

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

WILLIAM FRENCH,  
Plaintiff,

vs.

CUMMINS FILTRATION, INC.,  
Defendant.

No. C11-3024-MWB

**ORDER**

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This matter is before the Court on plaintiff’s June 29, 2012, motion (Doc. No. 28) to amend his complaint to add a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (“ADA”). Defendant filed its resistance (Doc. No. 30) on July 13, 2012. Neither party requested oral argument and, in any event, the court finds that oral argument is not necessary. *See* Local Rule 7(c). The court also finds that it is appropriate to rule on the motion without waiting for plaintiff to file a reply. *See* Local Rule 7(g).

***PROCEDURAL HISTORY***

Plaintiff filed this action in the Iowa District Court for Winnebago County on March 25, 2011. The state court petition (Doc. No. 2) contains a single count entitled “Retaliation in Violation of the Iowa Civil Rights Act.” Plaintiff alleges that while employed by defendant, he filed a complaint against defendant with the Iowa Civil Rights Commission (“ICRC”) alleging disability discrimination and retaliation. Petition ¶¶ 6, 13. He further alleges the defendant terminated his employment fifty-

three days after his ICRC complaint was administratively closed. *Id.* ¶ 22. He claims his termination was unlawful under the Iowa Civil Rights Act, Iowa Code chapter 216 (“ICRA”), because his ICRC complaint allegedly was a motivating factor in defendant’s decision. *Id.* ¶ 32.

Defendant removed (Doc. No. 1) this action to this court on May 19, 2011, invoking the court’s diversity jurisdiction under 28 U.S.C. § 1332(a). Defendant filed its answer (Doc. No. 4) on May 25, 2012, generally denying plaintiff’s operative allegations. On August 22, 2011, the court approved and entered the parties’ agreed scheduling order and discovery plan (Doc. No. 11), which included the following relevant deadlines:

Amendment of pleadings:	October 17, 2011
Completion of discovery:	April 16, 2012
Dispositive motions:	May 16, 2012

On September 15, 2012, the Honorable Mark W. Bennett entered a trial management order (Doc. No. 12) setting the jury trial of this matter for October 15, 2012.

No party filed a motion to extend any pretrial deadlines. On May 16, 2012, defendant filed a timely motion for summary judgment (Doc. No. 21). In its supporting brief (Doc. No. 21-1), defendant asserts the appropriate legal analysis for ICRA retaliation claims is the *McDonnell Douglas*<sup>1</sup> analysis that applies to cases brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (“Title VII”). *See* Brief in Support of Motion for Summary Judgment at 3. Using that analysis, defendant argues plaintiff’s ICRA claim fails as a matter of law. *Id.* at 4-15.

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<sup>1</sup>*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Plaintiff filed his resistance (Doc. No. 26) to the motion for summary judgment on June 29, 2012. Plaintiff argues, *inter alia*, that the legal standards applicable to his ICRA claim are different than those that apply to Title VII claims. *See* Brief in Resistance to Motion for Summary Judgment at 9-12. Plaintiff contends there are genuine issues of material fact precluding entry of summary judgment on his ICRA claim. *Id.* at 28. Defendant's motion for summary judgment is pending as of the date of this order.

Also on June 29, 2012, plaintiff filed his present motion for leave to amend his complaint in order to add a claim for violation of the ADA. That claim, which is Count II of the proposed first amended complaint (Doc. No. 28-2), is entitled "Violation of the ADA Disability Retaliation." The allegations of the proposed new claim do not describe a retaliation claim that simply mirrors plaintiff's existing ICRA claim. Instead, and in addition to alleging retaliation, plaintiff alleges:

38. Plaintiff's disability or perceived disability was a motivating factor in the retaliation against him.

39. Plaintiff's disability or perceived disability was the motivating factor in Defendants' termination of him.

Thus, while his existing ICRA claim alleges termination in retaliation for filing a civil rights complaint, plaintiff's proposed new ADA claim also alleges *discriminatory* termination; *i.e.*, termination based on his "disability or perceived disability." Defendant resists plaintiff's motion for leave to amend on grounds that it is untimely and that the proposed amendment would cause unfair prejudice to defendant.

