UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN; TOM TEN EYCK, Guardian of Morgan Ten Eyck; and MICHELLE TEN EYCK, Guardian of Morgan Ten Eyck, Plaintiffs, v. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	4:19-CV-04006-LLP **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO AMEND**

Plaintiffs submit this Reply Memorandum in Support of their Motion to Amend Complaint.

I. PRELIMINARY STATEMENT

The United States of America oppose Plaintiffs' motion arguing that Plaintiffs failed to diligently pursue their proposed claims; the United States would be prejudiced; and the proposed claims would be futile. Defendant's arguments must fail because Plaintiffs immediately sought to amend their complaint after Robert Neuenfeldt testified that he had never been trained pursuant to the BIA Law Enforcement Handbook; Defendant's stated reason of "altering its defense strategy" is not a proper consideration for establishing

prejudice; and Plaintiffs' proposed claims are not "clearly frivolous" and are cognizable under state law. *See Kirlin v. Halverson,* 2008 SD 107, 758 N.W.2d 436. Lastly, the discretionary function exception is a matter for summary judgment and is not properly before the Court. However, caselaw establishes that the discretionary function exception is not applicable in this case. *Gooden v. United States Department of Interior,* 339 F.Supp.2d 1072, 1079 (D.N.D. 2004).

In the case at bar, there has been significant discovery of new additional facts and testimony, which has led to the recognition that additional claims are relevant and material to this litigation and their inclusion is within the interests of justice. The United States cannot demonstrate prejudice and therefore Plaintiffs' motion must be granted.

II. Discussion

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires,' and this mandate is to be heeded." *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982) on reh'g, 710 F.2d 1361 (8th Cir. 1983). The United States Supreme Court has held that leave to amend should be given "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief." *Foman v. Davis*, 83 S. Ct. 227, 230 (1962). "[I]f the court is persuaded that no prejudice will accrue, the amendment should be allowed." *Isakson v. Parris*, 526 N.W.2d 733, 736 (S.D. 1995) (citing 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1487 (1990)).

"Rule 16(b) provides that a Scheduling Order "may be modified only for

good cause and with the judge's consent. Fed. R. Civ. P. Rule 16(b)(4). "The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." *Sherman v. Winco Fireworks, Inc.,* 532 F.3d 709, 716 (8th Cir. 2008). If it is found that the movant has been diligent in meeting the scheduling order's deadlines, prejudice to the nonmovant may also be a relevant factor. *Id.* at 717. Given the timing of Defendant Neuenfeldt's deposition, Plaintiffs could not reasonable have met the deadlines in the Scheduling Order to file an amended complaint. Plaintiffs' diligence in attempting to meet the order's requirements, combined with the lack of prejudice by the Defendant, demonstrates good cause.

a. Plaintiffs could not assert claims of negligent training supervision, and retention without the testimony of Robert Neuenfeldt.

Defendant claims that even if facts supporting Plaintiffs' new claims only came to light during the deposition of Neuenfeldt, "it would be because Plaintiffs failed to develop these claims in discovery." (Defendant's Response, Doc. 65 at p. 9.) It must be noted that the discovery deadline has not been met, hence the fact that the parties were, and still are conducting discovery and scheduling depositions. Defendant also attempts to fault Plaintiffs for not attempting to "depose any BIA employee with knowledge of the 638 Contract or any FSST employee who performed services under the contract." (*Id.* at p. 10.)

First, Defendant's assertion is simply false. Plaintiffs have been attempting to schedule the deposition of Brock Baker since January of 2021. (*See* correspondence dated January 20, 2021, attached as Ex. 15.) Mr. Baker

was a BIA employee who conducted an investigation regarding the events on June 17 and 18 of 2017. This information only came to light when Plaintiffs received discovery responses from the United States on December 30, 2020. (Affidavit of MSB, at ¶2.)

