IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

TOM FORBES,

Plaintiff,

v. No. 1:10-cv-1143

ANDREW JASON CALDWELL,
COUNTY OF HARDIN, and
UNITED STATES OF AMERICA,

Defendants.

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ORDER

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Before this Court for determination is the Motion for Leave of Court to Amend Complaint filed by pro se Plaintiff [D.E.22]. Defendants Andrew Jason Caldwell ("Caldwell") and the County of Hardin ("County") filed a response in the form of an objection to this amendment and a subsequent motion to dismiss [D.E.25].

## FACTUAL BACKGROUND

Plaintiff is a resident of Hardin County, Tennessee and on April 23, 2009 had a confrontation at his rural home with a census worker, Ms. Hopper. During this time, her supervisor Ms. Seaton became involved, as well as Caldwell, a Deputy Sheriff of Hardin County. Plaintiff was arrested, charged with aggravated assault against Ms. Hopper [D.E.1-2] and spent two days in the Hardin County jail until he posted bond. There is a Hardin Circuit Court order, dated November 23, 2009, providing for expungement of Plaintiff's criminal record in this matter,

which includes a finding by State Circuit Court Judge C. Creed McGinley that the charges against Plaintiff were dismissed by the State of Tennessee [D.E.1-2].

## PROCEDURAL HISTORY

Plaintiff brought a fourteen-page lawsuit in the General Sessions Court of Hardin County, Case No. 10-cv-266, against Caldwell, Hopper, Seaton and the County of Hardin for "Malicious Prosecution, Attendant with Official Misconduct, Official Oppression, Conspiracy, Making False Report, Perjury, Aggravated Perjury, Subornation of Perjury and Aggravated Trespass" [D.E.1-2]. This matter was removed to federal court pursuant to 28 U.S.C.§1441, *et. seq.* and 2679(d) as governed by the Federal Tort Claims Act [D.E.1]. The United States Attorney Lawrence J. Laurenzi certified under 28 C.F.R.§15.3 that at the times relevant to this lawsuit, Defendants Marjorie Hopper and Christine Seaton were acting within the scope of their employment with the United States Department of Commerce, Bureau of the Census [D.E.1-1]. The United States was substituted for Hopper and Seaton as a party defendant, with Hopper and Seaton being dismissed from this action [D.E.3]. Additionally, it is asserted that there is supplemental jurisdiction over the claims against the non-federal employees by virtue of these claims being "so closely related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *See* 28 U.S.C.§1367(a).

## ANALYSIS

The instant Motion was filed on July 22, 2010. Before this Motion to Amend, the United States filed a Motion to Dismiss on June 15, 2010, pursuant to Fed. Rule 12(b). Since Plaintiff seeks this amendment more than 21 days after the Defendant served its Motion to Dismiss, Plaintiff is precluded from amending the Complaint as a matter of course. *See* Rule 15(a)(1).

However, Rule 15 also permits amendment with the opposing party's written consent (which is not present) or leave from the Court, which the Court should freely give when justice so requires. *See* Rule 15(a)(2). Generally, the principle is that lawsuits should be tried on their merits rather than the technicalities of pleadings. *See Foman v. Davis,* 371 U.S. 178, 182 (1962). However, this circuit has cautioned that the right to amend should not be absolute or automatic. *Tucker v. Middleburg-Legacy Place, LLC,* 539 F.3d 545, 551 (6th Cir. 2008). District Courts should consider a number of factors when determining whether to grant a motion to amend under this rule, including, "[un]due delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Foman*, 371 at 182*; see also Pedreira v. Ky. Baptist Homes for Children, Inc., 597 F.3d 722, 729 (6th Cir. 2009); E.E.O.C. v. Taco Bell Corp., 575 F. Supp. 2d 884, 888 (W.D. Tenn. 2008) quoting Wade v. Knoxville Utils. Bd., 259 F.3d 452, 458–59 (6th Cir. 2001).*

Here, Plaintiff has made several attempts to cure the deficiencies of this Complaint. He now attempts his fourth amendment after he first initiated this lawsuit by filing the General Sessions Complaint in Hardin County. Since the removal to this District Court, Plaintiff's additional remedial efforts include:

- On June 23, 2010, Plaintiff filed the "Complaint of Violation of Civil Rights Under the Fourth and Fourteenth Amendments Amended by Reason of Removal to US [sic] District Court" [D.E. 8].

- On June 28, 2010, Plaintiff filed "Plaintiff's Motion for Voluntary Dismissal Without Prejudice Against United States of America And Remand Of Case To State Court" [D.E. 9].

- On July 13, 2010 Plaintiff filed his "Amended Complaint of Deprivation Of Civil Rights And Conspiracy To Deprive Of Civil Rights Under 42 U.S.C., Section 1983" [D.E. 13].

His current effort [D.E. 22] is the fourth attempt at correcting defective pleadings (three of these being without leave to amend). These filings certainly border on being "repeated failure[s] to cure deficiencies."

Secondly, the proposed amendment may be futile, certainly as to some, if not all, Defendants. Defendants Marjorie Hopper and Christine Seaton have been dismissed from this lawsuit by the Court, and the United State has been substituted [D.E.3]. While the United States has sovereign immunity, the Federal Tort Claims Act waives such immunity, but only to the extent Plaintiff first exhausts his remedies. *See* 8 U.S.C. 2675(a). The Plaintiff does not appear to have exhausted his remedies as to the United States.

However, as to Defendants Hardin County and Caldwell, the essence of Plaintiff's lawsuit against them is false arrest and false imprisonment. The Plaintiff alleges in the removed complaint (the General Sessions suit) in paragraph 19 that his attorney had told him that the District Attorney had moved to dismiss his case subsequent to the indictment by the Grand Jury. In other words, Plaintiff's case previously had been reviewed by a Grand Jury and an indictment handed down. With the dismissal, there followed an expungement of Plaintiff's Circuit Court Case No. 9107.

The allegations against Caldwell and the County deal with false arrest and unlawful seizure, resulting in false imprisonment. The arrest and seizure issues are determined by the probable cause (or lack thereof) of the arresting official. *See Gumble v. Waterford Twp.*, 171 Fed.Appx. 502, 507 (6th Cir. 2006); *Mark v. Furay*, 769 F. 2d 1266, 1269 (7th Cir. 1985). In the case at hand, an indictment was returned against Plaintiff, but it was subsequent to the arrest at issue. A subsequent grand jury indictment cannot establish probable cause for an earlier arrest. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 307-310 (6th Cir. Ohio 2005) ("In a

situation where the arrest of the plaintiff was pursuant to a grand jury indictment, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer. By contrast, neither the Supreme Court, nor this court, has ever held that a subsequent grand jury indictment can establish probable cause for an earlier arrest.") (internal citations omitted).

Plaintiff's Motion presents an extremely close question, but it appears to this Court, at this time, that the Plaintiff should be allowed to amend his Complaint. Accordingly, Plaintiff's Motion is GRANTED.

**s/Edward G. Bryant**
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: **November 30, 2010**

**ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.**