

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAI KWAN CURETON, LEATRICE SHAW,	:	CIVIL ACTION
ANDREA GARDNER, and	:	
ALEXANDER WESBY,	:	NO. 97-131
individually and on behalf of all others	:	
similarly situated,	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
NATIONAL COLLEGIATE	:	
ATHLETIC ASSOCIATION,	:	
	:	
	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

April 13, 2000

Presently before the Court is the Plaintiffs' Motion to Amend or Alter Summary Judgment and to Amend the Complaint. For the reasons given below, the Motion is Denied.

**I. BACKGROUND**

This is a putative class action lawsuit brought by four African-American student-athletes (Tai Kwan Cureton, Leatrice Shaw, Andrea Gardner, and Alexander Wesby), alleging that they were unlawfully denied educational opportunities as freshmen through the operation of initial eligibility rules by the Defendant National Collegiate Athletic Association ("NCAA"). Specifically, they claim that these rules ("Proposition 16") utilize a minimum test score requirement that has an unjustified disparate impact on black student-athletes.

Plaintiffs originally filed the Complaint more than three years ago, on January 8, 1997. Almost two years later the Court granted Plaintiffs' Motion to add Plaintiffs Gardner and Wesby. The parties then filed cross-motions for summary judgment. On March 8, 1999, this Court held, as a matter of law, that the NCAA is subject to suit under Title VI and its implementing regulations, and that the NCAA's initial eligibility rule has an unjustified disparate impact against black student athletes (the "March, 1999 Decision). See Cureton v. NCAA, 37 F.Supp. 2d 687 (E.D. Pa. 1999). The NCAA was granted an order to stay the injunction placed by this Court upon the NCAA's enforcement of Proposition 16 as it appealed the Court's grant of summary judgment to Plaintiffs. This Court granted Plaintiffs' partial class certification in July, 1999. A panel of the Third Circuit reversed this Court regarding the NCAA's liability under Title VI. See Cureton v. NCAA, 198 F.3d 107 (3d. Cir. 1999). The Court of Appeals remanded the case to this Court by an Order dated February 25, 2000 that directed me to enter summary judgment in favor of the NCAA. The Plaintiffs' present motion asks the Court to alter summary judgment and allow the Plaintiffs to amend their Complaint to include a claim of intentional racial discrimination by the NCAA in its formulation and enforcement of Proposition 16.

## **II. LEGAL STANDARD**

The parties have argued for the adoption of different standards by which the Court should rule on this Motion. The NCAA asks the Court to adopt the usual standard for motions filed under Fed. R. Civ. P. 59(e). The Plaintiffs argue that the Court should apply the more relaxed standard applicable to a motions to amend under Rule 15(a).

A proper motion to alter or amend judgment "must rely on one of three major grounds: '(1) an intervening change in controlling law; (2) the availability of new evidence [not

available previously]; [or] (3) the need to correct clear error [of law] or prevent manifest injustice. See North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (1995).

However, North River court's holding on this issue was in the context of a motion to reconsider an issue already litigated. The Third Circuit has stated its rule differently in Adams v. Gould, 739 F.2d 858, 864 (3d. Cir. 1984). In that case the court held that when deciding a Rule 59(e) Motion in the context of a contemporaneous Motion to Amend a Complaint, a court should apply the same standards as when deciding a motion to amend a complaint under Rule 15(a). Id. at 864.<sup>1</sup>

Clearly, plaintiffs cannot meet the Rule 59(e) standards. I, alternatively, review the motion under Rule 15(a) standards.

Under the liberal pleading philosophy of the federal rules as incorporated in Rule 15(a), "In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive . . . undue prejudice . . . futility of amendment, etc. -- the leave sought should as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962). In Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir.1993), the court cited Foman, supra and went on to say:

We have interpreted these factors to mean that "prejudice to the non-moving party is the touchstone for the denial of an amendment." Cornell & Co. v. Occupational Safety & Health Review Comm'n, 573 F.2d 820, 823 (3d Cir. 1978). In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment. Heyl &

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1. The Adams Court actually divided the analysis into four parts. First a court should determine whether the amended complaint states a cause of action. Secondly, it examines whether the claim would be barred by the previous judgment. Third, a court determines whether the claim would be untimely. Finally, a court analyzes the Motion to amend under the Rule 15(a) factors. For purposes of this Motion, the Court will assume that the claim is timely and would not be barred by the previous judgment. Whether the new claim would state a cause of action will briefly be discussed within the 15(a) analysis.

*Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981), *cert. denied.*, 455 U.S. 1018, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982).

The question of an undue delay requires the Court to focus on the Plaintiffs' reasons for not amending their complaint to assert the purposeful discrimination claim earlier whereas the issue of prejudice focuses on the effect the late amendment will have on the defendants. Id.

### **III. DISCUSSION**

Leave to amend "shall freely be granted when justice so requires." Fed.R.Civ.P.

Rule 15(a). The Court finds that justice does not require the Complaint to be amended.

#### **A. Undue Delay**

The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become "undue," placing an unwarranted burden on the court, or will become "prejudicial," placing an unfair burden on the opposing party. See Adams, 739 F.2d at 867. When a party filing a motion to amend has no adequate explanation for the delay, untimeliness can be a sufficient reason to deny leave to amend. See Frank v. U.S. West Inc., 3 F.3d 1357, 1365-66 (10th Cir.1993); Pallotino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994) (Dismissing a motion to amend by saying "Much of the value of summary judgment procedure ... would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should that theory fail, come back along thereafter and fight on the basis of some other theory"); Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1164 (5th Cir.1982), *cert. denied*, 464 U.S. 814 (1983) (motion to amend was filed two years and three months after the original complaint and was based on information available prior to the first amendment).

In assessing whether a delay is undue, a court must also consider competing factors, such as judicial efficiency. Trying cases one claim at a time is both unfair to the opposing party and inefficient for the judicial system. See Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 504 (4th Cir. 1992) (Rule 15(a) is not a tool to engage in the litigation of cases one theory at a time). Delay in presenting a post-judgment amendment when the moving party had an opportunity to present the amendment earlier is a valid reason for a district court not to permit an amendment. See United States Labor Party v. Oremus, 619 F.2d 683, 692 (7th Cir. 1980). See also Savers Fed. Savings & Loan Ass'n v. Reetz, 888 F.2d 1497, 1508 (5th Cir. 1989) (denying post-summary judgment motion to amend where factual basis for amended claim was clearly known to plaintiffs months before the motion for summary judgment was filed).

Under all circumstances of this case, the delay in seeking to amend the complaint is clearly excessive (undue). It is excessive because:

(1) On the face of the record, a motion to amend is excessive because it was filed three years after the complaint was filed.

(2) In considering the delay on the face of the record it is also important to note, as pointed out by defendant, that the information on which the proposed amended complaint is based was substantially known to plaintiffs as early as their response to motion to dismiss filed on July 9, 1997. See page 2 of plaintiff's response to motion to dismiss and paragraphs 10 to 13 of the proposed amended complaint.

(3) Judicial efficiency is ill served by trying one claim at a time, which is essentially what will happen if the court were to grant plaintiffs' motion.

(4) Interest in finality of the proceedings would be ignored if plaintiffs were permitted to amend after extensive discovery and summary judgment motions have been concluded, particularly where as here, the basis for proposed amended pleadings were clearly known as stated above.

Excessive time between the filing of the complaint and motion to amend, judicial inefficiency and lack of finality, even in light of plaintiffs' prior knowledge of the information that forms the basis of their proposed amended complaint could be overlooked if there were a reasonable explanation for the delay. In this case, no such reasonable explanation is forthcoming. The only reasons given for plaintiffs' delay in moving to amend are set forth in its brief as follows:

