

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ALFRED E. SCHMIDT,

Plaintiff,

v.

PETER KACHEL, P.E. Highway Commissioner,

Defendant.

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OPINION AND  
ORDER

02-C-286-C

This is a civil action for monetary relief. On March 18, 2003, I denied defendant Peter Kachel's motion for summary judgment and granted summary judgment to plaintiff Alfred E. Schmidt, who was at the time proceeding pro se, on plaintiff's claim that defendant violated his rights under the First Amendment by refusing to sell him road salt or other materials in retaliation for comments Schmidt made at a county board meeting. The case is proceeding to trial on the issue of damages only.

When I granted summary judgment to plaintiff, I did so on the court's own motion because the record revealed that plaintiff was entitled to it, despite his failure to file a cross motion for summary judgment. However, I noted that as a pro se litigant, plaintiff had struggled significantly to present his case in his pleadings and to defend his claim on

defendant's motion for summary judgment. In particular, I noted that plaintiff had experienced great difficulty in following the court's procedures and conforming his evidence to the rules of evidence. I suggested that he would be well-advised to retain a lawyer to represent him at trial. Plaintiff appears to have heeded that suggestion promptly. Presently before the court is plaintiff's motion to amend the complaint in this case to spell out explicitly the damages he wishes to prove that he is entitled to at trial. The motion and proposed amended complaint have been filed by plaintiff's newly retained lawyer.

Rule 15(a) states that "a party may amend [its] pleading once as a matter of course at any time before a responsive pleading is served" and that otherwise amendments are permissible "only by leave of court." Plaintiff requires leave of the court to amend his complaint because he has already amended his complaint once and defendants have answered. Whether to grant leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). According to the rule, leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Elaborating on this standard, the Court of Appeals for the Seventh Circuit has noted that "in the absence of undue delay, undue prejudice to the party opposing the motion, or futility of the amendment, leave should be freely given." Eastern Natural Gas Corp. v. Aluminum Co. of America, 126 F.3d 996, 999 (7th Cir. 1997).

Plaintiff's motion to amend his complaint will be granted in part and denied in part.

First, the interests of justice will be served by allowing plaintiff to amend his complaint to make clear that he is seeking economic damages and attorney's fees and costs. Plaintiff's earlier complaint included an attachment describing his business losses. In the attachment, plaintiff also asked for "legal and accounting fees," which I understand to be a request for attorney's fees and costs. With respect to these damages, then, plaintiff's proposed amendment merely clarifies the relief he sought in his earlier complaint and adds no new category of damages.

In addition, I will allow plaintiff to amend his complaint to include a request for punitive damages. "Punitive damages are available in § 1983 cases only upon a showing of 'evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others.'" Kyle v. Patterson, 196 F.3d 695, 697-98 (7th Cir. 1999) (citations omitted). The failure of a pro se plaintiff to request punitive damages or other specific relief in his complaint is not fatal, because "it is well-settled law in this circuit that pro se complaints are not held to the stringent standards expected of pleadings drafted by lawyers." Id. at 697; see also Calhoun v. DeTella, 319 F.3d 936, 943 (7th Cir. 2003). Defendant argues that he will be prejudiced if plaintiff is allowed to amend his complaint to add a specific request for punitive damages because the motion to amend was filed on the eve of trial, which is now three weeks away. First, I note that plaintiff's counsel filed the amended complaint promptly after being retained. In addition, although defendant argues that he will be unable to conduct discovery related to

plaintiff's request for punitive damages, defendant does not identify what information he might discover from plaintiff or others that would bear on the question of defendant's intent or recklessness in denying plaintiff the ability to purchase county materials. Moreover, given that plaintiff's original complaint alleged that defendant refused to sell plaintiff county road salt solely because he was angered by critical statements plaintiff made at a county board meeting, it should not come as a surprise to defendant that the original complaint alleged reckless or callous indifference to plaintiff's constitutional rights.

Finally, I note that other courts have allowed amendments adding claims for punitive damages, even at relatively late stages of the proceedings. See, e.g., Seifert v. Solem, 387 F.2d 925, 929 (7th Cir. 1967) (affirming trial court's decision granting plaintiff leave to amend complaint to include claim for exemplary damages on first day of trial because defendant failed to show prejudice); Romaine v. Rawson, 140 F. Supp. 2d 204, 207-08 n.2 (N.D.N.Y. 2001); Croxen v. United States Chemical Corp. of Wisconsin, 558 F. Supp. 6, 9 (N.D. Iowa 1982). Because plaintiff was proceeding pro se when he filed his first amended complaint, I conclude that he was not required to use certain magic words or phrases in order to preserve a claim for punitive damages. It will be up to plaintiff to prove at trial that defendant acted with an evil motive or intent, or was recklessly or callously indifferent to his First Amendment rights.

However, I will deny plaintiff's request to amend his complaint to add a request for emotional distress damages. I am persuaded that adding such a request at this late date would

be prejudicial to defendant. I am aware of no facts in the record suggesting that plaintiff suffered emotional distress as a result of defendant's actions. Moreover, allowing the amendment would put plaintiff's mental state in issue. Defendant could not defend against it without deposing plaintiff on this topic and presenting expert testimony regarding the legitimacy and extent of plaintiff's alleged emotional suffering. There is not enough time before trial to adequately prepare a defense to this claim.

#### ORDER

IT IS ORDERED that plaintiff's motion to amend his complaint pursuant to Fed. R. Civ. P. 15(a) is GRANTED to the extent that the amendment seeks to clarify plaintiff's request for economic damages and attorney's fees and costs and to add a request for punitive damages. The motion to amend is DENIED to the extent it seeks to add a request for emotional distress damages.

Entered this 3rd day of April, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge