

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARY ELIZABETH LEARY, et al.

PLAINTIFFS

v.

CIVIL ACTION NO. 3:99CV-465-S

STEPHEN W. DAESCHNER

DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the defendant, Stephen W. Daeschner (“Daeschner”), for summary judgment and motion of the plaintiffs, Mary Elizabeth Leary, et al. (collectively, “Leary”), for leave to file a second amended complaint.

The original complaint was filed in the case on July 16, 1999. The complaint sought injunctive and declaratory relief.¹ Those claims have been resolved.

On July 31, 2000, the court dismissed the First Amendment retaliation claims asserted in counts I and II by Mary Elizabeth Leary and Glenda H. Williams, respectively. By agreed order entered November 9, 1999, Donna Grant dismissed her claim asserted in count III. Count IV consisted of the prayer for relief, seeking a preliminary injunction, declaratory judgment and a permanent injunction. After an evidentiary hearing and briefing, the court ruled in favor of the plaintiffs on their due process claim on August 13, 1999 and enjoined the defendant from transferring the plaintiffs without first affording them notice and an opportunity to be heard. On August 16, 1999, the court found that the plaintiffs were given notice and were offered an opportunity to be heard, but they had waived those due process rights by declining to participate in the hearings or request a continuance of the proceedings. This courts rulings were reviewed by the

¹Lest there be any question concerning this point, we note that an Introduction at pg. 3 of the complaint, states that “[t]his is a suit for Injunctive Relief on the part of three highly qualified and tenured schoolteachers...”

United States Court of Appeals for the Sixth Circuit on interlocutory appeal and the rulings of this court were affirmed. See Mandate from USCA entered 10/16/00 (DN 77).

During the pendency of the interlocutory appeal, the plaintiffs moved to amend the complaint to add four new claims raising new issues under state and federal law. Leave was granted and the amended complaint was filed on March 17, 2000.

On August 29, 2000, this court dismissed counts V, VI, and paragraphs a and c of Count VII. On March 1, 2001, the court dismissed paragraphs b, d, e, and f of count VII.

Daeschner has now moved for dismissal of the only remaining count, count VIII which is a prayer for relief seeking compensatory and punitive damages for the claims asserted in counts V through VII. Specifically, in paragraphs a through d of count VIII, the plaintiffs demand damages in specific amounts for violation of each of counts V, VI, and VII. These claims for which compensatory and punitive damages were sought have been dismissed. Therefore, count VIII must also be dismissed.

The motion of Daeschner for summary judgment as to count VIII was filed in March of 2001. On April 30, 2001, the plaintiffs a their second motion to amend to add claims for 1) general, compensatory and punitive damages for violation of their due process rights, 2) damages for violation of the collective bargaining agreement, and 3) further injunctive and declaratory relief. This motion was filed after Daeschner's summary judgment motion which noted that the original complaint sought only declaratory and injunctive relief. Over six months had passed since the Sixth Circuit affirmed the court's disposition of the claims in the original complaint. It is over one year since the plaintiffs amended their complaint.

The plaintiffs' due process claim was addressed and declaratory and injunctive relief was granted to the limited extent that the plaintiffs were entitled to such relief. The Sixth Circuit upheld the court's determination, and found that the plaintiffs then subsequently had received and waived all process to which they were due:

In the circumstances of this particular case, the predeprivation hearing ultimately provided by the school board was sufficient to satisfy the dictates of due process...Although the school board gave the plaintiffs very little time to prepare for the August 16 hearing, the district court did not abuse its discretion in refusing to require further predeprivation process by extending its preliminary injunction. ...In sum, the plaintiffs were afforded due process and waived their right to it by refusing to participate in the hearing offered to them by the school board...Therefore, the plaintiffs have received all the predeprivation process that they are due, and the district court correctly lifted the preliminary injunction.

Leary v. Daeschner, 228 F.3d 729, 743-44 (6th Cir. 2000).

The court has been shown no authority for the proposition that the plaintiffs would be entitled to damages for process which was due, subsequently afforded them, but which they then waived. The court need not permit amendment of the complaint where such amendment would be futile. *See, ie., Hutsell v. Sayre*, 5 F.3d 996 (6th Cir), *cert. denied*, 510 U.S. 1119, 114 S.Ct. 1071, 127 L.Ed.2d 389 (1994). We need not reach this question, however, as the plaintiffs, at this late date, have failed to show good cause for their failure to assert these claims in a timely fashion. After the deadlines in the court's scheduling order have passed, the plaintiffs must show good cause in accordance with Fed.R.Civ.P. 16, as well as the more liberal justice standard found in Fed.R.Civ.P. 15. *See, Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000).

The plaintiffs filed an action for declaratory judgment and injunctive relief, specifically noting the nature of the action in the introductory paragraphs. When the complaint was amended and claims were added, the plaintiffs limited their claim for damages to particular causes of action, and did not include the due process claim.

The plaintiffs seek at this late date to recast the due process violation as one for breach of the collective bargaining agreement. They have provided no justification for their failure to raise this legal theory earlier. The plaintiffs have referenced the collective bargaining agreement throughout this litigation, and the claim has clearly been available to them.

For the reasons set forth hereinabove and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that

1. The motion of the defendant, Stephen W. Daeschner, for summary judgment as to count VIII of the amended complaint is **GRANTED**.
2. The motion of the plaintiffs, Mary Elizabeth Leary, et al., for leave to file a second amended complaint is **DENIED**.
3. This action is **DISMISSED WITH PREJUDICE**.

There being no just reason for delay in its entry, this is a final order.

This ____ day of _____, 2001.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record