IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICHARD D. THIELMAN,

Plaintiff,

v.

OPINION AND ORDER

99-C-580-C

JOSEPH LEEAN, Secretary of the Department of Health and Family Services; LAURA FLOOD, Deputy Administrator of the Department of Health and Family Services; ROBERT L. WAGNER, Treatment Director of the Department of Health and Family Services; BRYAN BARTOW, Director of the Wisconsin Resource Center; JON LITSCHER, Secretary of the Department of Corrections; JAMES DOYLE, Wisconsin Attorney General; STATE OF WISCONSIN, WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES and WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

This is a civil action for monetary damages and injunctive relief brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1367(a). Plaintiff Richard Thielman is an individual committed as a sexually violent person under Chapters 980 and 51 of the Wisconsin Statutes.

He alleges that defendants, acting in their official capacities and under color of state law, deprived him of his rights to adequate medical care and least restrictive conditions of confinement as guaranteed to him by state law and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The case is presently before the court on plaintiff's motion for leave to amend his complaint pursuant to Fed. R. Civ. P. 15(a).

Before I address the merits of plaintiff's motion, a brief review of the procedural history of this case is warranted. On November 30, 1999, this court entered an order allowing plaintiff to proceed *in forma pauperis* against the director of the Wisconsin Resource Center and the Wisconsin Attorney General on the following claims: 1) plaintiff is subjected to conditions of confinement that amount to punishment in violation of the Fourteenth Amendment and that violate Wis. Stat. § 51.61; 2) he is being deprived of treatment in violation of the Fourteenth Amendment and Wis. Stat. §§ 980 and 51.61; and 3) he is being denied equal protection under the Fourteenth Amendment because he is being treated differently from other civilly committed patients not committed under Chapter 980. The state filed a motion to dismiss; in response, plaintiff filed a document that was construed as a motion to amend the complaint. After receiving plaintiff's submission, this court ordered that counsel be appointed to represent him,

granted counsel the opportunity to amend the complaint a second time and denied the motion to dismiss as moot. See Order, March 1, 2000, dkt. #17.

On June 5, 2000, newly-appointed counsel filed a second amended complaint on plaintiff's behalf. The second amended complaint added defendants Joseph Leean, Laura Flood, Robert Wagner, Byran (correctly, Byron) Bartow (substituted for Macht), Jon Litscher, the State of Wisconsin, the Wisconsin Department of Health and Family Services and the Wisconsin Department of Corrections. In addition to declaratory and injunctive relief, plaintiff sought damages from the individual defendants in both their individual and official capacities. Also, plaintiff added claims challenging the constitutionality of Chapter 980 on its face, contending that it violated the Constitution's prohibitions against double jeopardy and ex post facto laws and the equal protection and due process clauses of the Fourteenth Amendment.

On July 20, 2000, defendants filed a motion to dismiss the second amended complaint. In response to the motion, plaintiff filed a proposed third amended complaint, in which he has dropped the following claims: 1) state law claims against defendants State of Wisconsin, Wisconsin Department of Health and Family Services and Wisconsin Department of Corrections; 2) § 1983 claims for damages against the individual defendants in their official capacities; and 3) constitutional challenges to Chapter 980. (Before this, the court had

granted plaintiff's request for voluntary dismissal of his claims against the individual defendants in their individual capacities.) In addition, plaintiff has explained that he is contending that Chapter 51 and Chapter 980 patients are similarly situated for equal protection purposes and he has added a claim alleging deprivation of his procedural due process rights with respect to the denial of adequate medical care and treatment. Finally, in a motion to amend accompanying the proposed third amended complaint, plaintiff seeks leave to add or substitute additional parties should it become appropriate after the completion of discovery.

Defendants' only objection to plaintiff's motion to amend is that they would prefer that it not be decided before the court decides their motion to dismiss the second amended complaint. Defendants are concerned that plaintiff may seek to file yet another amended complaint in order to cure any deficiencies that may come to light as a result of the motion to dismiss, which will spur another round of pleadings. Defendants' concerns about further delays are well-founded, particularly because this case is scheduled for trial in January 2001. However, one of the factors a court considers in deciding whether to allow a party to amend the complaint is whether doing so would be futile. See In re Stavriotis, 977 F.2d 1202, 1204 (7th Cir. 1992). "The opportunity to amend a complaint is futile if the complaint, as amended, would fail to state a claim upon which relief could be granted." General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1085 (7th Cir. 1997); see also 28 U.S.C. §

1915(e)(2) (requiring court to dismiss claims "at any time" in *in forma pauperis* proceeding if court determines that claim is frivolous, fails to state claim on which relief may be granted or seeks monetary relief from defendant who is immune from such relief). In other words, plaintiff's motion to amend the complaint has not made a dramatic change in the procedural posture of this case. Technically, defendants' motion to dismiss the second amended complaint has been rendered moot by the filing of a proposed third amended complaint, but the third complaint does not differ materially from the second (aside from what it omits) except insofar as it adds a claim of procedural due process. Accordingly, in reviewing the third amended complaint for futility, I have considered the points raised by defendants in their motion to dismiss plaintiff's second amended complaint.

