

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BIG CITY COFFEE, LLC, dba, BIG CITY  
COFFEE & CAFÉ, and SARAH JO  
FENDLEY, an individual,

Plaintiffs,

-vs-

LESLIE WEBB, individually and in her  
official capacity as Vice-President of Student  
Affairs and Enrollment Management; ALICIA  
ESTEY, individually and in her official  
capacity as Vice President for University  
Affairs and Chief of Staff, and FRANCISCO  
SALINAS, individually and in his official  
capacity as Assistant to the Vice-President for  
Equity Initiatives, and DOES 1-20,

Defendants.

Case No. CV01-21-15332

**ORDER (1) DENYING MOTION  
TO AMEND COMPLAINT, (2)  
GRANTING MOTION TO AMEND  
SCHEDULING ORDER, IN PART,  
AND (3) ALLOWING  
ADDITIONAL BRIEFING ON THE  
ISSUE OF PUNITIVE DAMAGES**

Before the Court are three motions: (1) Plaintiffs' Motion to Amend the Scheduling Order ("Motion to Amend the Scheduling Order"); (2) Plaintiffs' Motion Amend Complaint to Join Marlene Tromp as a Defendant ("Motion to Amend Complaint"); and (3) Plaintiffs' Motion for Comfort Order Regarding Punitive Damages, along with a memorandum in support ("Memorandum in Support") and a supporting declaration, all filed on August 7, 2023. On August 18, 2023, Defendants filed an opposition to Plaintiffs' motions ("Defendants'

Opposition”) along with supporting declarations. Also on August 18, 2023, Plaintiffs filed a reply memorandum (“Reply Memorandum”) with another supporting declaration. The Court held a hearing on the motions on August 21, 2023.

For the reasons set forth below, the Motion to Amend Scheduling Order is granted in part, the Motion to Amend Complaint is denied, and the Court hereby gives Defendants leave to file supplemental briefing within fourteen (14) days addressing whether Plaintiffs are required to comply with Idaho Code § 6-1604 with respect to their section 1983 claims.

### I. BACKGROUND

Plaintiffs seek to add Marlene Tromp as a defendant in this case. Tromp was initially named as a defendant in the Complaint that initiated this case, filed on October 1, 2021. (See Compl. and Demand for Jury Trial filed Oct. 1, 2021.) On April 22, 2022, Tromp was dismissed from this case when the Court granted Defendant’s motion to dismiss filed in this case on October 28, 2021. (See Order Granting in Part and Den. in Part Defs.’ Mot. to Dismiss filed Apr. 22, 2022.) Plaintiffs’ First Amendment violation claim was dismissed against Tromp because Plaintiffs failed to plead sufficient facts to sustain the claim against her. (*Id.* at 14-15.)

Plaintiffs now seek to again add Tromp as a Defendant, asserting their First Amendment violation and procedural due process claims against her. (Mem. in Supp. at 8.) Plaintiffs propose the following additional allegations against Tromp, underlined below:

46. Defendant Tromp participated in at least one IESC meeting in which the IESC’s objections to Big City were discussed. Indeed, Tromp arranged for and attended the September 15, 2020 IESC meeting in which Big City was a major topic of discussion.

47. At that meeting, she was sympathetic to students’ unreasonable and unconstitutional demands related to Big City and other vendors whom the students viewed as objectionable due to their protected speech.

48. Tromp further, at the same meeting, pledged to give a voice to students in campus food services. The meeting minutes indicate that “IESC requests feedback from administrators and folks who IESC can reach out to. Dr. Marlene Tromp will reach out to understand the process so that students’ voices are incorporated.” The minutes further disclose that “Dr. Marlene Tromp supports a process that is transparent and allows opportunities for students’ voices to be included in which vendor we bring in.”

49. The minutes then indicate that the IESC asked “[A]fter we identify the process and receive information, can we meet with Dr. Tromp again to navigate the new process—are you willing/have capacity to follow up with IESC? ***Yes, we might also be able to find others to help you accelerate what you are looking to do.***” (some emphasis in original, some added).

50. Further, Tromp was party to numerous emails in which students expressed opposition to Big City and demanded it be removed from campus.

...

53. IESC was outraged by Fendley’s October 21 post and complained loudly to Defendants. An outraged student emailed the post to several defendants, including Tromp and Webb, on October 22, 2020 at 10:50AM, and demanded that “Big City be held accountable.”

