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

RICKY D. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**NO. 03-2155 Ml/An**
	)	
CITY OF MEMPHIS,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO STRIKE PLAINTIFF'S AMENDED RESPONSES AND GRANTING MOTION FOR PERMISSION *NUNC PRO TUNC* TO AMEND FIVE RESPONSES TO REQUEST FOR ADMISSIONS

Before the Court is Defendant's Motion to Strike Plaintiff's Amended Response to Defendant City of Memphis' First Request for Admissions filed on January 28, 2005. Also before the Court is Plaintiff's Motion for Permission *Nunc Pro Tunc* to Amend Five (5) Responses to Defendant City of Memphis' First Request for Admissions filed on February 11, 2005. United States District Judge Jon P. McCalla referred these matters to the Magistrate Judge for determination. For the reasons set forth below, the Motion to Strike is **DENIED** and the Motion to Amend is **GRANTED**.

BACKGROUND

On July 16, 2003 the City of Memphis ("Defendant") served its First Set of Requests for Admissions on Plaintiff Ricky D. Adams ("Plaintiff"). Plaintiff served his responses to the Requests for Admissions on August 4, 2003. Defendant then filed a Motion for Summary Judgment relying, in part, on Plaintiff's response to Request for Admission No. 1. After Plaintiff

was deposed on May 4, 2004, Plaintiff learned of a mistake in the responses to the Requests for Admissions. Plaintiff therefore filed, without leave of Court, amended responses to the Requests for Admissions. Defendant then filed the instant motion, pursuant to Rule 36(b), to strike Plaintiff's amended responses, since the amended responses were filed without leave of Court.

Plaintiff responded to the Motion to Strike on February 11, 2005. In his response, Plaintiff states that in order to cure the deficiency of the amended responses to the requests for admissions, Plaintiff would be filing a Motion for Permission *Nunc Pro Tunc* to Amend the responses. Plaintiff therefore asks the Court to deny the Motion to Strike and to alternatively grant the Motion to Amend.

Plaintiff's Motion to Amend requests that the Court grant leave for Plaintiff to amend the responses to Requests Nos. 1, 4, 5, 12, and 13. Plaintiff states the amendments for Nos. 12 and 13 "are intended for the sole purpose of correcting numbering errors and have no bearing on any claims or defenses raised by the parties." (Mot. to Amend, at 1). With respect to Requests Nos. 4 and 5, the proposed amendments "furnish information based on expert opinion that was not available to Plaintiff" when Plaintiff originally responded to the requests for admission. (*Id.*). Plaintiff argues that permission to amend should be granted because it would allow this case to be decided on the merits and would not be prejudicial to Defendant.

Defendant responded to the Motion to Amend on February 28, 2005. In the Response Defendant argues that because Plaintiff was untimely in requesting permission to amend, and because Plaintiff waited an excessively long period of time before formally requesting leave of Court to amend the responses to the request for admission, the Motion to Amend should be denied.

ANALYSIS

I. Motion to Amend Responses

Rule 36 of the Federal Rules of Civil Procedure states that

> the court may permit withdrawal or amendment [of the response to a request for admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Fed. R. Civ. P. 36(b). Rule 36(b) "emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." Fed. R. Civ. P. 36(b) advisory committee's notes (1970). "Both the caselaw and the Advisory Committee Note to Rule 36 suggest that courts should be reluctant to deny motions to withdraw or amend when final disposition of the case may result from mere discovery noncompliance rather than the merits." *ADM Agri-Industries, Ltd. v. Harvey*, 200 F.R.D. 467, 471 (M.D.Ala. 2001).

A "district court has considerable discretion over whether to permit withdrawal or amendment of admissions." *American Auto. Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1119 (5th Cir. 1991); *see also Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997). The Court should apply a two-prong test when determining whether to permit withdrawal of an admission. First, the Court should ask whether the presentation of the merits of the action will be subserved if the admission is not withdrawn, and second, the Court should ask whether the party who obtained the admission will be prejudiced. *See Kerry Steel*, 106 F.3d at 154. Prejudice, under Rule 36(b), does not mean "that the party who initially obtained the admission will now have to convince the fact finder of its truth." *Id.*

(quoting *Brook Village North Assoc. v. General Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982)). Instead, the prejudice in Rule 36(b) "relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *American Auto.*, 930 F.2d at 1120; *see also Dynasty Apparel Indus. v. Rentz*, 206 F.R.D. 596, 601 (S.D. Ohio 2001).

With respect to Request No. 1, Plaintiff's counsel states that the response is incorrect and erroneous, and counsel blames herself for the unintentional response to this interrogatory, even though Plaintiff's counsel did not attach an affidavit to that effect to the Motion to Amend. Counsel correctly states that if the Court does not allow the amendment, Plaintiff's claim will be essentially terminated. After review, it appears the original response to Request No. 1 resulted from an honest mistake or attorney error. If the amendment is allowed, this matter will be decided on the merits rather than on some unintentional mistake by Plaintiff's counsel. As such, Plaintiff meets the first prong of Rule 36(b)'s test.

Defendant will also not suffer from any prejudice if the amendment is allowed. Plaintiff served an Amended Response on Defendant on or about May 4, 2004, and while Plaintiff failed to obtain leave of Court to amend Plaintiff's responses to Defendant's Request for Admissions in May 2004, the parties have proceeded with discovery. As such, because Defendant will not be prejudiced, Plaintiff meets the second prong of Rule 36(b)'s test. Therefore, because whether to grant an amendment is within the sound discretion of the trial court and because the Court should be reluctant to deny a motion to amend when the case could be decided on a technicality or error, rather than on the merits, the Motion to Amend, with respect to Request No. 1, is **GRANTED**. Plaintiff shall serve an amended response to Request No. 1 within 11 days of entry of this Order.

With respect to Requests Nos. 4 and 5, the proposed amendments "furnish information based on expert opinion that was not available to Plaintiff" when Plaintiff originally responded to the requests for admission. (Mot. to Amend, at 1). With respect to Requests Nos. 12 and 13, the amendments "are intended for the sole purpose of correcting numbering errors and have no bearing on any claims or defenses raised by the parties." (*Id.*). After review, the Court can see no reason why the amendments to Request Nos. 4, 5, 12, and 13 should not be allowed. As such, for good cause shown, the Motion to Amend, with respect to Request Nos. 4, 5, 12, and 13, is **GRANTED**. Plaintiff shall serve an amended response to Request Nos. 4, 5, 12 and 13 within 11 days of entry of this Order.

II. Motion to Strike Amended Responses

Because the Court concludes that Plaintiff should be allowed to amend his discovery responses pursuant to Fed. R. Civ. P. 36(b), Defendant's Motion to Strike Plaintiff's amended responses is **DENIED**.

Pursuant to the Order of Reference, any objections to this Order shall be made in writing within ten days after service of this Order and shall set forth with particularity those portions of the Order objected to and the reasons for those objections.

IT IS SO ORDERED.

_____
S. THOMAS ANDERSON
UNITED STATES MAGISTRATE JUDGE

Date:_____