

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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LAMONT HEARD, et al.,

Plaintiffs,

v.

Case No. 1:13-CV-373

TOM FINCO, et al.,

HON. GORDON J. QUIST

Defendants.

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**ORDER GRANTING PLAINTIFFS' APPEAL OF MAGISTRATE  
JUDGE'S DECEMBER 28, 2015 ORDER (ECF NO. 231)**

Plaintiffs have filed Objections to the magistrate judge's December 28, 2015 Order denying Plaintiffs' motion for leave to file a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d), in which Plaintiffs sought to add claims relating to Ramadan 2013 and 2014. Plaintiffs' Objections are properly construed as an appeal of a pretrial order pursuant to 28 U.S.C. § 636(b)(1)(a), subject to the "clearly erroneous or contrary to law" standard. For the following reasons, the Court will grant Plaintiffs' appeal and reverse the December 28, 2015 Order.

***Background***

On January 12, 2015, Plaintiffs, while proceeding pro se, filed a Renewed Motion for Leave to File Their First Verified Amended Civil Complaint and Supplemental Pleading pursuant to Federal Rule of Civil Procedure 15(a)(2), 15(c)(1)(A)–(C), and 15(d). (ECF No. 216.) In their pro se motion, Plaintiffs sought to add additional claims relating to Ramadan 2011 and 2012 (violation of the Equal Protection Clause and conspiracy), as well as entirely new claims relating to Ramadan 2009 and 2010—which preceded the date Plaintiffs filed their initial complaint—and Ramadan 2013 and 2014—which arose after Plaintiffs filed their initial complaint.

On July 2, 2015, the Court entered an order appointing counsel for Plaintiffs. (ECF No. 207.) On September 25, 2015, Magistrate Judge Kent entered an order denying Plaintiffs' pending pro se motion for leave to file a first amended verified complaint and to file a supplemental complaint. (ECF No. 216.) The magistrate judge concluded that, because Plaintiffs had since been appointed counsel, "[a]llowing plaintiffs to file the proposed amended complaint would defeat the assistance of counsel." (*Id.* at PageID.1827.) Alternatively, the magistrate judge noted that Plaintiffs failed to explain why they waited two years to seek to add claims arising from Ramadan 2009 and 2010, and he opined that Plaintiffs' request to add the new claims arising from Ramadan 2013 and 2014 was essentially an attempt to circumvent the exhaustion requirement. (*Id.* at Page ID.1827–28.)

On November 6, 2015, Plaintiffs, through counsel, filed a Motion for Leave to File a Supplemental Complaint pursuant to Federal Rule of Civil Procedure 15(d). (ECF No. 224.) In support of their motion, Plaintiffs argued that they should be granted leave to supplement their complaint pursuant to Rule 15(d) because their claims arose after the date they filed their original complaint and they properly exhausted their 2013 and 2014 Ramadan claims, as required by the Prison Litigation Reform Act (PLRA), prior to filing their motion to supplement. (*Id.* at PageID.1858.) Plaintiffs further argued that Defendants would not be prejudiced by the supplemental complaint. (*Id.* at PageID.1858–59.) On December 28, 2015, Magistrate Judge Kent issued an order denying the motion. (ECF No. 231.) The magistrate judge concluded that denial was proper because Plaintiffs failed to appeal the September 25, 2015 Order denying their pro se motion to add claims for Ramadan 2013 and 2014, as authorized by Federal Rule of Civil Procedure 72(a), and therefore Plaintiffs waived any alleged error in the September 25, 2015 Order. The magistrate judge alternatively concluded that Plaintiffs sought the same relief they sought in their prior motion, and he had previously concluded that Plaintiffs' request circumvented the exhaustion requirement.

### *Discussion*

First, the Court rejects the magistrate judge's waiver analysis because the September 25, 2015 Order denying Plaintiffs' pro se motion for leave to file a first amended complaint and supplemental pleading did not unequivocally indicate that Plaintiffs' request to amend and/or supplement their pleading was forever foreclosed. While the magistrate judge cited alternate grounds for denying the motion, his primary basis was that, being represented by counsel, justice did not require that Plaintiffs' pro se amended pleading be allowed. Given that no Case Management Order had been issued setting a deadline for amendment of pleadings, Plaintiff's counsel could have reasonably understood that the magistrate judge's statement suggested that Plaintiffs were free to seek leave to amend or supplement through counsel. Thus, in the Court's judgment, Plaintiffs' failure to appeal the September 25, 2015 Order did not result in a waiver of any arguments regarding exhaustion.

