IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

CATHY SELLARS, CLAUDIA LOPEZ, and LESLIE FORTUNE, on behalf of themselves and all others similarly situated, Plaintiffs, vs. CRST EXPEDITED, INC., Defendant.	Case No. 15-CV-117-LTS-KEM **ORDER**

Plaintiffs move to amend their complaint (Doc. 263) to substitute named Plaintiffs in the wake of an Eighth Circuit decision reviving their class claims in part (but not the claims of current named Plaintiffs). Defendant resists. Doc. 266. I **grant** the motion to amend (Doc. 263).

I. BACKGROUND

This case progressed to the summary-judgment stage, and the district court granted summary judgment to Defendant CRST Expedited, Inc., a trucking company, on all claims. Docs. 204, 251. On appeal, the Eighth Circuit largely affirmed, but it revived the retaliation claim in part. Doc. 256. Thus, in providing background, I focus on that claim.

In March 2017, the court certified a class of women who had worked as truck drivers for CRST after October 12, 2013, and who had "been subjected to retaliation based on sex as a result of CRST requiring them to exit the truck in response to their complaints of sexual harassment." Doc. 85. Plaintiffs' claim was based on CRST's policy that when a woman complained her co-driver had sexually harassed her, the

woman had to get off the truck, leaving the harasser to continue the trip alone. As CRST paid its drivers by the mile, Plaintiffs alleged this policy essentially resulted in an "unpaid suspension" for women who reported sexual harassment. The court recognized that sometime in the summer of 2015, after Plaintiffs had initiated a lawsuit in California (ultimately dismissed and re-filed here), CRST began providing a flat-rate layover pay to women who complained of sexual harassment.[1] But in certifying the class, the court did not distinguish between those claims that accrued before summer 2015 (like named Plaintiffs') and those that accrued after.

In January 2019, the court granted summary judgment to Defendant on the class retaliation claim. Doc. 204. The court held that for sexual-harassment claims reported after the policy change in July 2015, Plaintiffs could not show an adverse employment action, because Plaintiffs had not offered evidence demonstrating that the layover "pay was consistently less than a driver would have made had she stayed on the truck." *Id.* at 32. The court distinguished claims from before the policy change in July 2015, holding "a reasonable jury could conclude that [CRST's policy] of requiring female drivers who complain[ed] of sexual harassment to exit the truck, and to receive no pay until they could be re-paired with another driver, constitute[d] a materially adverse employment action." *Id.* at 34-35. But the court ultimately held that these pre-2015 Plaintiffs could not prove CRST had a retaliatory motive in removing women from trucks without pay (specifically noting it was not considering evidence of the July 2015 policy change, which could constitute a subsequent remedial measure). *Id.* at 37-41. The court dismissed named Plaintiffs' individual retaliation claims for the same reason in July 2019. Doc. 251.

On appeal, the Eighth Circuit affirmed dismissal of the class retaliation claims before the policy change in July 2015, as well as named Plaintiffs' individual retaliation claims. Doc. 256 at 26. The circuit agreed with the district court that pre-2015 Plaintiffs

[1] Plaintiffs' complaint made no mention of layover pay and alleged that during times that women were not driving, they were not paid. Doc. 2 ¶ 33.

could not prove retaliatory intent through either direct evidence or the *McDonnell Douglas* burden-shifting framework. *Id.* at 13-15. But the Eighth Circuit held that because CRST did not inform drivers of the layover-pay policy change, "the post-2015 class members were subject to the same adverse employment action as that experienced by the pre-2015 class members," as they would still "expect to experience a net decrease in pay after complaining." *Id.* at 16. The court declined to address "whether direct or circumstantial evidence establishes that CRST took this adverse employment action in retaliation for the post-2015 class members' Title VII-protected activity," leaving it for the district court to decide in the first instance. *Id.* at 17. The court also noted that since it was affirming dismissal of named Plaintiffs' claims, a question existed "on remand whether the surviving class members have a class representative who meets the requirements of Federal Rule of Civil Procedure 23(a)." *Id.*

Now, on remand, Plaintiffs move to amend their complaint to add named Plaintiffs to represent the remaining post-2015 class members. Doc. 263. Defendant resists. Doc. 266. Plaintiffs filed a reply. Doc. 269.

II. DISCUSSION

Under Federal Rule of Civil Procedure 15(a)(2), a party may amend a pleading prior to trial with leave of court. Allowing amendment of pleadings would be improper if the motion to amend involves "undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment."[2] "The court should freely give leave [to amend] when justice so requires."[3]

In addition, because the deadline to amend the complaint and add parties established by the scheduling order expired in June 2016 (Doc. 12), Plaintiffs must demonstrate "good

[2] ***Popoalii v. Correctional Medical Services***, 512 F.3d 488, 497 (8th Cir. 2009).

