

2022 WL 2824661

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United States District Court, W.D. Kentucky,
Louisville Division.

EMW WOMEN'S SURGICAL CENTER, P.S.C. and
Ernest Marshall, M.D., Plaintiffs,

v.

SECRETARY OF KENTUCKY'S CABINET FOR
HEALTH AND FAMILY SERVICES et al.,
Defendants.

Civil Action No. 3:19-cv-178-DJH-RSE

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Signed April 21, 2022

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Attorneys and Law Firms

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Catherine E. York, Wesley W. Duke, Kentucky Cabinet for Health and Family Services, Frankfort, KY, for Defendant Eric Friedlander.

ORDER

David J. Hale, Judge

*1 Plaintiffs EMW Women's Surgical Center, P.S.C. and Ernest Marshall, M.D. move for leave to file a supplemental complaint to challenge the constitutionality of House Bill 3, a new Kentucky law restricting abortion. (Docket No. 81) Plaintiffs also seek imposition of a temporary restraining order and/or preliminary injunction prohibiting enforcement of HB 3. (D.N. 82) Because

expedited consideration of HB 3's constitutionality is already underway in another case before this Court and supplementation is not otherwise in the interest of judicial economy, the Court will deny the motion to supplement, and the motion for temporary restraining order will therefore be denied as moot.

I.

Pursuant to Federal Rule of Civil Procedure 15(d), "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Although "Rule 15 sets a liberal policy in favor of permitting parties to amend their pleadings," *Mattox v. Edelman*, 851 F.3d 583, 592 (6th Cir. 2017), the Court's discretion under 15(d) is broad. Fed. R. Civ. P. 15 advisory committee's note to 1963 amendment. And "[i]n every instance, the exercise of this discretion must be guided by the animating principle behind Rule 15(d), which is 'to make pleadings a means to achieve an orderly and fair administration of justice.'" *Cooper v. Bower*, No. 5:15-CV-P249-TBR, 2017 WL 3389521, at *1, 2017 U.S. Dist. LEXIS 122981, at *4 (W.D. Ky. Aug. 3, 2017) (quoting *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 227, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964)). The purpose of a supplemental pleading "is to bring the case 'up to date' by 'set[ting] forth new facts that have occurred since the filing of the original pleading and that affect the controversy and the relief sought.'" *El-Khalil v. Usen*, No. 21-1140, 2021 WL 4621828 at *4, 2021 U.S. App. LEXIS 30186 at *10 (6th Cir. Oct. 7, 2021) (alteration in original) (quoting *Weisbord v. Mich. State Univ.*, 495 F. Supp. 1347, 1351 (W.D. Mich. 1980)).

As an initial matter, it is not apparent that enactment of HB 3 "affect[s] the controversy and the relief sought" in this case. This action was filed in 2019 to challenge two abortion laws enacted that year: House Bill 5, which criminalized abortion performed with awareness that the patient sought the abortion on the basis of disability, sex, race, color, or national origin of the embryo or fetus, and Senate Bill 9, which criminalized abortion performed after detection of a fetal heartbeat. (See D.N. 5-1; D.N. 5-2) Plaintiffs sought a declaratory judgment that HB 5 and SB 9 violated the Fourteenth Amendment, as well as injunctions prohibiting their enforcement. (D.N. 5) The proposed supplemental complaint asserts similar challenges and seeks similar relief as to HB 3, an omnibus law imposing a variety of new restrictions on abortion.¹

(D.N. 81-2) Similarity between claims does not automatically make supplementation appropriate, however, even where the parties and some background facts are the same. *Cf. Hoffman v. Solis*, 636 F.3d 262, 272 (6th Cir. 2011) (citing *Allen v. Reynolds*, 895 F.2d 1412, 1990 U.S. App. LEXIS 2173 at *5 (6th Cir. Feb. 13, 1990)) (finding denial of motion to supplement proper despite causal connection between plaintiff’s original complaint, which “concerned [his employer’s] denying him a promotion allegedly in retaliation for his voicing safety and regulatory concerns,” and his supplemental complaint, which “concerned [the employer’s] punishing him for allegedly violating its recordation policy by taping discussions with [other] employees”; the court noted that the plaintiff was able to assert the latter claims in a separate action).

