

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(WORCESTER DIVISION)

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G, a 12-year-old minor)	Civil No. 4:15-cv-40116-TSH
suing by a fictitious name for privacy reasons,)	
MOTHER, and FATHER, suing under)	
fictitious names to protect the)	
identity and privacy of G, their minor child,)	
)	
Plaintiffs,)	
)	
-v-)	
)	
THE FAY SCHOOL,)	
by and through its Board of)	
Trustees, and ROBERT GUSTAVSON,)	
)	
Defendants.)	
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**PLAINTIFFS’ MEMORANDUM OF LAW SUPPORTING THEIR MOTION FOR
LEAVE TO AMEND THE FIRST AMENDED COMPLAINT**

This Motion

Plaintiffs respectfully submit this Memorandum of Law in support of their motion, pursuant to Rule 15(a)(2) of the *Federal Rules of Civil Procedure*, for leave to file a Second Amended Complaint. A copy of the Proposed Second Amended Complaint is attached to the Motion.

Nature of this Case As Initially Filed

The initial complaint in this case was filed on August 19, 2015 (Doc. No. 1). It alleged that G, a 12-year old minor, has a disability because he is adversely affected physiologically by high doses of Wi-Fi radiation, that defendant Fay School’s new Wi-Fi system has such high doses, and that they cause G to suffer headaches, dizziness, rapid heart rate, chest pain, nausea, and ear-ringing, all of which affect his ability to learn, his memory, and his concentration, which are “major life

functions” protected by the ADA. Two doctors have thus diagnosed him. The central claim is that the Fay School ("Fay") has violated the American with Disabilities Act (“ADA”) (Title 42 U.S.C. §12182(a)) because it should have made a workable accommodation for G’s disability but has refused to do so and indeed has punished G and his parents for seeking such an accommodation.¹

Defendants deny these allegations.

The Count that Would Be Added If This Motion Is Allowed

The only new allegations sought by this motion for leave to amend are the four paragraphs (¶¶ 77 – 80) found in the Proposed Second Amended Complaint at pages 31 and 32, where they are highlighted. If allowed, these allegations would add one Count that would be based on the matters already alleged. The new claim would be that not only did defendants fail to provide plaintiff G with an accommodation for his disability as has already been alleged, the new Count would add that the defendants have retaliated against G and his parents by reason of their having asserted their right to seek an accommodation for his disability, which is a separate ADA claim under 42 U.S.C. § 12203(a) and (2). These provisions prohibit Fay from discriminating against plaintiffs because they have made a charge seeking relief against Fay under the ADA; and from intimidating and interfering with plaintiffs in their attempt to exercise G’s rights under the ADA.

Proceedings Since the Filing of the Initial Complaint

After the Complaint was filed, plaintiffs sought a preliminary injunction which, if granted, would have ordered Fay to allow G’s parents and a computer expert onto the Fay

¹ The Initial Complaint also sought relief under two related state law claims, which were (1) breach of contract because Fay failed to help G with his disability as they had promised to in their Student Handbook and by the way they treated him and his parents punitively for having pressed his disability claim, and (2) for negligence because of the unreasonable risk posed by Fay’s Wi-Fi which could reasonably have been altered to avoid the harm G has suffered.

campus to examine its Wi-Fi configuration and to discuss with Fay how it might be changed to accommodate G's condition (Doc. No 4). That hearing was set for September 4, 2015, but this Court has delayed proceedings (Doc. Nos. 13, 16, and 23) since before that hearing was held in order to allow an attempt to find a workable accommodation, as both parties requested. No solution was found and defendants were ordered to file an answer to the Complaint by December 9, 2015. (Doc. No. 25.)

As that filing date approached, plaintiffs filed an Amended Complaint to add allegations based on the developments occurring as the parties met at Fay to examine the Wi-Fi and because of events occurring between G and Fay while school was in session between September and December, 2015. The Amended Complaint also added a misrepresentation claim alleging that Fay's refusal to work with G and his parents to find a workable accommodation and the way in which Fay punished G and his parents for having sought an accommodation was not only a breach of contract as alleged in the initial complaint (in Count II thereof) but was also misrepresentation of the statements made in the Student Handbook and on the Fay websites about how cooperative Fay would be with anyone claiming a disability. That Amended Complaint was filed on December 8, 2015² (Doc. No. 26) and was answered by defendants on December 22, 2016. (Doc. No. 28.)

The parties have now appeared for a scheduling conference (on January 13, 2016) and this Court has set a trial to commence on August 8, 2016. Pursuant to this Court's Scheduling Order (Doc. No. 35), amendments to the pleadings, such as the one sought by this motion, are due no later than January 22, 2016, as are initial disclosures. Discovery does not close until May 31, 2016.

² There was no need for a motion in relation to the Amended Complaint since there had not yet been a responsive pleading to the original Complaint. *See*, Rule 15(a)(1).