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

cause" to modify the schedule under Federal Rule of Civil Procedure 16(b)(4).[4] Some district courts in the Eighth Circuit have suggested that a party must also demonstrate excusable neglect to amend a complaint after the deadline for amendment has expired, relying on Federal Rule of Civil Procedure 6(b)(1)(B), which provides "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect."[5]

"The primary measure of good cause is the movant's diligence in attempting to meet the deadline"[6] "Good cause may be shown by pointing to a change in the law, newly discovered facts, or another significant changed circumstance that requires amendment of a party's pleading."[7] A court may also consider prejudice to the nonmoving party caused by modification of the scheduling order, but this factor will generally not be considered if the moving party has not been diligent in meeting the scheduling-order deadlines.[8] Somewhat similarly, when analyzing excusable neglect, the court considers prejudice, the length of delay, the reason for the delay, and whether the movant acted in good faith.[9]

---

[4] *See* ***Sherman v. Winco Fireworks, Inc.***, 532 F.3d 709, 16 (8th Cir. 2008) (holding that a party must demonstrate good cause under Rule 16, in addition to the requirements of Rule 15(a), when moving to amend a pleading after the deadline set by the scheduling order has expired).

[5] *See* ***Younie v. City of Hartley***, No. C14-4090-CJW, 2016 WL 2864442, at *3 (N.D. Iowa May 13, 2016); ***BCD Farms, Inc. v. Certified Angus Beef, LLC***, No. 8:05CV25, 2007 WL 2344814, at *3 (D. Neb. Aug. 14, 2007); *but see* ***Shank v. Carleton Coll.***, 329 F.R.D. 610, 614 n.2 (D. Minn. 2019); *cf.* ***Sherman***, 532 F.3d at 716-17 (holding that Rule 16 good-cause standard governed amendment of pleadings after expiration of scheduling-order deadline, not Rule 15 standard; not addressing Rule 6 and excusable neglect).

[6] ***Ellingsworth v. Vermeer Mfg. Co.***, 949 F.3d 1097, 1100 (8th Cir. 2020) (quoting ***Albright v. Mountain Home Sch. Dist.***, 926 F.3d 942, 951 (8th Cir. 2019)).

[7] ***Id.*** at 1100.

[8] ***Kmak v. Am. Century Companies, Inc.***, 873 F.3d 1030, 1034 (8th Cir. 2017).

[9] ***Younie***, 2016 WL 2864442, at *3; ***BCD Farms***, 2007 WL 2344814, at *3.

CRST also notes that some courts have analyzed whether to allow substitution of named plaintiffs under Rule 24, governing intervention.[10]

> (1) *In General*. On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact. . . .
>
> (3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.[11]

The court considers the "totality of the circumstances" in determining whether intervention under Rule 24 is timely, including:

> (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties.[12]

Thus, under whatever rule the court applies, the considerations are largely the same.

CRST argues that amendment would be futile, as the court has already determined Plaintiffs cannot prove retaliatory intent. The district court and the Eighth Circuit both determined that pre-2015 Plaintiffs could not prove retaliatory intent, but they did not address post-2015 Plaintiffs' claims. While I agree with CRST that it seems unlikely the analysis would differ much (and they may be entitled to summary judgment on this basis for the post-2015 Plaintiffs' claims), CRST overstates the court's prior rulings. If the issue

---

[10] *See* ***Randall v. Rolls-Royce Corp.***, 637 F.3d 818, 826-27 (7th Cir. 2011) (also citing Fed. R. Civ. P. 23(d)(1)(B)(iii) ("In conducting [a class] action, the court may issue orders that . . . require—to protect class members and fairly conduct the action—giving appropriate notice to . . . class members of . . . the members' opportunity to . . . come into the action")); ***Chambers v. N. Am. Co. for Life & Health Ins.***, No. 4:11-CV00579JAJCFB, 2016 WL 7427333, at *5-6 (S.D. Iowa June 13, 2016).

[11] **Fed. R. Civ. P. 24(b)**.