In considering a motion to dismiss for failure to state a claim, the court must accept as true the well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. See Hishon v. King & Spalding, 467 U.S. 69, 72 (1984). The court may dismiss a complaint for failure to state a claim only if the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. See Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir. 1996). Applying these principles, I conclude that plaintiff will be allowed to file his third amended complaint. However, as will be explained below, I am dismissing his state law claims for damages and injunctive relief against the individual defendants because they are barred by

the Eleventh Amendment. Plaintiff may proceed on his remaining claims for prospective injunctive relief against the individual defendants in their official capacities under § 1983.

Plaintiff's third amended complaint fairly alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff is a patient at the Wisconsin Resource Center in Winnebago, Wisconsin. He was committed as a sexually violent person under Chapters 980 and 51 of the Wisconsin Statutes. Defendants Joseph Leean, Laura Flood and Robert Wagner are officials at the Wisconsin Department of Health and Family Services: Leean is Secretary, Flood is Deputy Administrator and Wagner is Treatment Director. Defendant Byron Bartow is Director of the Wisconsin Resource Center. Defendant Jon Litscher is Secretary of the Wisconsin Department of Corrections. Defendant James Doyle is Attorney General for the State of Wisconsin. Each defendant is ultimately responsible for setting and enforcing policy with regard to the care, custody and treatment of Chapter 980 patients.

The Wisconsin Resource Center is located within the perimeter of a Wisconsin Department of Corrections prison and relies on the Department of Corrections for many essential services, including laundry and medical care. Many employees of the Wisconsin

Resource Center come directly from the Department of Corrections and have little or no formal training in sex offender treatment.

The Wisconsin Resource Center has not implemented a certified meaningful treatment program for sex offenders. The Wisconsin Resource Center does not use an available "phase" program that would allow Chapter 980 patients, including plaintiff, more liberty and freedom. In addition, the center employs staff that are not qualified or competent to make decisions about the civil confinement and treatment of Chapter 980 patients.

Because plaintiff is committed under Chapter 980, defendants are subjecting him to conditions of confinement that are punitive and more restrictive than those placed upon Chapter 51 patients. For instance, plaintiff rooms and eats with convicted prisoners serving sentences. Prisoners are allowed to mix with patients and work in the Chapter 980 patients' dining room. Chapter 980 patients are punished by being housed for many days in "wet cells" with no recreation and showers only every three days or by being placed in the "prison hole" with Department of Corrections prisoners. Chapter 980 patients are required to wear state-issued inmate clothing when they leave their assigned living unit and they are subjected to random searches without cause. Also, such patients are required to wear full body shackles whenever they leave the Wisconsin Resource Center even when it is not required by an emergency situation or a therapeutic treatment program.

No meaningful treatment is provided at the Wisconsin Resource Center to Chapter 980 patients who are amenable to treatment, including plaintiff. Treatment programs are uncertified and the staff administering the programs lack the education, training or experience to oversee the programs competently or to make judgments about treatment. Plaintiff and other Chapter 980 patients are being denied participation in a gradual, supervised, therapeutic program of community access and reintegration that is offered routinely to other people civilly committed in Wisconsin. Chapter 980 patients, including plaintiff, are similarly situated to Chapter 51 patients.

OPINION

A. Eleventh Amendment Immunity

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." The Supreme Court has drawn upon principles of sovereign immunity to construe the Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.' " Pennhurst State School and Hospital v.

Halderman, 465 U.S. 89, 100 (1984) (quoting Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280 (1973)).

In Pennhurst, the Supreme Court explained that "a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." Id., 465 U.S. at 102 (citing Cory v. White, 457 U.S. 85, 91 (1982)). To determine whether the nature of a suit is such that it is one against the state, the court looks to the "essential nature and effect" of the proceeding. Ford Motor Co. v. Dept. of Treasury of State of Indiana, 323 U.S. 459, 464 (1945). "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Dugan v. Rank, 372 U.S. 609, 620 (1963) (citations omitted). In other words, the Eleventh Amendment bars a suit against state officers when "the state is the real, substantial party in interest." Pennhurst, 465 U.S. at 101 (citing Ford, 323 U.S. at 464). This bar applies to state law claims brought into federal court under pendent jurisdiction. Id. at 120-21.