The Substance of the Proposed Amendment

The proposed Second Amended Complaint sought by this motion would add only four paragraphs which are, in full:

77. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 76, as if separately pleaded herein in their entirety.

78. The actions by Fay as described in those paragraphs just named, in addition to failing to make a reasonable accommodation for G's disability in violation of the ADA provisions prohibiting such conduct, have also violated additional provisions of the ADA, specifically Title 42 U.S.C. § 12203(a) and (2), which prohibit discrimination by Fay against plaintiffs because they have opposed Fay's Wi-Fi policy and practice and because plaintiffs have made a charge, or assisted, or participated in any manner in an investigation, proceeding, or hearing, seeking relief under the ADA; these provisions also prohibit Fay from coercing, intimidating and , interfering with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the ADA.

79. Fay has violated the just-enumerated provisions of the ADA through conduct such as and including that alleged in paragraphs 53 through 57, 68 through 71, and 75 and 76.

80. Plaintiffs seek an order from this Court prohibiting any future such violations by Fay, its officers, directors, employees and all those acting in privity with them, as well as such other relief as this Court may deem proper.

This Amendment should be allowed for the reasons stated below.

ARGUMENT

(1) Allowance of Amended Pleadings at this Stage Is Freely Given

Because this motion is filed before the Scheduling Order's deadline for doing so (January 22, 2016), Rule 15(a)(1) allows such amendments with liberality.

Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. * * * In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by

amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) As the First Circuit has reiterated this freely-given mandate more recently, ruling in a case where, as here, the motion is made after defendants filed a responsive pleading but before the time for doing so under the scheduling order had expired:³

Once a responsive pleading has been filed, subsequent amendments require court approval, and such approval is “freely given when justice so requires.” *See* Fed.R.Civ.P. 15(a). We have often described this standard as reflecting the “liberal” amendment policy underlying Rule 15.

O’Connell v. Hyatt Hotels of Puerto Rico, 357 F.3d 152, 154-56 (1st Cir. 2004).

When a motion is filed before the Scheduling Order’s deadline has expired the emphasis is on whether Fay would be prejudiced:

. . . Rule 15(a)’s “freely given” standard, . . . focuses mostly on the bad faith of the moving party and the prejudice to the opposing party, *see Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)...

O’Connell, 357 F.3d at 155.

(2) There Would Be No Prejudice Here

There are over four months of discovery time remaining. And the case has been pending since August, during which time the parties have been focused on these issues. The allegations by which plaintiffs now allege retaliation have already been alleged in the Amended Complaint where they are stated as a basis for the breach of contract action. *See*, proposed paragraph 79 which adopts by reference numerous allegations by paragraph number which have been in the case some from the beginning, last August, and some since the Amended Complaint was filed on December 8, 2015, fully 40 days before the date this motion is filed. So there is no possibility

³ Once the Scheduling Order deadline for filing a motion to amend has filed, the standard is more rigorous. *See*, Rule 16.

that these facts or the retaliation theory could come as any surprise, much less could this be a claim in relation to which defendants would not have ample time to develop a defense, given the four months of discovery remaining.

(3) There is No Bad Faith In This Retaliation Allegation

The proposed retaliation claim is certainly feasible under both the law and the facts. Indeed there is a sound basis for this claim.

As to the law, when a person claims a disability and makes a request for an accommodation pursuant to the ADA, the entity to which that request is made is prohibited from taking any actions in response that constitute retaliation:

(a) Retaliation.

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

Title 42 U.S.C. § 12203(a) and (b).

For a student to establish a prima facie claim for retaliation against their school, he or she must show that:

- (1) The student (or parent advocating on the student's behalf) "engaged in protected conduct;"
- (2) The student or parent was "subjected to an adverse action" by the school; and
- (3) There was a "causal connection between the protected conduct and the adverse action."

Lebron v. Commonwealth of Puerto Rico, 770 F.3d 25, 31 (1st Cir. 2014), citing *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 41 (1st Cir. 2012).

As has been clearly defined, “protected conduct includes advocating for a student's right to be free from disability-based discrimination,” even if it turns out the student does not qualify as disabled. *Lebron v. Commonwealth of Puerto Rico*, 770 F.3d 25, 31 n. 9 (1st Cir. 2014), citing *Esposito*, 675 F.3d at 41. For instance, both requesting an accommodation and complaining of discrimination on the basis of a disability are protected activities for the purposes of § 12203. See, e.g., *Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 115 (1st Cir. 2013)(“Requesting an accommodation is protected conduct under the ADA's retaliation provision.”); *Vazquez v. Municipality of Juncos*, 756 F. Supp. 2d 154, 164 (D.P.R. 2010)(“[P]rotected activity in retaliation claims can take the form of informal protests.”).⁴

Moreover, for conduct to be “protected” under the first prong stated above, the student does not need to show that they qualify as “disabled” under the ADA. As such, a “plaintiff need not succeed on a disability discrimination claim in order to assert a claim for retaliation.” *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 40-41 (1st Cir. 2012), citing *Colón-Fontáñez v. Municipality of San Juan*, 660 F.3d 17, 36 (1st Cir.2011).