## ANALYSIS

Leave to amend a pleading “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). There is, however, no absolute right to amend a pleading. *See, e.g., Hammer v. Osage Beach*, 318 F.3d 832, 844 (8th Cir. 2002); *Becker v. Univ. of Nebraska*, 191 F.3d 904, 908 (8th Cir. 1999); *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). Indeed, balanced against the liberal amendment policy of Rule 15(a) is the court's interest in enforcing its scheduling orders. Here, the court established October 17, 2011, as the deadline for motions to amend pleadings. Scheduling orders may be modified only for “good cause.” Fed. R. Civ. P. 16(b)(4); *see also* Local Rule 16(f) (“The deadlines established by the Rule 16(b) and 26(f) scheduling order and discovery plan will be extended only upon written motion and a showing of good cause.”).

“The interplay between Rule 15(a) and Rule 16(b) is settled in this circuit.” *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 716 (8th Cir. 2008). The liberal amendment standard contained in Rule 15(a) applies when a motion for leave to amend is filed within the time permitted by the court's scheduling order and discovery plan. On the other hand, “[i]f a party files for leave to amend outside of the court's scheduling order, the party must show cause to modify the schedule.” *Popoalii v. Correctional Medical Services*, 512 F.3d 488, 497 (8th Cir. 2008); *see also In re Milk Products Antitrust Litigation*, 195 F.3d 430, 437-38 (8th Cir. 1999) (“If we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure.”) (*quoting Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998)).

Plaintiff filed his motion for leave to amend more than eight months after the deadline set forth in the scheduling order and discovery plan. As such, Rule 15(a) does not apply. Instead, the proposed amendment may be allowed only if plaintiff can establish good cause for the untimely action. In *Sherman*, the Eighth Circuit Court of Appeals explained the Rule 16(b) “good cause” standard as follows:

“The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements.” *Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir. 2006); *see also* Fed.R.Civ.P. 16(b), advisory committee note (1983 Amendment) (“[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension.”). While the prejudice to the nonmovant resulting from modification of the scheduling order may also be a relevant factor, generally, we will not consider prejudice if the movant has not been diligent in meeting the scheduling order's deadlines. *See Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001) (concluding that there was “no need to explore beyond the first criterion, [diligence,] because the record clearly demonstrate[d] that Bradford made only minimal efforts to satisfy the [scheduling order's] requirements”). Our cases reviewing Rule 16(b) rulings focus in the first instance (and usually solely) on the diligence of the party who sought modification of the order. *See, e.g., Rahn*, 464 F.3d at 822 (affirming the district court's denial of Rahn's request for a modification of the scheduling order because the record made clear that Rahn did not act diligently to meet the order's deadlines); *Barstad v. Murray County*, 420 F.3d 880, 883 (8th Cir. 2005) (affirming the district court's denial of leave to amend the Barstads' complaint under Rule 16(b) because the Barstads had eight months to request an amendment of the scheduling order and “knew of the claims they sought to add when they filed the original complaint”); *Freeman v. Busch*, 349 F.3d 582, 589 (8th Cir. 2003) (affirming, under Rule 16(b), the district court's denial of Freeman's motion to amend her complaint because she provided no reasons why the amendment could not have been made earlier or why her motion to amend was filed so late).

*Sherman*, 532 F.3d at 716-17. Under this “good cause” standard, the Eighth Circuit held that leave to add a new defense should have been denied, as such leave was not sought until almost eighteen months after the deadline to amend pleadings had expired. *Id.* at 717-18. This court, in applying *Sherman*, has held that good cause for an untimely amendment under Rule 16(b) “requires a showing that, despite the diligence of the movant, the belated amendment could not reasonably have been offered sooner.” *Transamerica Life Insurance Co. v. Lincoln National Life Insurance Co.*, 590 F. Supp. 2d 1093, 1100 (N.D. Iowa 2008) (citing *Sherman*).

With this standard in mind, the issue is not close in this case. Plaintiff has offered no explanation as to why the belated amendment, which seeks to add a claim under the ADA to this case for the first time, could not reasonably have been offered sooner. In *Sherman*, the Eighth Circuit found “no change in the law, no newly discovered facts, or any other changed circumstances” that made the proposed new “preemption” defense more viable after the deadline for amendments, suggesting that such circumstances, if present, might have constituted “good cause.” *Sherman*, 532 F.3d at 718. The same lack of relevant changed circumstances exists here. Plaintiff has pointed to no change in the law, no newly-discovered facts and no other unforeseen developments that have suddenly made the proposed new ADA claim viable.