The Eleventh Amendment bar to suit is not absolute. The state may consent to be sued in federal court or Congress may abrogate state immunity pursuant to a valid exercise of its own power. Marie O. v. Edgar, 131 F.3d 610, 615 (7th Cir. 1997). Also, suits may be brought

against state officials acting in their official capacity for ongoing violations of federal law so long as the relief sought is prospective injunctive relief only. Id.; Scott v. O'Grady, 975 F.2d 366, 369 (7th Cir. 1993).

Plaintiff has conceded that the Eleventh Amendment bars him from proceeding against the State of Wisconsin and its agencies on his state law claims and against the individual defendants on his § 1983 claims for damages. However, his proposed third amended complaint retains his state law claims against the individual defendants for damages and injunctive relief. Because these claims are against state officials acting in their official capacities, they are functionally equivalent to a suit against the state and thus cannot be brought unless Congress has abrogated the state's immunity or the state has consented to be sued in federal court. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). It is well-settled that Congress did not abrogate the state's immunity when it enacted § 1983. Id., 491 U.S. at 68-69. (However, official-capacity actions for prospective injunctive relief under § 1983 are not barred by sovereign immunity because they are not treated as actions against the state for sovereign immunity purposes but rather as actions against the individual. See Kentucky v. Graham, 473 U.S. 159, 167, n. 14, (1985); Ex parte Young, 209 U.S. 123, 160 (1908) (because state cannot authorize unconstitutional action, officer is "stripped of his official or representative character

and . . . subjected in his person to the consequences of his individual conduct").) Thus, plaintiff's only hope is to argue that the state has waived its constitutional protection.

"In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). It is not enough for a state to waive its sovereign immunity generally and agree to be sued in state court. See Florida Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147, 150 (1981) (per curiam). "In order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985); see also Pennhurst, 465 U.S. at 99 ("a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued") (emphasis in original).

Wis. Stat. § 51.61(7)(a) and (b) allows individuals whose rights are protected under Chapter 51.61 to sue a person, including the state or any of its political subdivisions, for compensatory and exemplary damages arising from a violation of the rights guaranteed by the statute. Specifically, § 51.61(7)(a) provides:

> (a) Any patient whose rights are protected under this section who suffers damage as the result of the unlawful denial or violation of any of these rights may bring an action against the person, including the state or any political subdivision thereof, which unlawfully denies or violates the right in question. The individual may recover any damages as may be proved, together with exemplary damages of not less than $100 for each violation and such costs and reasonable actual attorney fees as may be incurred.

Section 51.61(7)(b) provides:

> (b) Any patient whose rights are protected under this section may bring an action against any person, including the state or any political subdivision thereof, which willfully, knowingly and unlawfully denies or violates any of his or her rights protected under this section. The patient may recover such damages as may be proved together with exemplary damages of not less than $500 nor more than $1,000 for each violation, together with costs and reasonable actual attorney fees. It is not a prerequisite to an action under this paragraph that the plaintiff suffer or be threatened with actual damages.

Neither of these subsections state unequivocally that the Wisconsin Legislature was waiving the state's immunity from suit in *federal* court when it enacted Wis. Stat. § 51.61(7)(a) and (b). Although the state has waived its immunity with respect to suits brought against it under ch. 51.61 in *state* court, the statute lacks any express language from which a court could conclude that the state was also waiving its immunity from suits brought in federal court. In the absence of such express language, there is no basis for finding that Wisconsin has waived its constitutional protection with respect to the state law claims alleged in plaintiff's complaint.

Because there is no exception to the Eleventh Amendment's bar that would allow plaintiff's state law claims for injunctive relief and damages against the individual defendants in their official capacities, these claims (set forth in plaintiff's first cause of action in the third amended complaint) must be dismissed.

B. Claims for Prospective Injunctive Relief

In their motion to dismiss the second amended complaint, defendants argued that plaintiff failed to state a claim against the individual defendants upon which relief can be granted because 1) he failed to allege that the defendants were involved personally in the alleged violations; 2) he failed to allege facts indicating that the defendants did not base their actions on professional judgment; 3) there is no substantive due process right to treatment for persons committed under Chapter 980; and 4) plaintiff is not similarly situated to other mental health patients. I will consider each of these arguments in the context of determining whether plaintiff's claims for prospective injunctive relief, as amended, state a claim upon which relief may be granted.