Secondly, it is absurd to allege that Plaintiffs "had notice and knowledge of these potential claims, but were not diligent in developing or pursuing them." Defendant's Response, (Doc. 65, at p. 10.) No reasonable person would assume that a federal law enforcement officer failed to receive any training whatsoever. The only way such a fact would come to light is through alarming testimony from that officer. Neuenfeldt's numerous admissions that he was entirely unfamiliar with the dictates of the BIA Handbook, as he had never seen the document, could not be assumed and certainly could not be alleged without some factual basis. As stated in Plaintiffs' Memorandum, Neuenfeldt's deposition was taken on Wednesday, February 24, 2021. (Doc. 57, at p. 3.) The following Monday on March 1, 2021, counsel was notified of Plaintiffs' intent to amend. (Doc 63-1.) There was no other way for Plaintiffs to gather such startling and damning information other than from Neuenfeldt's testimony. Advising opposing counsel of Plaintiffs' intent to amend less than three business days after learning of the factual basis in support of claims for negligent supervision, training and retention constitutes utmost diligence.

Defendant's entire argument rests on the fact that Plaintiffs "had access to former Chief of Police, Nicholas Cottier—the very person who hired and supervised Neuenfeldt." (Doc. 65, at p. 10.) First, it is disputed who actually

hired Neuenfeldt, and Neuenfeldt testified that he himself was the supervisor. (*See* Neuenfeldt Dep. 60:2-8, attached as Ex. 16.) Defendant also assumes that Mr. Cottier knew of the lack of training and that he would volunteer such information. Further, at the time of this incident, Cottier was an officer under acting Chief Neuenfeldt.

Lastly, Defendant argues that Plaintiffs deliberately postponed Neuenfeldt's deposition as a safety measure. (*See* Doc. 65, at 11.) The Court needs to be made aware that Defendant Neuenfeldt's deposition date was dictated by his tardy discovery disclosures. Plaintiff served discovery on Neunfeldt on November 2, 2020, and did not receive a response until the day before his deposition on February 23, 2021. (Affidavit of MSB ¶2.) Plaintiffs were unable to conduct the deposition prior to receiving Neuenfledt's responses to discovery. If Neuenfeldt's deposition would have taken place at the very start of discovery, this motion would have followed in the same course.

While Defendant claims that Plaintiffs should have a "magic ball" to anticipate all claims prior to the completion of discovery, that is simply not required by law. Defendant's claim that Plaintiffs were not diligent in pursuing these claims must fail.

b. The United States' claim of having to change "defense litigation tactics" is not a lawful reason for prejudice.

The law clearly establishes that delay alone is not enough to warrant denial of permission to amend; prejudice to the nonmovant must also be shown. *Doe v. Cassel,* 403 F.3d 986, 991 (8th Cir. 2005). "The [prejudice] inquiry should center on whether the nonmoving party has a fair opportunity

to litigate the new issue and to offer additional evidence if the case will be tried on a different point. *Prairie Lakes Health Care Sys., Inc., v. Wookey*, 1998 S.D. 99, ¶ 29, 583 N.W.2d 405, 417 (citing *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 571 (S.D. 1994)). The mere fact that an amendment changes the plaintiff's theory of the case is not a sufficient reason to deny a motion to amend. *Ward Electronics Service, Inc. v. First Commercial Bank*, 819 F.2d 496,497 (4th Cir. 1987). "A plaintiff typically will not be precluded from amending a . . . complaint in order to state a claim on which relief can be granted or from adding a claim to an otherwise proper complaint *simply because that amendment may increase defendant's potential liability*." 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1487 (1990) (emphasis added).