*2 Nor would supplementation serve the interest of judicial economy in this case. Although “allowing supplemental pleadings before a court already up to speed is often the most efficient course” when new claims arise in a complex case, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016), the undersigned is no more “up to speed” on the issues surrounding HB 3—brand-new legislation unrelated to SB 9 and HB 5 except that all three laws restrict abortion—than any other judge in this district who has previously presided over a case involving abortion legislation. *Cf. Griffin*, 377 U.S. at 226, 84 S.Ct. 1226 (finding supplementation appropriate where supplemental complaint “rel[ie]d in good part on transactions, occurrences, and events which had happened since the action had begun[, b]ut these new transactions were alleged to have occurred as a part of continued, persistent efforts to circumvent” the Court’s earlier ruling in the same case); *Husted*, 837 F.3d at 625 (finding no abuse of discretion in district court’s granting of motion to supplement where “[t]he supplemental complaint revolved around new election laws that affected the terms of a longstanding consent decree [entered in the same case] that resolved an even lengthier dispute”).

Moreover, adding claims arising from HB 3 would unduly complicate the existing litigation, which has only recently resumed following a stay and remains stayed in part. (*See* D.N. 79) Far from “achiev[ing] an orderly and fair administration of justice,” *Griffin*, 377 U.S. at 227, 84 S.Ct. 1226, the requested supplementation would instead

split this case into three tracks: on one, the Court will soon decide whether the temporary restraining order previously entered should remain in effect as to HB 5; another (Plaintiffs’ challenge to SB 9) is on hold pending the Supreme Court’s resolution of *Dobbs v. Jackson Women’s Health*; on the third, the Court would consider whether enforcement of HB 3 should be enjoined. (*See* D.N. 79; D.N. 81-2) The inefficiency of such an approach is underscored by the existence of a separate lawsuit before this Court asserting the same challenges against HB 3 and seeking the same relief as the proposed supplemental complaint; indeed, enforcement of HB 3 has now been temporarily enjoined in that case.² *See Planned Parenthood Great Nw., Haw., Alaska, Ind., & Ky., Inc. v. Cameron*, No. 3:22-cv-00198-RGJ, ECF No. 27 (W.D. Ky. Apr. 21, 2022); *id.*, ECF No. 1 (Apr. 14, 2022). Denial of supplementation thus will not prevent expedited consideration of HB 3’s constitutionality and will promote, rather than hinder, judicial economy. *See Cooper*, 2017 U.S. Dist. LEXIS 122981, at *4 (“[L]eave to supplement may be denied if it would be fairer and more orderly to let the plaintiff raise the new claim(s) in another lawsuit.” (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1229 (11th Cir. 2008))).

II.

*3 For the reasons set forth above, the Court concludes that supplementation is inappropriate under the circumstances presented here. Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

- (1) Plaintiffs’ motion for leave to file a supplemental complaint (D.N. 81) is **DENIED**.
- (2) The motion for temporary restraining order (D.N. 82) is **DENIED** as moot.

All Citations

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Footnotes

¹ For example, HB 3 bans abortion after fifteen weeks (with certain limited exceptions); imposes extensive new reporting requirements; and requires cremation or interment of fetal remains. (*See* D.N. 81-2, 854-60, 871-942)

² Notwithstanding Plaintiffs' assertion that supplementation would avoid "burden[ing] the judicial system and parties with ... a wholly new complaint in a newly initiated case" (D.N. 81-1, PageID # 842), a new case was filed mere hours after the motion to supplement, with the plaintiff there listing the case as related to this one. *See Planned Parenthood Great Nw.*, ECF No. 1-2 (Apr. 14, 2022). Plaintiffs' repeated references to the then-unfiled Planned Parenthood case in their motion for temporary restraining order (*e.g.*, D.N. 82-1, PageID # 953) make clear that the filings were coordinated, though Plaintiffs did not specify the location or filing status of that case. The Court further notes that while Plaintiffs' motion to supplement presumes that "a new complaint challenging [HB 3] ... 'would then [be] transferred to' this Court 'under the related case doctrine,' and could be 'consolidated with the current case' " (D.N. 81-1, PageID # 845 (alteration in original) (citation omitted)), a motion to reassign was filed in *Planned Parenthood Great Northwest* and denied by the presiding judge, who concluded that the challenge to HB 3 was not sufficiently related to the original complaint in this case to warrant reassignment. *See* No. 3:22-cv-00198-RGJ, ECF No. 12 (Apr. 15, 2022).