**C. Plaintiffs' Delay in Moving to Amend Their Complaint Is Neither Undue Nor In Bad Faith.**

Because of the unusual procedural posture of this case, which is strikingly similar to the procedural posture presented in *Adams*, Plaintiffs' delay cannot be characterized as "undue" or as in "bad faith." The unusual procedural posture is this: the court of appeals, rather than the district court, found that the implementing regulations upon which Plaintiffs' disparate impact claim was based are program specific, and that the member institutions have not ceded controlling authority to the NCAA. As a result, the court of appeals rejected Plaintiffs' original legal theory on a motion for summary judgment. As the *Adams* court noted, if this Court had rejected Plaintiffs' original legal theory, and Plaintiffs had then raised their alternative theory, which on the same facts is legally sufficient, it would have been "**unusual** for [the Court] not to allow [Plaintiffs] to amend because of 'undue delay'" *Id.* at 868 (emphasis added). This difference (i.e., the Third Circuit rejected Plaintiffs' original theory, rather than this Court) "**should not affect the plaintiffs' ability to amend upon rejection of [a necessary component of] their original legal theory. The rationale of most cases rejecting 'post-judgment' amendments -- that the plaintiff should have raised the new theory before trial -- is inapplicable.**" *Id.* (emphasis added). Because amendment of a complaint is not unusual at the summary judgment stage, Plaintiffs' failure

to amend their complaint earlier cannot be characterized as undue delay. *Id.* at 869 (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1488, at 436 (1971)).

Similarly, Plaintiffs' delay is not in bad faith. As in *Adams*, “[P]laintiffs had a colorable excuse for not amending earlier since the district court accepted the facial validity of their original legal theory.” *Id.* at 868 (emphasis added). Moreover, Plaintiffs had a reasonable belief that the claim for purposeful discrimination was unnecessary to their case. They had already won on their disparate impact claim. Where the failure to include in a complaint a known theory of the case arises not from an attempt to gain tactical advantages, but from a reasonable belief that the theory is unnecessary, it is inappropriate to deny leave to amend the complaint to add the alternative theory. *Dussouy*, 660 F.2d at 598. Indeed, this Court confirmed that Plaintiffs' belief was reasonable when it granted summary judgment in Plaintiffs' favor. *Cureton*, 1997 WL 634376 (E.D. Pa. Oct. 9, 1997); *Cureton v. NCAA*, 37 F.Supp. 2d 687 (E.D. Pa. 1999). Moreover, as set forth more fully in Plaintiffs' Memorandum of Law, Plaintiffs were not aware of all of the facts revealed throughout the course of the discovery and briefing process that now support their purposeful discrimination claim, and were justified in thinking that this claim was unnecessary to their case. Thus, it cannot be said that Plaintiffs' delay is in bad faith.

Footnotes omitted.

I find plaintiffs' reasons to fall far short of being adequate ones. To suggest that they did not really need to pursue the issue raised in the proposed amended complaint belies the whole history of this suit. From the very outset, the viability of a private cause of action based upon Title VI's implementing regulations was very uncertain. It was also very clear that the disparate impact claims might likewise suffer because of the program specific limitations in the implementing regulations.

Having reason to know all of this, plaintiffs nevertheless did not pursue a claim under Title VI for intentional discrimination. In fact, quite to the contrary, plaintiffs referred to the NCAA's initial eligibility rules as having a laudable goal. I am nonplussed at how, in light of

what plaintiffs knew when this suit was filed, they failed to press the claim they now wish to pursue in the proposed amended complaint. I can only conclude that it is a last gasp measure to have a second bite of the proverbial apple. Unfortunately, the apple was consumed in their original complaint and the extensive proceedings that brought us to this point in this case.

I am reluctant to find that plaintiffs are acting in bad faith. However, in light of the long, hard fought nature of this lawsuit, plaintiffs' prior knowledge of substantially all the facts that support their proposed amended complaint, and their acknowledgment of the laudable goals of NCAA testing, one could certainly entertain the notion that plaintiffs are acting in bad faith, or in sport's lingo, are simply poor losers.