54. Previously, on that same morning, Tromp discussed Big City’s social media posting and the student response in Tromp’s class, and then later conferred with Webb regarding the class discussion.

55. One day after Fendley’s post, she was summoned to a meeting with Webb, the then-second highest ranking Administration official, reporting directly to Tromp, and Estey, Vice President for University Affairs and Chief of Staff, and the third highest ranking official at BSU, who also reports directly to Tromp. Tromp instructed Estey, her second in command (and the person who ultimately terminated Plaintiffs) to arrange and attend the meeting (which already was to include Webb).

56. Upon information and belief, Tromp’s reason for sending Estey was for the purposes of terminating the school’s relationship with Big City, or it was at least reasonably foreseeable that the meeting would result in such an outcome. At minimum, Tromp failed to stop a series of actions by Estey, Webb and Salinas, that culminated in deprivations of Plaintiffs’ constitutional rights.

57. The temporal proximity between Tromp’s arranging and participating in the September 15, 2020 IESC meeting, her receipt of the email from the angry student on October 22, 2020 at 10:50AM demanding that “Big City be held

accountable,” her discussion of Big City in her class that same morning, and her instructing Estey, the person who ultimately dismissed Big City from campus, to attend the meeting with Fendley, strongly suggests that Tromp was responsible in whole or part for the termination of Big City from campus.

58. Upon information and belief, Plaintiffs’ expressive conduct was a substantial or motivating factor for Tromp’s adverse actions, and Tromp expressed opposition to Plaintiffs’ speech to others.

...

72. Defendants’ actions immediately after the October meeting further evidence Defendants’ culpability in this matter. Tromp engaged in retaliatory actions and speech prior to and subsequent to the meeting, speaking to, at minimum, Defendants Estey and Webb, the students in Tromp’s class, Mayor Lauren McLean, former Boise Chief of Police Chief Ryan Lee, and members of the media. For example, within minutes of learning the outcome of the meeting from Estey, Tromp called Boise Mayor Lauren McLean, presumably in an attempt to have Holtry and Holland silenced. This temporal proximity further suggests Tromp was intimately involved in Plaintiffs’ removal from campus.

(Mot. to Am. Compl., Ex. B (emphases in original).)

Plaintiffs also ask this Court to amend the scheduling order entered in this case to extend both the discovery deadline and the deadline for joining parties and amending the pleadings.

(Mem. in Supp. at 2-4.) Plaintiffs also ask this Court to enter an order that they are relieved from complying with Idaho Code § 6-1604 because they have filed a section 1983 claim. (*Id.* at 12.)

## II. STANDARD

Whether to grant a motion to amend the pleadings is reviewed for abuse of discretion. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat’l Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991) (citation omitted). To determine if a trial court has abused its discretion, the appellate court considers “[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by

the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (citation omitted).

Scheduling orders may not be modified “except by leave of the court on a showing of good cause.” Idaho R. Civ. P. 16(a)(3). A trial court’s decisions involving the application of a “good cause” standard are discretionary decisions. *Phillips v. E. Idaho Health Servs., Inc.*, 166 Idaho 731, 757, 463 P.3d 365, 391 (2020) (citation omitted). “[A]lleged errors not affecting substantial rights will be disregarded.” *Id.* (citations omitted). “Good cause” in the context of amending a scheduling order under Rule 16 does not require sworn testimony by affidavit. *Id.*

### **III. DISCUSSION**

A motion to amend a complaint prior to trial is governed by Idaho Rule of Civil Procedure 15(a), which states:

(a) Amendments Before Trial.

(1) Amending as a Matter of Right. A party may amend its pleading once as a matter of right within:

- (A) 21 days after serving it, or
- (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

Idaho R. Civ. P. 15(a) (emphasis added). While Rule 15 instructs that leave should be freely given “when justice so requires,” it does not mean a party is awarded limitless leave to amend.

See Idaho R. Civ. P. 15(a)(2). The Idaho Supreme Court has held:

In determining whether to grant such leave, the district court may consider whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim.