The Court also rejects the magistrate judge's alternative basis for denying the motion—that Plaintiffs' motion was an attempt to circumvent the exhaustion requirement by adding claims that had not been exhausted prior to the filing of the original complaint. The PLRA provides that:

No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). The exhaustion requirement is mandatory and applies to all suits by prisoners regarding prison conditions, regardless of the nature of the wrong or the type of relief sought. *Porter v. Nussle*, 534 U.S. 516, 532, 122 S. Ct. 983, 992 (2002); *Booth v. Churner*, 532 U.S. 731, 738–39, 121 S. Ct. 1819, 1823–24 (2001). In addition, “exhaustion” under the PLRA means “proper exhaustion,” i.e., “compliance with an agency’s deadlines and other critical procedural rules.” *Woodford v. Ngo*, 548 U.S. 81, 90, 126 S. Ct. 2378, 2385–86 (2006).

Plaintiffs requested leave to supplement their complaint pursuant to Federal Rule of Civil Procedure 15(d), which provides that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d). “The purpose of a supplemental pleading is to set out claims arising from transactions or events that happened after the date of the original pleading.” *Eidam v. Bailey*, No. 1:10-CV-34, 2011 WL 2600678, at \*4 (W.D. Mich. June 29, 2011). To the extent Plaintiffs seek to supplement their claims based on events that occurred during Ramadan 2013 and 2014—after they filed their original complaint—their motion was authorized under Rule 15(d). The magistrate judge concluded, however, that Plaintiffs’ request should be denied because it would allow Plaintiffs to circumvent the exhaustion requirement. In light of Plaintiffs’ allegation in their motion that they properly exhausted Ramadan 2013 and 2014 claims prior to filing their motion to supplement, it is difficult to see how Plaintiffs’ motion could have circumvented the exhaustion requirement. Moreover, *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999), which the magistrate judge cited, is inapplicable to the instant case. The prisoner plaintiff in *Freeman* filed his initial complaint before fully exhausting his administrative remedies as to the claims he asserted in his initial complaint. The court held that because “[t]he plain language of the statute makes exhaustion a precondition to filing an action in federal court[,] [t]he prisoner may not exhaust administrative remedies during the pendency of the federal suit.” *Id.* at 645 (citation omitted). In the instant case, because the claims that Plaintiffs seek to assert by way of a supplemental pleading had not arisen at the time Plaintiffs filed their initial complaint, Plaintiffs could not have exhausted those claims prior to filing suit.

The issue Plaintiffs’ motion presents is whether 42 U.S.C. § 1997e(a) bars a prisoner from asserting a claim in a supplemental pleading that arose after the date of the original complaint if the

prisoner exhausts such claim before the supplement is filed. The Sixth Circuit has not addressed this precise issue, although it has implicitly suggested that § 1997e(a) does not preclude supplementation under Rule 15(d) in prisoner cases. *See Spies v. Voinovich*, 48 F. App'x 520, 527 (6th Cir. 2002) (noting that the district court abused its discretion by failing to address the plaintiff-prisoner's motion to supplement to add a claim based on post-complaint retaliation). In *Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010), the Ninth Circuit considered the interplay between supplemental pleadings and the exhaustion requirement under § 1997e(a) and concluded that new claims asserted in a supplemental pleading are "brought" within the meaning of § 1997e(a) at the time the supplemental pleading is filed and that the exhaustion requirement is satisfied so long as the prisoner exhausts the claims prior to filing the supplemental pleading. *Id.* at 1005. The court observed that "Congress has never indicated . . . that it intended to do away with Rule 15(d) and supplemental pleadings in PLRA actions," *id.* at 1007, and it noted that in *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910 (2007), the Supreme Court "held that the PLRA 'does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself.'" *Id.* at 1005 (quoting *Jones*, 549 U.S. at 214, 127 S. Ct. at 920). The *Rhodes* court cited a "closely analogous" case from the Seventh Circuit, *Barnes v. Briley*, 420 F.3d 73 (7th Cir. 2005), as supporting its conclusion. In *Barnes*, the plaintiff, a federal prisoner, initially brought claims under the Federal Tort Claims Act (FTCA) based on his conditions of confinement. The district court concluded that the plaintiff properly exhausted his FTCA claims and thereafter appointed counsel. Subsequently, the plaintiff's counsel determined that the plaintiff's claims were proper under § 1983 and filed a motion for leave to amend to substitute a claim under § 1983. The district court granted the motion, but subsequently dismissed the plaintiff's § 1983 claims as unexhausted at the time the plaintiff filed his original complaint, even though the plaintiff had exhausted his claims before seeking leave to amend. On appeal, the Seventh Circuit reversed, concluding that the