Defendant alleges prejudice because it has to alter its defense strategy. First, altering litigation tactics is not a valid reason to show prejudice. *See Ward Electronics Service, Inc.,* 819 F.2d at 497. If a party was prevented from amending a complaint simply because it would force the defense to change its strategy, the procedural avenue for filing a motion to amend would not even exist. Secondly, Defendant cannot cry foul over any delay when it filed a motion to extend the scheduling order and postpone trial a few weeks prior to Plaintiffs' current motion. (*See* Doc. 47.) Further, Defendant cannot claim any surprise given Plaintiffs' administrative claim, which set for the duty to adequately train, instruct and supervise its employees. However, setting forth a general duty to train, instruct and supervise does not give rise to a factual

basis required to support a claim for negligent training, negligent supervision, and negligent retention. Again, it was not until Defendant Neuenfeldt's testimony that Plaintiffs could in good faith pursue the additional claims for negligent training, supervision, and retention.

Discovery is not completed, there have been no hearings to date, and there have been no dispositive motions. Defendants have not conducted a substantial amount of discovery and have only taken one deposition. There is currently no trial date set for this matter. Defendant cannot in good faith claim it will not have a fair opportunity to answer and litigate Plaintiffs' proposed claims. There is no prejudice.

c. Plaintiffs' claims are not clearly frivolous and therefore not futile.

"[A] motion to amend should be denied on the merits 'only if it asserts clearly frivolous claims or defenses.' " *Becker v. Univ. of Neb. At Omaha,* 191 F.3d 904, 908 (8th Cir. 1999) (citing *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.,* 32 F.3d 1233, 1255 (8th Cir. 1994)). The United States bears the burden of proving that some reason exists to deny leave to amend. *Roberson v. Hayti Police Dep't.,* 241 F.3d 992, 995 (8th Cir. 2001). In deciding whether a proposed amendment should be allowed, "the court should not consider the likelihood of success unless the claim is 'clearly frivolous,' " *Popp Telecom v. American Sharecom, Inc.,* 210 F.3d 928, 944 (8th Cir.200).

Given the unequivocal testimony by Defendant Neuenfeldt regarding his absolute lack of training and supervision, Plaintiffs proposed amendment is not

clearly frivolous. On numerous occasions Neuenfeldt confirmed that he had never seen the BIA Manual:

47:18 Q And did you read the manual that guides tribal laws?

47:19 A No.

47:20 Q Ever seen it?

47:21 A I was not given one.

(Neuenfeldt Dep. 47:18-21, Doc 63-3.);

48:13 Q And whether it's the use of firearms or it's
48:14 high-speed pursuits, if you don't read the requirements of the
48:15 manual, it's almost impossible for you to know them, correct?

48:16 MS. ROCHE: Objection, form.

48:17 THE WITNESS: I was given the law and order
48:18 code manual, *not the BIA manual*, which would be the
48:19 specific tribal manual.

(Neuenfeldt Dep. 48:13-19 (emphasis added), Doc 63-3.);

44:24 Q Now, I want to ask you, you start a job and you're
44:25 driving a police vehicle and you have the opportunity or might
45:1 have the opportunity to chase somebody with your police
45:2 vehicle, yet you did not look at any policy whatsoever
45:3 regarding pursuits; is that correct?

45:4 MS. ROCHE: Objection, form, argumentative.

45:5 THE WITNESS: Correct.

45:6 BY MR. STEVEN BEARDSLEY:
45:7 Q And that's true when you went to the tribe too. You
45:8 didn't look at any pursuit policy for the tribe either, did
45:9 you?

45:10 A Correct.

45:11 Q So when you went to Flandreau city police, did you
45:12 look at any manual or policy or guideline regarding pursuits
45:13 for the city of Flandreau?

45:14 A No.

(Neuenfeldt Dep. 44:24-45:14, Doc. 63-3.)

Therefore, any argument by Defendant concerning the discretionary function exception, which is only appropriate for summary judgment, should not be considered at this juncture. "Whether or not a claim would survive a motion for summary judgment is not the proper standard to be applied at the motion to amend stage...." *Aberle v. Polaris Industries, Inc.,* 2008 WL 11505997, at *1 (D.S.D. 2008). "Clearly frivolous" has been defined as a claim with "no objective factual support for the claim and therefore no reasonable chance of success." *U.S. ex rel Montgomery v. St. Edward Mercy Medical Center,* 2008 WL 110858, at *4, fn. 7 (E.D. Ark. 2008).