*Atwood v. Smith*, 143 Idaho 110, 115, 138 P.3d 310, 315 (2006) (quoting *Spur Prods. Corp. v. Stoel Rives LLP*, 142 Idaho 41, 44, 122 P.3d 300, 303 (2005)). “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 the allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, ‘be freely given.’” *PHH Mortg. v. Nickerson*, 160 Idaho 388, 395–96, 374 P.3d 551, 558–59 (2016) (citing *Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986); see also *Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25*, 165 Idaho 690, 695, 451 P.3d 25, 30 (2019); see also *Carl H. Christensen Family Tr. v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999)).

With respect to claims brought under 42 U.S.C. § 1983, a supervisor who does not participate in the alleged harassment can be held liable only if: (1) the behavior of her subordinates results in a constitutional violation; and (2) the supervisor’s action or inaction was affirmatively linked to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence of the supervisor amounting to deliberate indifference. *Welch v. Ciampa*, 542 F.3d 927, 937 (1st Cir. 2008) (citations and quotations omitted); see also *Starks v. Lewis*, 313 F. App’x 163, 167 (10th Cir. 2009) (it is not

enough for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation; plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights; the supervisor must be personally involved in the constitutional violation, and a sufficient causal connection must exist between the supervisor and the constitutional violation); *see also Addison v. City of Baker City*, 758 F. App'x 582, 585 (9th Cir. 2018).

The causal connection “can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury.” *Bartlett v. Wengler*, No. 1:12-CV-00312-EJL, 2014 WL 4773959, at \*3 (D. Idaho Sept. 24, 2014) (citation omitted).

In this case, Plaintiffs argue that their additional allegations proposed against Tromp reflect that she was “certainly involved in setting in motion” the October 2020 meeting that resulted in Plaintiffs’ removal from campus. (Mem. in Supp. at 9.) Defendants argue that the proposed amendments are untimely, futile, and prejudicial. (Defs.’ Opp’n at 8.) Defendants also argue that any attempt to add Tromp as a defendant with respect to all of the claims that were previously dismissed should not be permitted. (*Id.* at 5-7.) Plaintiffs clarified, however, that they are only attempting to add Tromp as a defendant with respect to their First Amendment and procedural due process claims. (Reply Mem. at 3-4.)

**A. The Motion to Amend Complaint is not untimely.**

Defendants argue that Plaintiffs amendment is untimely because Defendants have been in possession of the information on which they rely before this litigation was commenced—since December 2020—and yet failed to amend the Complaint after the Court dismissed Tromp from

this case in its April 22, 2022 order. (Defs.' Opp'n at 5, 8, 12.) In that order, the Court gave Plaintiffs leave to amend their Complaint by May 27, 2022. (Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss filed Apr. 22, 2022 at 41.) Defendants argue that Plaintiffs failed to amend the Complaint by that date and instead waited fourteen (14) months from that date to assert claims based upon information that it possessed before this lawsuit was filed. (Defs.' Opp'n at 2, 8, 10.) Plaintiffs argue that the Court's order did not prevent them from moving to amend at a later date and that timeliness alone is not a reason to deny their motion. (Mem. in Supp. at 4-7.) The Court agrees with Plaintiffs.

Here, Plaintiffs were granted leave to amend their Complaint in the Court's April 22, 2022 order, but Plaintiffs were not required to amend their Complaint at that time. (*See* Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss filed Apr. 22, 2022.) In addition, the parties thereafter entered into a stipulation for scheduling and planning setting forth the pretrial deadlines in this case. (Case Scheduling Plan filed Aug. 19, 2022.) The Court entered an order consistent with the parties' stipulated pretrial deadlines on August 24, 2022. (Order Governing Proceedings and Setting Trial filed on Aug. 24, 2022.) In that order, the deadline to file and hear amendments to any pleading (including amendments to add claims for punitive damages), or to join any additional parties, was September 1, 2023. (*Id.* at 3-4.) The Court agrees that there appears to be undue delay in asserting the amendment pending before the Court, in light of the fact that the amendments are based in large part on documents that were in Plaintiffs possession before this lawsuit was filed. However, because the motion was filed by the deadline in the August 24, 2022 scheduling order, the Court finds that the Motion to Amend Complaint is not untimely.



