaid based obligations, OSUPS and OSUPI fired Plaintiff because he identified misdiagnosed Medicaid funded patients.

And finally, the complaint is amended as to Plaintiff's breach of contract and Ohio discrimination claims. It is well settled that punitive damages may not be recovered in a breach of contract claim unless the breach was motivated by malice and involved analogous tortuous conduct. *See, generally, Mabry-Wright v, Zlotnik*, 165 Ohio App.3d 1 (Ohio App. 2005) . OSUPS and OSUPI were motivated by malice and ill will: punish Plaintiff for identifying the misdiagnosis of women, a significant number of whom were Medicaid funded patients. In doing so, OSUPS and OSUPI ruined Plaintiff's consulting clinical practice and adversely affected his expert witness business relationships.

As this Court correctly stated Revised Code § 4112.01 does not present a statutory claim for relief and § 4112.14 concerns age discrimination, which Plaintiff is not asserting in this action. By amendment, Plaintiff is correcting the typographical error made when the Second Amended Complaint was filed. Claims under Revised Code 4112.02 and 4112.99 are well recognized under Ohio law. ²

Based on the forgoing, Plaintiff respectfully requests that leave be granted to file the Third Amended Complaint.

² Ohio Employment Practices Law (2010-2011).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was served via electronic mail upon all counsel of record registered with this Court's electronic filing system, on this 31st day of December 2010.

s/William W. Patmon III
William W. Patmon III