plaintiff “complied with the purpose and letter of the PLRA.” *Barnes*, 420 F.3d at 678. The court reasoned that by completing the grievance process before seeking to amend to add his § 1983 claims, the plaintiff satisfied the PLRA by affording the defendants an opportunity to address his grievance prior to filing suit. *Id.* Moreover, the court found that the district court’s rationale (requiring exhaustion prior to the filing of the original complaint) required the plaintiff to “shoulder an impossible task—to exhaust remedies not yet pertinent to the allegations of the filed complaint.” *Id.* *Accord Boone v. Nose*, 530 F. App’x 112, 113 n.1 (3d Cir. 2013) (stating that prisoners may file supplemental pleadings under the PLRA “if the claims in question 1) have truly accrued since the beginning of the suit and 2) are exhausted per 42 U.S.C. § 1997e(a) before the supplement is filed”).

District courts within the Sixth Circuit and elsewhere have also concluded that prisoners may supplement their pleadings under Rule 15(d) so long as the new claims have been properly exhausted prior to the amendment or supplementation. *See Robbins v. Payne*, No. 11-15140, 2012 WL 4812495, at \*3 (E.D. Mich. Oct. 10, 2012) (noting that “case law from this district and elsewhere supports the conclusion that 1997e(a) does not bar supplemental claims pertaining to events occurring after the action was filed”); *Romano v. Sec’y, DOC*, No. 2:06-cv-375-FtM-29DNF, 2011 WL 1790125, at \*4 (M.D. Fla. May 10, 2011) (finding that the PLRA only required exhaustion of the plaintiff’s new claims at the time he filed his amended complaint); *Hoyt v. Rogers*, No. 10-CV-10262, 2011 WL 940350, at \*4–6 (E.D. Mich. Mar. 16, 2011) (concluding that Rule 15(d) allowed the plaintiff to supplement his complaint to add new retaliation claims but denying the motion to supplement because the plaintiff failed to exhaust his administrative remedies). The Court finds these cases, as well as the Ninth Circuit’s decision in

*Rhodes* and the Seventh Circuit's decision in *Barnes*, persuasive and concludes that the PLRA does not preclude supplementation under Rule 15(d) of properly exhausted claims.<sup>1</sup>

Having concluded that the PLRA does not preclude Plaintiff's motion to supplement, the Court next considers whether other considerations justify denial of Plaintiffs' motions. The standards applicable to motions to amend also apply to motions to supplement. *See Spies v. Voinovich*, 48 F. App'x 520, 527 (6th Cir. 2002).

Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision. Delay by itself is not a sufficient reason to deny a motion to amend. Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted.

*Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 458–59 (6th Cir. 2001) (citation and internal quotation marks omitted). In their response, Defendants argued that Plaintiffs' motion should be denied because it is untimely, was filed in bad faith, and is unduly prejudicial to Defendants. Defendants' arguments are unpersuasive. Plaintiffs did not delay in seeking to add their Ramadan 2013 and 2014 claims. Their first motion was denied without prejudice because it was signed by fewer than all Plaintiffs, (ECF. No. 161), and their second motion was denied because Plaintiffs were represented by counsel. Plaintiffs have thus been diligent in seeking to add their new claims. Moreover, Defendants have not shown bad faith. Plaintiffs are seeking to add claims that arose after they filed their initial complaint. Nothing indicates that Plaintiffs are seeking to circumvent the Court's prior rulings. Defendants also fail to show

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<sup>1</sup>The Court in *Mattox v. Edelman*, No. 12-13762, 2016 WL 398242 (E.D. Mich. Jan. 12, 2006), *report and recommendation adopted*, 2016 WL 945340 (E.D. Mich. Mar. 14, 2016), reached the opposite conclusion, based largely on the Sixth Circuit's decision in *Cox v. Mayer*, 332 F.3d 422 (6th Cir. 2003). However, *Cox*, which addressed the Rule 15(d) issue in *dicta*, does not address the present circumstances. After filing his complaint, the plaintiff in *Cox* was paroled. The plaintiff failed to properly exhaust his claims but argued that he could cure his failure to exhaust by supplementing his pleadings to allege that exhaustion did not apply to him because he was no longer a prisoner. *Cox*, 332 F.3d at 428. The court stated that the plaintiff could not use Rule 15(d) to avoid § 1997e(a)'s exhaustion requirement. Unlike *Cox*, Plaintiffs in the instant case properly exhausted most of their claims in their initial complaint. Thus, there was no need to cure failure to exhaust through supplementation.