**B. The Motion to Amend Complaint is denied as futile.**

Plaintiffs' request to add Tromp as a defendant is denied as futile and also because the allegations do not set forth a valid claim. The proposed amendments alleged against Tromp include that she: (1) arranged for, attended, and participated in student meetings in which "objections" to Big City were made; (2) was sympathetic to unspecified and unidentified student demands related to Big City and other vendors; (3) agreed to give a voice to students regarding what vendors are brought to Boise State; (4) agreed to meet with students; (5) was included as a recipient in emails from students in which students discussed their opposition to, and a request to remove, Big City Coffee, as well as discussed its social media post; (6) discussed Big City's social media post and the student response in her classroom, and conferred with Webb about it; (7) instructed Estey to arrange and attend a meeting with Big City; and (8) failed to stop a series of actions by Estey, Webb, and Salinas that culminated in the deprivation of Plaintiffs' constitutional rights. (Mot. to Am. Compl., Ex. B.) Plaintiffs also claim that Tromp expressed opposition to Plaintiffs' speech to "others" and engaged in retaliatory actions and speech prior to and subsequent to the October 22, 2020 meeting. (*Id.*)

The Court finds that the above allegations are futile and insufficient to move forward with a valid First Amendment or procedural due process claim against Tromp. Allegations that Tromp participated in meetings and discussed Big City, without any specificity as to what was discussed vis-à-vis Tromp, and that she agreed to meet with students, agreed to give students a voice as to what vendors are brought onto Boise State, and was a recipient of emails sent by students who discussed their opposition and request to remove Big City, without more, does not reflect that Tromp participated in or is affirmatively linked to Big City's departure from Boise State's campus or the violation of Plaintiffs' constitutional rights. Similarly, there are no

allegations regarding what Tromp said or discussed in her classroom regarding Big City or its social media post, nor whether Tromp in anyway encouraged, directed, or participated in any decision to remove Big City from Boise State's campus. There are also no allegations regarding any specific acts, omissions, statements or conduct attributable to Tromp with respect to Plaintiffs' conclusory allegation that she "expressed opposition to Plaintiffs' speech to others." And, when asked at oral argument what statements were made by Tromp in support of Plaintiffs' allegations that Tromp engaged in retaliatory actions and speech prior to and subsequent to the October 2020 meeting, counsel for Plaintiffs stated that Plaintiffs did not know.

There are no allegations asserted by Plaintiffs that could be characterized as supervisory encouragement, condonation, acquiescence or gross negligence by Tromp with respect to Big City's departure from Boise State's campus, nor any participation in violating Big City's constitutional rights. Moreover, it is not enough for Plaintiffs to allege that Tromp simply asked Estey to set up the meeting with Big City, or that Tromp was in charge of other individuals who are alleged to have actually committed the constitutional violations at issue in this case. Plaintiffs must allege sufficient facts that demonstrate a deliberate, intentional act by Tromp to violate Plaintiffs' constitutional rights. They have failed to do so. None of the proposed allegations reflect that Tromp participated in the alleged constitutional violations at issue and they do not reveal an affirmative link between Tromp and those constitutional violations. Moreover, the proposed allegations assert insufficient conclusory statements that Tromp set in motion a series of acts by others and/or refused to terminate a series of acts by others. There are no allegations that reflect that Tromp knew or reasonably should have known that any particular act or omission by Tromp would cause others to violate Plaintiffs' constitutional rights. As a

result, the motion to amend is denied because such amendment would be futile and the allegations fail to set forth valid claims.

**C. The Motion to Amend the Scheduling Order is granted in part.**

Plaintiffs ask the Court to extend the deadline to join parties and amend the pleadings as well as the discovery deadline, in light of the delays in this case attributed to dispositive motions that were filed and the discovery disputes between the parties. (Mem. in Supp. at 4-7.)

Idaho Rule of Civil Procedure 16 governs modification of scheduling orders, which orders may not be modified except with leave of the court and on a showing of good cause (or by stipulation of all the parties), and approval of the court. Idaho R. Civ. P. 16(a)(3). On the one hand, the Court finds that part of the reason that the parties experienced a delay in the pace of their discovery was Plaintiffs' use of the overly broad phrase, "Basis for Dispute" in a number of its discovery requests, which the parties were unable to narrow and necessitated court intervention. In addition, the facts underlying the dispute in this case occurred in 2020 and this case has been pending for almost two years; it was initiated on October 1, 2021. And, the Court granted Plaintiffs leave to amend their Complaint in its April 22, 2022 order, but Plaintiffs declined to amend their Complaint at that time. Thereafter, the parties engaged in discovery—albeit with a number of discovery disputes involved—and Plaintiffs thereafter had the ability to move to amend the pleadings to add additional parties in this case, evidenced by the pending motion to amend at bar.

