IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Sean DeCrane Plaintiff, vs. Edward J. Eckart, Jr., *et al.* Defendants.	Case No. 1:16-cv-02647 Judge Christopher A. Boyko Magistrate Judge William H. Baughman, Jr.

PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Plaintiff Sean DeCrane respectfully moves that the Court grant him leave to file the Third Amended Complaint attached as Exhibit 1. (A tracked-changes version is attached as Exhibit 2.)

MEMORANDUM IN SUPPORT

I. Introduction

Based on information obtained in discovery, DeCrane's proposed third amended complaint adds two paragraphs of factual allegations and two claims challenging current and unconstitutional City of Cleveland policies ("Speech Policies") that restrict free speech on matters of public concern by Division of Fire employees. Rather than filing a separate action (which he may also do), DeCrane seeks leave to amend because the issues are inextricably intertwined with those presented by his existing factual allegations, and there is no reason to burden this Court or delay adjudication of his claims while the action is reassigned to this Court as a related case. The City will suffer no prejudice by defending them now, rather than after they are related back to this Court, but they cause DeCrane ongoing and irreparable harm.

II. Factual Background

Retired City of Cleveland Division of Fire Battalion Chief Sean DeCrane alleges that Cleveland Assistant Safety Director Edward Eckart—with assistance from Defendants James Votypka and Christopher Chumita—repeatedly retaliated against DeCrane based on Eckart's mistaken belief that DeCrane disclosed to a reporter that previous fire chief Darryl McGinnis lacked the required continuing education to maintain his professional certification.[1] DeCrane sought leave to amend to add an additional state-law claim against the individual defendants on May 18, 2017 (Dkt. No. 15), which this Court granted on February 16, 2018 (Dkt. No. 45).

Meanwhile, the parties conducted discovery. The City produced the Speech Policies that DeCrane requests leave to challenge, and the City's deponents revealed that these policies further develop the factual background to his pending claims. The policies prohibit firefighters from sharing information about the Division of Fire with reporters, or disclosing information purportedly harmful to their superiors or City employees. *See* Ex. 1 at ¶¶ 95–96; *see also* Exs. 3–5.

The City promulgated the Speech Policies shortly after the leaks for which DeCrane was wrongfully punished became public. Indeed, the regulation prohibiting firefighters from criticizing their superiors to the press was issued by former chief Patrick Kelly in a General Order soon after the McGinnis information was "leaked"; shortly thereafter, Kelly received a promised promotion (over DeCrane) to Fire Chief.

No additional discovery is necessary to adjudicate the claims DeCrane proposes to add, because he challenges the Speech Policies' constitutionality on their face. They present a straightforward question of law for the Court, as they replicate restrictions this Court declared

[1] Pl.'s Second Am. Compl. (ECF # 46).

unconstitutional 20 years ago, on the municipal *defendants'* motion for summary judgment in another First Amendment case brought by a veteran firefighter driven from his Division by sham charges.[2]

DeCrane was subjected to the Speech Policies' restrictions, and they continue to harm his constitutionally protected interests in receiving speech from willing speakers. By purporting to prohibit City employees from speaking to the press, or sharing anything harmful with him, or information that their superiors (like the Defendants here) might deem inappropriate or offensive, they chill potential witnesses still employed by the City against providing fulsome testimony.

The City's Rule 30(b)(6) designee confirmed the absolute prohibitions the Speech Policies continue to impose, and their chilling effect is not only presumed as a matter of law, but was confirmed by Defendants themselves—who affirmed that sharing information that could reflect negatively on the Division of Fire violated its regulations, and most troublingly, in the deposition of a material witness, Patrick Corrigan. Corrigan was brought up on sham charges alongside DeCrane, but remains a City employee, and interrupted his own deposition testimony to ask the City's outside lawyers to promise on the record that the City would not retaliate against him for the testimony he would provide. He repeatedly conditioned his answers to deposition testimony in conformity with these policies, clarifying that he intended no disrespect to superior officers or disagreement with their policy decisions, and reiterated his desire to remain employed.[3]

By purporting to prohibit the City firefighters with whom he served to share information about the Division of Fire, the Speech Policies also continue to harm DeCrane's right to receive speech from willing speakers in his capacities as a prominent international expert, speaker, and consultant on fire safety, a former comrade, and a concerned citizen.

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[2] *Spain v. City of Mansfield*, 915 F. Supp. 919, 924 (N.D. Ohio 1996).

[3] Every employee called to testify in a case like this must wrestle with these questions as a matter of conscience, but the First Amendment prohibits cities from maintaining an overt threat of official retribution against them for providing harmful testimony.

Most important, the Speech Policies continue to work irreparable harm to Cleveland residents, like DeCrane's family, who rely on the Division to keep them safe, and on the City's firefighters to inform the press if vital fire-safety services are compromised.

Before he was driven from the Division, DeCrane's family and Cleveland residents could—and did—rely on him to raise concerns about issues of public concern internally, as he did when he learned that the City's Fire Chief was unqualified to be a firefighter. Now they must rely on the next DeCrane to disregard the example the City made of him, and provide uncensored expertise and candid criticism where official decisions are wrong and potentially dangerous to the public.

DeCrane therefore respectfully requests that this Court grant him leave to amend his complaint, add two purely legal claims to this action, and deem the Third Amended Complaint filed as the date of this motion for leave,[4] so that his motion for summary judgment and motion for permanent injunction—which he intends to file by the March 2, 2018 dispositive-motion deadline—may be adjudicated without unnecessary delay. Amending for this purpose is proper and, given that leave should be freely granted, DeCrane respectfully requests that the Court grant him leave to file his Third Amended Complaint.