Plaintiff contends he “is not changing his claim,” but that is simply incorrect. He seeks to assert a new claim under a federal statute that he elected, for some reason, not to invoke until long after the deadline for amendments to pleadings and after defendant filed a motion for summary judgment on his state law claim. Moreover, as noted above, the proposed amendment includes an allegation that plaintiff’s employment was terminated because of his “disability or perceived disability.” This

allegation fundamentally differs from his existing state law claim, in which plaintiff contends defendant terminated his employment in retaliation for filing a civil rights complaint.

Plaintiff also contends defendant “has essentially tried [the ADA] claim by consent” by relying on federal law to support its motion for summary judgment. The court disagrees. In addressing plaintiff’s ICRA retaliation claim, defendant cited an Eighth Circuit case for the proposition that such claims are analyzed under the same framework used for analyzing Title VII claims. *See* Brief in Support of Motion for Summary Judgment at 3. Defendant then cited various federal cases while making its arguments concerning plaintiff’s ICRA claim. *Id.* at 3-15. A party’s contention that a state law claim should be analyzed consistent with an analogous federal claim is a far cry from consenting to an amendment that adds the analogous federal claim to the lawsuit. The court finds defendant did not introduce plaintiff’s proposed ADA claim into this case simply by relying on federal case law in its analysis of the ICRA claim.

Plaintiff waited until after the close of discovery and after defendant’s filing of a dispositive motion to seek leave to add a new claim with new allegations that would significantly change the scope and nature of this case. Plaintiff has offered no explanation or excuse as to why his proposed new claim could not have been added through a timely motion for leave to amend his pleadings. As such, plaintiff has failed to demonstrate the diligence required to justify an untimely amendment.

When assessing good cause under Rule 16(b), the court need not consider the issue of prejudice to the nonmovant if the movant fails to establish diligence. *Sherman*, 532 F.3d at 717. Nonetheless, the court does find that unfair prejudice would result to the defendant if plaintiff’s motion for leave to amend is granted. This has been a

retaliation case brought under the ICRA since it was filed in March 2011. Discovery has closed and the defendant's dispositive motion is pending. Plaintiff now seeks to change the case materially by adding a claim under federal law and asserting, for the first time, that his discharge was based on his actual or perceived disability. If the court were to grant the amendment, discovery would have to be reopened to allow defendant an opportunity to investigate plaintiff's new theory. This would likely require new depositions of the plaintiff and other fact witnesses. It would also require a new deadline for dispositive motions to give defendant fair opportunity to seek summary judgment on the new claim. And, of course, all of this would require continuance of the current trial date of October 15, 2012.<sup>2</sup> While these prejudicial consequences may be acceptable when the nonmovant causes, or bears some responsibility for, the need for an untimely amendment, such is not the case here.

### ***CONCLUSION***

Plaintiff has not established good cause as required by Federal Rule of Civil Procedure 16(b) to add a new claim to this case long after the deadline for amendments to pleadings and the close of discovery. Plaintiff's motion (Doc. No. 28) for leave to amend complaint is **denied**.

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Moreover, even if the proposed amendment did not change plaintiff's theory of the case by adding discriminatory discharge to his existing retaliatory discharge theory, allowing plaintiff to add a claim under the ADA could drastically affect defendant's potential exposure to punitive damages. *See, e.g., Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (punitive damages available under ADA); *Magnussen v. Casey's Marketing Co.*, 787 F. Supp. 2d 929, 939 n.3 (N.D. Iowa 2011) (comparing ADA and ICRA remedies); *Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503, 515-16 (Iowa 2004) (punitive damages not available under ICRA). Defendant would be unfairly prejudiced by the last-minute addition of a cause of action that includes potential exposure to punitive damages.

**IT IS SO ORDERED.**

**DATED** this 19<sup>th</sup> day of July, 2012.



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**LEONARD T. STRAND  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT**