

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

AMY PICKETT,

Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER (TTUHSC), *et al.*,

Defendants.

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CIVIL ACTION NO. 5:20-CV-232-H-BQ

ORDER DENYING PLAINTIFF'S MOTION TO AMEND

Pro se Plaintiff Amy Pickett seeks leave to amend her Complaint by (1) reviving previously asserted and dismissed claims, (2) adding new claims under 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973 (RA), and (3) seeking a permanent injunction. ECF Nos. 32, 33. Because Pickett's proposed amendments would be futile, the Court hereby **DENIES** the motion without prejudice.

I. Procedural History

Pickett filed her original Complaint on September 23, 2020, alleging claims under Title II of the ADA, Section 504 of the RA, and 42 U.S.C. § 1983 for alleged procedural and substantive due process violations. ECF No. 1. Defendants Texas Tech University Health Sciences Center (TTUHSC), Barbara Cherry, and Michael Evans (collectively, Defendants) filed a motion to dismiss. ECF No. 11. Defendants subsequently filed a motion to stay discovery in this action, which the Court granted. ECF Nos. 22, 27. On July 30, 2021, the undersigned entered findings, conclusions, and recommendations (FCR) regarding Defendants' motion to dismiss. ECF No. 28. The FCR specifically advised Pickett that, if she elected to amend her complaint as to the ADA and RA failure-to-accommodate claims based on two discrete incidents, she must do so within

fourteen days from the date of the FCR. *Id.* at 43. Pickett did not file an amended complaint within the fourteen-day time period.

On August 27, 2021, twenty-eight days after entry of the FCR, Pickett filed the instant Motion for Leave to Amend. ECF No. 32. On September 23, 2021, the United States District Judge entered an order accepting in part the FCR, and the district judge:

(1) dismis[s]e[d] Pickett's failure-to-accommodate claims premised on [TTUHSC's] failure to extend Pickett's start time of her October 2018 examination and to allow her to retake exams or substitute exam grades and grant[ed] leave to amend those claims in accordance with the FCR; (2) dismis[s]e[d] Pickett's disability-harassment and Section 1983 claims against Dr. Cherry and Dr. Evans in their individual capacities with prejudice; (3) dismis[s]e[d] Pickett's Section 1983 claims for damages against Dr. Cherry and Dr. Evans in their official capacities without prejudice; (4) dismis[s]e[d] Pickett's Section 1983 procedural-due-process claim for injunctive relief; and (5) denie[d] defendants' request to dismiss all other claims.

ECF No. 35, at 24. Thus, the following claims are live in this action: (1) ADA and RA claims against TTUHSC and Defendants Cherry and Evans in their official capacities for (a) disability discrimination and (b) failure-to-accommodate based on Pickett's advisor Dr. Jeanette Crenshaw's denial of additional time to submit assignments for feedback and her professors' failure to provide lecture notes; and (2) a § 1983 substantive due process claim against Defendants Cherry and Evans in their official capacities for injunctive relief. *See id.* at 2–3, 23–24.

Attached to Pickett's Motion to Amend is a proposed amended complaint with redline changes. ECF No. 32-1. In the proposed amended complaint, Pickett appears to raise two new causes of action—a § 1983 First Amendment violation and a retaliation claim under the ADA and RA.¹ *Id.* at 1–2, 17, 22. Pickett also adds a claim for permanent injunctive relief that seeks an order directing Defendants to “cease discrimination and retaliation against [Pickett] or any other

¹ Under the “First Cause of Action” heading, which relates to Pickett's ADA and RA claims, Pickett also references an alleged breach of contract, but she does not explain how such claim relates to the ADA and RA. ECF No. 32-1, at 14, 17.

TTUHSC . . . student.” *Id.* at 23. Finally, Pickett attempts to amend the ADA and RA failure-to-accommodate claims the undersigned directed her to amend within fourteen days of the date of the FCR. *Id.* at 10–11.

Defendants oppose Pickett’s request to amend. Resp. 1, ECF No. 34. They argue that Pickett’s amendment (1) is not timely, (2) “does not comply with the FCR’s limitation on amending only as to the [RA] . . . and [ADA] . . . claim based on the October 2, 2018, exam start time,” and (3) fails to meet the good cause standard under Fed. R. Civ. P. 15(a). *Id.* at 1–4. Regarding Pickett’s failure to establish good cause for the amendment, Defendants contend that “Pickett’s proposed amendments are futile because they do not alter the nature of her claims” and “add nothing new to the issues before the Court” *Id.* at 3–4. Moreover, Defendants assert that Pickett essentially raises the same claims as in her original Complaint and thus, amendment would be futile and needlessly subject the parties to “another round of filing motions to dismiss” *Id.*

II. Discussion

Under Rule 15(a) of the Federal Rules of Civil Procedure, “[a] party may amend its pleading once as a matter of course . . . 21 days after service of a motion under Rule 12(b)[.]” Fed. R. Civ. P. 15(a)(1)(B). “In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). “The court should freely give leave when justice so requires.” *Id.*; *see Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 391 (5th Cir. 2017). But “leave to amend is in no way automatic.” *Id.* (alteration and citation omitted); *see Strickland v. Bank of N.Y. Mellon*, 838 F. App’x 815, 821 (5th Cir. 2020) (per curiam) (“Although leave to amend under Rule 15(a) is to be freely given, that generous standard is tempered by the necessary power of a district court to manage a case.”). Courts retain

discretion to grant a motion to amend and should consider the following factors in deciding whether to provide the requested relief: (1) undue delay; (2) movant's bad faith or dilatory motive; (3) repeated failure to cure deficiencies despite previous amendments; (4) undue prejudice to the opposing party; and (5) futility of the amendment. *Body by Cook*, 869 F.3d at 391 (citation omitted). "An amendment is futile if it would fail to survive a Rule 12(b)(6) motion." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). Courts should therefore "review [a] proposed amended complaint under the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.* (internal quotation marks and citation omitted).

As to Defendants' timeliness argument, the Court agrees that Pickett's attempt to amend her failure-to-accommodate claims is not timely under the FCR. The FCR provided that Pickett should amend her failure-to-accommodate claims premised on TTUHSC's failure to extend the start time of her October 2018 examination and to allow her to retake exams or substitute exam grades within fourteen days of the date of the FCR. Pickett neither amended those claims nor sought an extension of time.² As a result, those discrete claims have been dismissed for the reasons set forth in the FCR and the district judge's order adopting the undersigned's recommendation on that issue, and cannot be re-alleged. Nevertheless, because Pickett is proceeding in this matter pro se, and she filed her motion prior to the district judge adopting the FCR, the Court chooses not to extend this holding to any of her other claims or deny leave to amend as to those claims based on untimeliness. *See, e.g., Terry v. McLain*, No. 3:15-cv-1098-D, 2015 WL 6751129, at *2 (N.D. Tex. Nov. 5, 2015) (granting plaintiff's motion for leave to amend where, even though she did not

² Pickett asks that the Court "grant forgiveness for [her] delay in submitting the amended complaint" because she "works nights as a nurse and" has been working daily. ECF No. 33, at 2. Pickett also states, however, that it was not until August 18, 2021, i.e., after the fourteen-day timeframe set forth in the FCR, that she conferred with Defendants' counsel regarding amendment of her Complaint. *Id.* Pickett's failure to timely amend or otherwise move for an extension of time, coupled with the fact that she has been on notice of purported deficiencies in her Complaint since Defendants filed their motion to dismiss on January 22, 2021, counsel against permitting Pickett to amend outside the specified time period.

file her motion by “the deadline in the undersigned’s notice of deficiency,” plaintiff had generally complied with the court’s scheduling order and had “diligently prosecuted her *pro se* matter”); *Baker v. Bowles*, No. 3:05-CV-1118-L, 2005 WL 8165365, at *2 (N.D. Tex. Nov. 17, 2005) (“No scheduling order has been issued in the instant case; thus, Plaintiff’s motion to amend is presumed to be timely.”).

While the Court agrees with Defendants’ second contention—that Pickett failed to limit the scope of her amendment to the deficiencies addressed in the FCR—it does not provide sufficient basis to deny Pickett’s motion. At the time she filed her motion, Defendants had not yet answered Pickett’s original Complaint. Moreover, Pickett has not had the opportunity to amend (other than that provided under Rule 15(a)(1)(B)), and the Court has not entered a scheduling order setting forth pretrial deadlines. In sum, this case is still at a very early stage, which weighs heavily in favor of allowing Pickett to amend. *See, e.g., Thomas v. Texas*, No. 3:17-CV-0348-N-BH, 2017 WL 11496979, at *2 (N.D. Tex. May 19, 2017) (granting plaintiff’s motion to amend, where “case [was] still at a very early stage, the proposed amendment aim[ed] to address pleading deficiencies, and nothing in the record suggest[ed] bad faith or dilatory motive by the plaintiff”); *Baker*, 2005 WL 8165365, at *2.

The Court finds, however, that Pickett’s attempt to amend certain claims would be futile. The district judge expressly dismissed with prejudice Pickett’s disability harassment and § 1983 claims against Defendants Cherry and Evans in their individual capacities. ECF No. 35, at 24. In her proposed amended complaint, however, Pickett reasserts those claims. ECF No. 32-1, at 15–16, 18, 20. Moreover, the district judge dismissed Pickett’s § 1983 claims for damages against Defendants Cherry and Evans in their official capacities as barred by the Eleventh Amendment. *See* ECF No. 35, at 22–24. Through the proposed amendment, Pickett once again seeks money

damages against Defendants Cherry and Evans in their official capacities for the alleged § 1983 violations, but pleads no new facts demonstrating that such claims are not barred by the Eleventh Amendment. ECF No. 32-1, at 18–23. Any amendment of the foregoing claims would be futile, for the reasons set forth in the FCR and the district judge’s order. *See, e.g., Coleman v. Bank of N.Y. Mellon*, No. 3:12–CV–4783–M–BH, 2015 WL 898860, at *4 (N.D. Tex. Mar. 3, 2015) (finding that plaintiff’s proposed amendment of claims the court had previously dismissed with prejudice would be futile).

For the foregoing reasons, the Court **DENIES** without prejudice Pickett’s Motion to Amend. Pickett shall have **twenty-one days** from the date of this Order to file any motion to amend her Complaint that complies with the foregoing analysis. The Court admonishes Pickett that should she decline to file a motion to amend within twenty-one days, this case will proceed on the surviving claims in her original Complaint.

SO ORDERED.

Dated: October 25, 2021.



D. GORDON BRYANT, JR.
UNITED STATES MAGISTRATE JUDGE