On the other hand, the Court notes that the Defendants' filing of both a motion for reconsideration, a second motion to dismiss, and a motion to dismiss based upon immunity in 2022, contributed to the slowed pace of discovery in this case. However, while Defendants' motion for reconsideration and second motion to dismiss were pending, the parties stipulated to

the deadlines in this case, including the deadlines to complete discovery and amend the pleadings. (*See* Case Scheduling Plan filed Aug. 19, 2022.) The Court also notes that counsel for Plaintiffs gave counsel for Defendants additional time to respond to discovery and get up to speed on this case. In addition, the Court finds that Plaintiffs have raised a valid legal issue warranting clarification from the Court with respect to whether they must comply with Idaho Code § 6-1604.

In light of the foregoing, the Court finds good cause to extend both the discovery deadline and the deadline to file amendments to the pleadings to join additional parties. Plaintiffs ask the Court to extend the deadline to file a motion to amend the pleadings—including the ability add new parties—to November 30, 2023. (Mem. in Supp. at 5, 18.) But the Court finds that this requested date could unreasonably cause a delay that is prejudicial to Defendants and any newly proposed party, in light of the trial date that is set to begin on February 28, 2024.

Therefore, the Motion to Amend the Scheduling Order is granted to the extent that the last day to complete any fact and expert discovery shall be November 15, 2023. All discovery, including serving an interrogatory, requesting the production of documents, issuing third-party subpoenas for documents, requests for inspection, requests for examination, requests for admission, and noticing a deposition, must be served far enough in advance so that such discovery can be completed by these dates. This deadline does not affect a party's duty to supplement discovery, as set forth in Idaho Rule of Civil Procedure 26(e). The deadline for joinder of any parties is October 13, 2023.

**D. The Court will allow supplemental briefing on whether Plaintiffs are relieved from complying with Idaho Code § 6-1404.**

Plaintiffs argue that they are entitled to seek an award of punitive damages under 42 U.S.C. § 1983 and that requiring them to comply with Idaho Code § 6-1604 imposes an improper and unnecessary burden on their right to recover on their federal law claims. (Mem. in Supp. at 12-17.) In response, Defendants argue that the cases cited by Plaintiffs are not similar and request additional time to brief the issue. (Defs.' Opp'n at 19-20.) Defendants are hereby given fourteen (14) days from the date of this order to: (1) address the cases cited by Plaintiffs in their request for a "comfort order;" and (2) to respond to the argument that Plaintiffs are not required to comply with the requirements of Idaho Code § 6-1604 before pleading a claim for punitive damages in connection with their federal claims under § 1983, because Idaho's statute conflicts in both its purpose and effects with § 1983's remedial objectives. The Court will consider the briefing closed on this issue once Defendants file their briefing, and will thereafter rule on this issue, without further hearing. The Court will also issue a ruling as to whether the deadline to amend the pleadings will also be extended any further.

**IV. CONCLUSION**

For the reasons set forth above, the Court orders as follows:

1. Plaintiffs' Motion to Amend Complaint is hereby DENIED.
2. Plaintiff's Motion to Amend the Scheduling Order is GRANTED, in part. The last day to complete any fact and expert discovery shall be November 15, 2023. All discovery, including serving an interrogatory, requesting the production of documents, issuing third-party subpoenas for documents, requests for inspection, requests for examination, requests for admission, and noticing a deposition, must be served far enough in advance

so that such discovery can be completed by these dates. This deadline does not affect a party's duty to supplement discovery, as set forth in Idaho Rule of Civil Procedure 26(e).

The deadline for joinder of any parties is October 13, 2023.

3. Defendants are hereby given fourteen (14) days from the date of this order to provide supplemental briefing on the issues set forth above regarding whether Plaintiffs must comply with Idaho Code § 6-1604 with respect to their section 1983 claims.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

9/25/2023 2:08:11 PM

  
\_\_\_\_\_  
CYNTHIA YEE-WALLACE  
District Judge

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on 9/25/2023, I caused a true and correct copy of the foregoing ORDER to be forwarded with all requires charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

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