[12] ***Chambers v. N. Am. Co. for Life & Health Ins.***, No. 4:11-cv-00579-JAJ-CFB, 2016 WL 7427333, at *5 (S.D. Iowa June 13, 2016) (quoting ***ACLU of Minn. v. Tarek ibn Ziyad Academy***, 643 F.3d 1088, 1094 (8th Cir. 2011)).

were as obvious as CRST contends, the Eighth Circuit would have held the post-2015 Plaintiffs, like the pre-2015 Plaintiffs, could not prove retaliatory intent and affirmed dismissal of the action. Instead, the Eighth Circuit remanded the case for the district court to decide the issue in the first instance. Cognizant of the limits on magistrate-judge jurisdiction, I do not find that the court's prior rulings definitively show the futility of the post-2015 Plaintiffs' claims. Accordingly, amendment to add named Plaintiffs to represent the post-2015 Plaintiffs would not be futile.

CRST also argues that Plaintiffs were not diligent in seeking amendment and therefore cannot satisfy the good-cause standard. CRST notes that Plaintiffs have known about the 2015 policy change since at least July 2016. In addition, Plaintiffs acknowledged the differences between the pre-2015 and post-2015 class members in their summary-judgment briefing in July 2018, and they did not move for amendment after the court's summary-judgment ruling on the class claims in January 2019. Docs. 187, 204.

I do not find Plaintiffs could have moved for amendment after the summary-judgment ruling, as at that point, the class claims had been dismissed. Thus, there was no need to add named Plaintiffs to represent the post-2015 class members. And although Plaintiffs could have moved to amend upon learning of the policy change or during summary-judgment briefing, at that point, they did not know that the court would essentially divide the class into subclasses, nor that the Eighth Circuit would affirm dismissal of the named Plaintiffs' claims while the post-2015 class members' claims survived, leaving them without a class representative. As Plaintiffs note, *neither* party moved to divide the class into subclasses at any point, and the court's certification ruling suggests Plaintiffs' removal from the truck (which happened to both the pre-2015 and post-2015 class members) constituted the adverse employment action. Plaintiffs acted with diligence in moving to amend after the Eighth Circuit's opinion revived the post-2015 class members' claims, while affirming dismissal of the pre-2015 class members' claims (including those of named Plaintiffs). There is no evidence that Plaintiffs acted in anything other than good faith.

CRST argues that it would suffer prejudice should the court allow amendment. CRST notes that it would need additional discovery on the new named Plaintiffs, causing delay. First, as CRST argues in support of its futility argument, whether the post-2015 class members can prove retaliatory intent is ripe for summary-judgment review. The parties can brief the summary-judgment issue without conducting additional discovery, which would only become necessary in the event the court allows the claim to proceed to trial.

In addition, the class has already been certified. As Plaintiffs note, "[w]hen the district court certifies the propriety of a class action, the class of unnamed persons described in the certification acquires a legal status separate from the interest asserted by the named plaintiff."[13] Thus, the Eighth Circuit has recognized that "substitution of plaintiffs is often appropriate when a class representative's claim becomes moot after the class is certified."[14] Without substitution, the likely remedy would be to dismiss the post-2015 class members' claims without prejudice, allowing them to refile the claims with new representatives—resulting in a waste of the parties' and court's work on this case over the last seven years.[15] I do not find that CRST would be prejudiced by Plaintiffs' late amendment to add new class representatives.

In sum, I find that Plaintiffs had good reasons for their late amendment to add new class representatives, and they acted promptly once the district court and Eighth Circuit

---

[13] ***Bishop v. Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n***, 686 F.2d 1278, 1285 (8th Cir. 1982) (cleaned up).

[14] ***Oetting v. Norton***, 795 F.3d 886, 892 (8th Cir. 2015) (citing Supreme Court case in which "a statute enacted after the district court's grant of class action relief mooted the named plaintiffs' claims, and other regulatory changes 'fragmented' the 'live' claims of unnamed members of the certified class," and the Court "remanded 'for . . . substitution of class representatives with live claims'" (emphasis omitted)).

[15] *See* ***Powell v. Nat'l Football League***, 773 F. Supp. 1250, 1255 (D. Minn. 1991) (holding that when court dismissed claims of named class representatives, and "[n]o new class representatives have emerged since that order," "dismissal without prejudice [wa]s warranted").

essentially divided the (already certified) class into subclasses. As amendment would cause minimal delay and CRST would not be prejudiced, I grant Plaintiffs leave to file the amended complaint adding additional named Plaintiffs to represent the post-2015 class members.

III. CONCLUSION

The court **grants** Plaintiffs' motion for leave to file a first amended complaint (Doc. 263), and directs Plaintiffs to file the first amended complaint attached as an exhibit to their motion (without the "proposed" label in the caption) (Doc. 263-2) by **February 8, 2022**.

SO ORDERED on February 1, 2022.

Kelly K.E. Mahoney
Chief United States Magistrate Judge
Northern District of Iowa