#### B. Prejudice

The Third Circuit has emphasized that prejudice to the non-moving party is the touchstone for the denial of a request for leave to amend. See Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir.1989). Several courts have found that prejudice exists where a plaintiff seeks to amend the complaint several years after the start of litigation. See, e.g., Lorenz, 1 F.3d at 1414 (denying motion brought three years after start of litigation); Hewlett-Packard Co. v. Arch Assocs. Corp., 172 F.R.D. 151, 153 (E.D. Pa.1997) (denying motion brought fifteen months after original pleading was dismissed); Johnston v. City of Phila., 158 F.R.D. 352, 353 (E.D.Pa.1994) (denying motion to add new theory of liability after close of discovery and on eve of trial); Kuhn v. Philadelphia Elec. Co., 85 F.R.D. 86, 87 (E.D.Pa.1979) (denying motion after discovery was completed because defendants had already expended considerable time and money preparing the issues for trial).

The NCAA would be prejudiced if Plaintiffs were allowed to amend the Complaint to add a claim of intentional discrimination. Such a claim would allow the parties to seek damages against the NCAA. Prior to this motion, the parties litigated solely on a theory that called for only equitable relief. The NCAA stipulated to Plaintiffs' class certification with the understanding that only injunctive relief was sought. Granting the amendment might require the Court to revisit the availability of the class action as a method to resolve this litigation.

Amending the Complaint would likely lead to further discovery requests. The record is already voluminous and, as this Court has noted elsewhere, has not provided any evidence of intentional discrimination. See Cureton, 37 F.Supp.2d at 704-705. Nevertheless, Plaintiffs are likely to seek further discovery. This Court put parties on notice of its disfavor towards motions that would affect the close of discovery when it allowed Plaintiffs to add two named defendants to the Complaint in late 1998. In the present case, discovery has been closed for more than a year.

Also, the proposed amendment would essentially force the NCAA to begin litigating this case again. Prejudice has been found when an granting a motion to amend requires a defendant to engage in significant new preparation. See Furman Lumber, Inc. v. Mountbatten Sur. Co., 1997 U.S. Dist. LEXIS 10120, at \*5 (E.D. Pa. July 14, 1997) (also finding that two month delay in filing amendment after learning facts upon which it was based was undue); Rehabilitation Inst. v. Equitable Life Assurance Society of the United States, 131 F.R.D. 99, 102 (W.D. Pa. 1992).

### C. Futility

"The trial court may properly deny leave to amend where the amendment would not withstand a motion to dismiss." Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). Thus, if the proposed amendment "is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend. Id. The Court also finds that allowing the Plaintiffs to amend the complaint would be futile. Plaintiffs have alleged, and continue to allege, that the standardized test component of Proposition 16 impermissibly discriminates against black student-athletes. However, while this Court previously accepted the Plaintiffs theory on a disparate impact claim, the Court also recognized that there was no evidence in the record of intentional discrimination. The allegations put forward by the Plaintiffs do not support a claim that the NCAA intended to treat black student-athletes differently from their white counterparts.

### **IV. CONCLUSION**

The Court denies the Plaintiffs' Motion to Alter or Amend Summary Judgment and to Amend the Complaint. The Court finds that Plaintiffs have unduly delayed amending the Complaint and that the NCAA would likely be prejudiced by allowing the amendment now. Furthermore, amending the Complaint would be futile.

An appropriate order follows.

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Plaintiffs,	:	
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v.	:	
	:	
	:	
NATIONAL COLLEGIATE	:	
ATHLETIC ASSOCIATION,	:	
	:	
	:	
Defendant.	:	

**ORDER**

AND NOW, this 13th day of April, 2000. upon consideration of Plaintiffs' Motion to Alter or Amend the Summary Judgment and Motion for Leave to Amend Their Complaint, and the National Collegiate Athletic Association's (the "NCAA's") response thereto, it is hereby ORDERED that pursuant to the mandate of the United States Court of Appeals for the Third Circuit, JUDGMENT is entered in favor of the NCAA and against the Plaintiffs.

IT IS FURTHER ORDERED that Plaintiffs' Motion is DENIED.

The Clerk of Court is directed to mark this case CLOSED.

BY THE COURT:

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RONALD L. BUCKWALTER, J.