South Dakota law recognizes causes of action for negligent training, supervision, and retention. *See Kirlin v. Halverson,* 2008 SD 107, 758 N.W.2d 436. Contrary to Defendant's argument, Plaintiffs have stated a claim under the FTCA that is grounded in state law. Defendant's reliance on *Sorace v. United States* is misplaced. 788 F.3d 758 (8th Cir. 2015). *Sorace* involved a FTCA cause of action based upon a drunk-driving accident on the Rosebud Sioux Indian Reservation in South Dakota. Plaintiff, Sorace, alleged that the Rosebud Sioux Tribe's Police Department was negligent in failing to locate and arrest the drunk driver prior to the accident. *Id.* at 762. The case involved an affirmative duty to prevent the misconduct of third parties, which is not recognized by South Dakota. *Id.* at 763. For this reason, "the District Court

properly dismissed Sorace's complaint for failure to state a claim for negligence." *Id.* The court indicated that certain items cited by the plaintiff, to include the BIA Handbook, "fail to create a private cause of action." *Id.* at 765. This rule of law is not disputed and is also not applicable to the case at bar.

Contrary to *Sorace,* Plaintiffs proposed claims are grounded in negligence theories which are recognized by South Dakota law. The numerous violations of federal directives do not create a private cause of action, but merely provide a factual basis for Plaintiffs' negligent training, retention, and supervision claims. As such, Defendant's argument should fail.

Further, *Gooden v. United States Department of Interior* is directly on point and supports Plaintiffs' claims. 339 F.Supp.2d 1072, 1079 (D.N.D. 2004). In *Gooden,* the District Court of North Dakota, Northwestern Division, was faced with claims against a BIA officer for excessive force. The lawsuit alleged that Officer Mark Houle assaulted Alan Gooden during a routine traffic stop when he smashed Gooden's index finder with his flashlight, then crushed Gooden's finger with his boot causing it to be severed from the hand. *Id.* at 1074.

Defendants filed a motion for summary judgment on Gooden's negligent hiring, training, and supervision claims based on the discretionary function exception. "The discretionary function exception prohibits any claim against the United State's that is based upon the exercise or performance of, or the failure to exercise or perform, a discretionary function or duty on the part of a

federal agency or an employee of the Government, whether or not the discretion involved is abused." *Id.* at 1075 (citing 28 U.S.C. § 2680(a)). Plaintiff relied on the directives of the BIA Law Enforcement Handbook arguing that Defendants' actions were controlled by regulations or policies and therefore, are non-discretionary. *Id.* at 1078. The court stated that "[t]he BIA Law Enforcement Handbook has an express policy about mandatory use-of-force training, as well as an additional policy about pre-service and in-service training of officers." *Id.* at 1079. As such, the court held "that the discretionary function exception does not apply to the negligent training claim." *Id.*

While it is inappropriate at this stage for this Court to consider whether Plaintiffs' proposed claims would survive summary judgment, *Gooden* supports the conclusion that the discretionary function exception is not appropriate in the case at bar. Further, the BIA Handbook itself explicitly indicates the mandatory nature of its directives. The BIA Handbook requires all personnel to familiarize themselves with the contents of the Handbook:

RESPONSIBILITY OF ALL OJS PERSONNEL

It shall be the duty of all OJS personnel to familiarize themselves with the contents of this Handbook and conduct themselves in accordance with its precepts. Ignorance or misunderstanding of any of the provisions of this Handbook will not be accepted as a defense against disciplinary charges.