[4] *See, e.g., Scott Hutchison Enterprises, Inc. v. Rhodes, Inc.*, No. C-1-01-776, 2005 WL 2000661, at *6 (S.D. Ohio Aug. 18, 2005) ("[T]he Court finds that it is appropriate to deem the claims filed as of the date plaintiffs filed with the Court their motion for leave to file the proposed second amended complaint, to which the proposed second amended complaint was attached."); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 8223066, at *3 (S.D. Ohio Mar. 17, 2016) ("As a party has no control over when a court renders its decision regarding the proposed amended complaint, the submission of a motion for leave to amend, properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments, tolls the statute of limitations, even though technically the amended complaint will not be filed until the court rules on the motion.") (*quoting Moore v. Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993)); *Pund v. City of Bedford*, 2017 WL 3219710, at *3 (N.D. Ohio July 28, 2017) (same); *see also Mayes v. AT&T Info. Sys., Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (citing appellate and district-court cases); *Pattiz v. Schwartz*, 386 F.3d 300, 302–03 (8th Cir. 1968); *Sheets v. Dziabis*, 738 F. Supp. 307, 313 (N.D. Ind. 1990).

III. Law and argument

A. Standard

A party may, without leave, amend its pleading once either within 21 days of serving it or after a responsive pleading.[5] After that, a party "may amend its pleading only with the opposing party's consent or the court's leave."[6] The court must "freely give leave when justice so requires."[7]

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."[8] "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.'"[9]

B. The Court should grant DeCrane's motion for leave to amend, rather than require him to file a new lawsuit, because he can demonstrate that the City's Speech Policies are facially unconstitutional.

DeCrane seeks to add two First Amendment claims challenging the City's Speech policies. No additional discovery is needed, because his claims assert facial challenges, and they arise from the same set of facts DeCrane pleaded in his pending Complaint. He has learned, and alleges in his proposed Third Amended Complaint, that the City imposed the policies in response to the very actions that form the basis for his pending claims. *See* Ex. 1 at ¶¶ 95–96 & Claims 5 & 6.

None of the justifications to deny leave are present here. Defendants will not be prejudiced by this amendment, because DeCrane could simply proceed in a separate action. And Defendants

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[5] Fed. R. Civ. P. 15(a)(1).

[6] Fed. R. Civ. P. 15(a)(2).

[7] *Id.*

[8] *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[9] *Id.*

know of the discovery production resulting in the new claims. Indeed, they promulgated and produced the Speech Policies, and clearly established precedent has been in plain sight for 20 years. Defendants have already obtained leave for additional time to respond to a new cause of action (Dkt. No. 47), even though they had over seven months' notice of the claims,[10] which (unlike the proposed claims here) will involve disputes over facts, rather than the plain language of the policies attached to this motion, which supply the only (and undisputed) facts necessary for judgment.

If the City has difficulty articulating a concise defense of policies to which it has subjected its employees for over four years, and affecting the flow of information upon which DeCrane relied in in this litigation, DeCrane will not oppose a reasonable extension of the City's opposition deadline to his motion, and will not object to any request for leave to file a contemporaneous cross-motion for summary judgment.

This amendment would only remove the need to unnecessarily expend judicial resources and delay adjudication of claims that would be related to this Court. And granting DeCrane leave to amend serves both the interests of justice and an important public interest. Facial challenges exist to permit restrictions on speech to be challenged even if they are not applied, because the implied threat they convey chills protected speech. As the Supreme Court affirmed, in a case brought by the very publication to which DeCrane supposedly leaked information about the Division of Fire, the "difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as-applied'" requires that "courts must entertain an immediate facial attack" if an ongoing regulation risks creating "self-censorship by speakers in order to avoid being denied a license to speak."[11]

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[10] *Moore*, 999 F.2d at 1131.

[11] *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988); *see also Epona v. Cty. of Ventura*, 876 F.3d 1214, 1220 (9th Cir. 2017) (reversing dismissal of facial challenge to prior restraint because parties with business interests affected by unconstitutional restrictions on third parties have standing to challenge them).

IV. Conclusion

If the Court does not grant leave to amend, DeCrane and perhaps other affected individuals will proceed by separate action. But he respectfully submits that the interests undergirding the rule requiring that leave to amend be freely granted are served here, and requests leave to file his Third Amended Complaint.[12]

Respectfully submitted,

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[12] Patrick Kelly is not currently a defendant in this action, but in light of the City's recent attempts to obtain new and contrary testimony from him, and his role in promulgating the Speech Policies, he may also be an appropriate defendant in connection with DeCrane's pending claims, his proposed claims, and other as-yet-unpled claims based on newly discovered facts. Should his most recent declaration prove—as appears to be the case—that he has altered or perjured his testimony, DeCrane reserves his right to supplement his Complaint and seek relief at an appropriate juncture in this case, or, if necessary, by separate action. He does not do so on in this motion, and will respond separately to Kelly's sworn statements provided with Defendants' recent motion to disqualify.

CERTIFICATE OF SERVICE

I certify that the above document was filed on February 22, 2018 using the ECF system, which will send notification to all counsel of record.

/s/ Patrick Kabat
One of the attorneys for Plaintiff Sean DeCrane