The second prong, being “subjected to adverse action” is certainly alleged in good faith based on the facts alleged. By reason of having complained about the Wi-Fi and

⁴ While the student need not be “disabled” under the ADA to bring a retaliation claim, some courts have held that the student and parents requesting the accommodation or making the complaint (i.e., the “protected conduct”) must be doing so in “good faith.” See, .g., *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1025 (8th Cir. 1999)(“Filing such a grievance is a protected activity under the ADA as long as Amir had a reasonable good faith belief in the allegations contained in the grievance.”). By any measure, the plaintiffs in this case have a good faith basis for claiming the disability, including two opinions from doctors, and the fact that G suffers his symptoms only at Fay, and nowhere else.

having sought an accommodation, plaintiffs allege that Fay has: (i) threatened to remove G from the school if his parents speak to other parents or even anyone of the Fay teachers about the Wi-Fi problem (Amended Complaint, ¶ 53); (ii) demanded as a condition of staying in the school that G be seen by three separate specialists, including a psychologist when there was no indication of any such problem, and two doctors on two separate occasions who do not even recognize that G's condition even is recognized medically (*Id.*, ¶¶ 55, and 57); (iii) threatened to dismiss G from school if he attempted to measure the Wi-Fi emissions with a small device designed to take such measurements wanted by G's parents so that they could show Fay where the Wi-Fi was the most intense (*Id.*, ¶ 68); (iv) refused to allow G's parents to have any contact with any of G's teachers so they could gain an understanding of what lessons were being taught during times when G was unable to come to school because of the symptoms suffered from the Wi-Fi emissions he was exposed to there (*Id.*, ¶ 68); (v) refused to allow G's parents to arrange for the tape recording of the classes, at the parents' expense, when G was unable to come to school because of the symptoms suffered from the Wi-Fi emissions, even though such recordings would allow G to stay current with the lesson plan at home where he was not exposed to Wi-Fi and even after Fay had specifically warned G's parents that if he was unable to come to school, he would still have to stay current with the course work by studying at home (*Id.*, ¶ 69, 70); and (vi) refused to allow G's parents to arrange for the skyping of the classes, at the parents' expense, when G was unable to come to school because of the symptoms suffered from the Wi-Fi emissions, even though such skyping would allow G to stay current with the lesson plan at home where he was not exposed to Wi-Fi and even after Fay had specifically warned G's parents that if he was unable to

come to school, he would still have to stay current with the course work by studying at home (*Id.*, ¶ 69, 70). These threats to dismiss G from school are real and quite menacing given that the parents had invested so much money and the first six years of G's educational life, among the most formative, in Fay and its educational methods.

As to prong three needed to make a prima facie case for retaliation, "causal connection" it does not require that the protected conduct be the sole reason for the retaliatory actions. Instead, plaintiff need only show that the "adverse action was taken (at least in part) because of the protected conduct." *Vazquez v. Municipality of Juncos*, 756 F. Supp. 2d 154, 164 (D.P.R. 2010). The level of "causal connection" sufficient to establish the prima facie case requirement can sometimes be shown simply through temporal proximity (i.e., that the retaliatory act came after the protected conduct). *See, e.g., D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 42 (1st Cir. 2012)("We have said that close temporal proximity between protected conduct and an adverse action sometimes may suffice for a prima facie case of retaliation.")(internal quotations and citations omitted); *Vazquez v. Municipality of Juncos*, 756 F. Supp. 2d 154, 166 (D.P.R. 2010)(denying defendant's motion for summary judgment where a library patron asked to use the elevators on the basis of a disability and was subsequently barred from using library computers).

Once a prima facie case of retaliation has been established, a burden-shifting framework is set in motion:

Once a plaintiff makes such a showing, the burden shifts to the defendant to articulate a legitimate, non-retaliatory explanation for the adverse action. *See Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 36 (1st Cir. 2010). If the defendant does so, the burden shifts back to the plaintiff to show that the proffered legitimate explanation is pretextual, meaning that the defendant was motivated by a retaliatory animus. *See id.*

D.B. ex rel. Elizabeth B. v. Esposito, 675 F.3d 26, 41 (1st Cir. 2012); *see also Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 115 (1st Cir. 2013).

There is plainly a good faith basis for adding this retaliation count.

CONCLUSION

The motion allowing leave to file the Second Amended Complaint should be allowed.

Dated: January 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J.E. Markham, II, do hereby certify that on January 19, 2016, I served the foregoing document via electronic mail on opposing counsel:

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