(Doc. 58-2, at p.13.) The Handbook shall be the standing orders governing the actions of all personnel:

AUTHORITY

By virtue of the authority vested in me as Deputy Director, Bureau of Indian Affairs, Office of Justice Services, I hereby prescribe and adopt the OJS Law Enforcement Handbook, Third Edition, as the standard operating procedures of the Office of Justice Services. This Handbook shall be the standing orders governing the actions of all personnel of this office and will supersede any former Handbook editions and any current Special Orders.

(*Id.*) The Handbook requires an executed Code of Conduct, which was not completed by Neuenfeldt. (Doc. 58-2, at p. 23.) The Handbook requires an executed Oath of Office, which was not completed by Neuenfeldt. (Doc 58-2, at p. 25.) The Handbook sets forth written directives, which are to be distributed and updated. All personnel in the organization are to receive a copy of the Handbook and are responsible and accountable for complying with the policies, rules, and procedures contained in the Handbook:

VIII-01 OJS HANDBOOK

A. Written directives provide employees with a clear understanding of the constraints and expectations relating to the performance of their duties. The OJS Deputy Bureau Director issues written directives in the OJS Handbook. The Handbook contains General Orders, Uniform and Investigative Orders, Special Operations Orders, Administrative Orders/Support Operations and specific Division Orders that remain in full force and effect until amended or rescinded by the Deputy Bureau Director. These directives establish policies, procedures, and/or rules, which affect the entire organization. They are the most authoritative directives and take precedence over all other internal directives.

B. All personnel in the organization receive a copy of the OJS Handbook. Handbooks are distributed in hard copy or on CD, as appropriate. In addition, the Handbook is strategically located throughout the organization.

C. All OJS personnel are responsible and accountable for complying with the policies, rules, and procedures contained in the Handbook. Personnel are responsible for maintaining the OJS Handbook and any subsequent Special Orders issued to them.

(Doc. 58-2, at p. 37.)

The United States' failure to train Neuenfeldt pursuant to the mandatory directives set forth in the BIA Handbook does not involve any element of discretion or choice. Defendants' conduct is not protected by the discretionary function exception.

Defendant relies on *Colombe v. United Sates*, 2017 WL 2937596 (D.S.D. 2017) and *Uses Many v. United States,* 2019 WL 7629237, (D.S.D. 2019) for the proposition that the BIA Handbook was not mandatory for officers engaging in a high-speed pursuit. (See Doc. 65, at p. 27.) The court in *Uses Many* found that the officers' decision to continue or abandon the pursuit was a discretionary decision. 2019 WL 7629237 at *14. While specific portions of the BIA Handbook may in fact be advisory and contain elements allowing officer discretion, failure to provide the Handbook to Neuenfeldt, failure complete any training pursuant to the Handbook, and failure to obtain the mandatory certifications within the Handbook does not involve an element of choice or discretion. Therefore, the cases of *Colombe* and *Uses Many* did not hold that the United States could escape liability under the discretionary function exception when it was completely derelict in its duty to train federal officers pursuant to the BIA Handbook. Both cases are distinguishable and do not assist the Court with the disposition of the current motion to amend.

Defendant also claims that "Plaintiffs should not be permitted to revive, retool, and develop their abandoned supervisory Bivens claim." (Doc. 65, at p. 16.) This position is interesting given the fact that Plaintiffs have not abandoned anything and discovery is ongoing. In light of Neuenfeldt's

testimony, Plaintiffs' supervisory Bivens claim is viable and will be developed further through appropriate discovery. Defendant's argument should be disregarded.

III. CONCLUSION

Based on the foregoing, Plaintiffs have demonstrated that good cause exists to modify the scheduling order and that the interests of justice require allowing the requested amendment. Further, Defendant United States of America has failed to carry its burden to demonstrate prejudice. As a result, Plaintiffs respectfully request that their Motion to Amend Second Amended Complaint be granted.

Dated this 5th day of May, 2021.

BEARDSLEY, JENSEN & LEE, Prof. L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2021, a true and correct copy of the foregoing has been served on the following by the following means:

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