1. Personal involvement

Defendants argue that plaintiff has failed to allege the requisite personal involvement of each defendant in the alleged deprivations to support a finding of liability under § 1983. However, personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity. Wolf-Lillie v. Sonquist, 699 F.2d 864, 870 (7th Cir. 1983). Because plaintiff is suing defendants in their official capacity, this action operates as a claim against the state itself. See Monell v. Department of Social Services, 436 U.S. 658, 690 n. 55 (1978). To establish that he is entitled to injunctive relief on his official capacity claims, plaintiff must show that a policy or custom of the state played a part in the alleged constitutional deprivation. Kentucky v. Graham, 473 U.S. 159, 166 (1985). A well-settled governmental practice can establish a "custom" with the force of law even though the custom has not received formal approval through the body's decision making channels. Wolf-Lillie, 699 F.2d at 870 (citing Monell, 436 U.S. at 690-91). "Informal actions, if they reflect a general policy, custom, or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights, may well satisfy the amorphous standards of § 1983." Id. (citation omitted).

Although it would have been helpful if plaintiff had alleged that the deprivations to which he is subject result from an express policy or widespread practice that is so permanent and well-settled that it has the force of law, I conclude that such an allegation can be fairly

inferred from the complaint. As is clear from the "Factual Allegations" section of the complaint, plaintiff is not challenging a specific isolated instance in which he was denied adequate treatment or equal protection; rather, he is challenging the state's ongoing practices with respect to Chapter 980 patients at the Wisconsin Resource Center. Plaintiff has alleged that these practices deprive him of his constitutional rights to due process and equal protection and that the defendants are responsible for the unconstitutional practices as state officials with policymaking authority. This is sufficient to state a claim against defendants in their official capacities.

Plaintiff has alleged that each of the defendants has policy-making authority with regard to the care, custody and treatment of Chapter 980 patients and is responsible for the inadequate care and restrictive conditions of confinement provided to such patients at the Wisconsin Resource Center. Defendants deny that Litscher or Doyle has any responsibility for the care and custody of Chapter 980 patients, noting that Litscher has authority only over the Department of Corrections and Doyle has no statutory authority over the care and treatment of Chapter 980 patients. Although it is true that "whether a particular official has 'final policymaking authority' is a question of state law," St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion), the court must also consider whether an official has policymaking authority as a result of a "'custom or usage' having the force of law." Id., at 124, n. 1. The

evidence may prove, as defendants contend, that Litscher and Doyle lack any policy-making authority under state law with respect to Chapter 980 patients and are therefore not parties against whom prospective relief could be ordered, but that is a matter to be decided on a motion for summary judgment or at trial. For now, plaintiff's allegations are sufficient to survive a motion to dismiss.

In their reply brief, defendants recast their argument in different terms, arguing that plaintiff has failed to allege facts showing that there is a "case or controversy" against Doyle or Litscher because plaintiff's alleged injuries cannot be traced to these defendants. This court does not consider arguments that are raised for the first time in a reply brief. In any case, because the foundation for defendants' "case or controversy" argument is the same as that underlying their "policymaker" argument, it is foreclosed by the preceding analysis.

2. Substantive due process and professional judgment

Defendants contend that plaintiff has failed to state a claim upon which relief can be granted because the Supreme Court has never enunciated a general substantive right to treatment under the Fourteenth Amendment. On November 30, 1999, this court entered an

order granting plaintiff's request for leave to proceed *in forma pauperis*, concluding that an arguable basis in law exists for plaintiff's claims that he is being deprived of treatment in violation of his rights to substantive due process. See Opinion and Order, Nov. 30, 1999, dkt. #5, at 16-22. After noting initially that it was "unclear whether civilly committed patients under Chapter 980 who are amenable to treatment have a substantive due process right to such treatment protected by the Fourteenth Amendment," id. at 16, I concluded from a review of the case law, including the Supreme Court's opinions in Kansas v. Hendricks, 521 U.S. 346 (1997), and Youngberg v. Romeo, 457 U.S. 307 (1982), that plaintiff's allegations that defendants were failing to provide him with treatment for his mental disorders was adequate to state a cognizable substantive due process claim.

Although review for failure to state a claim under Fed. R. Civ. P. 12(b)(6) requires a level of scrutiny more exacting than the "arguable basis in law or fact" standard, see Neitzke v. Williams, 490 U.S. 319, 326 (1989), I conclude that even under the more demanding standard plaintiff may proceed on his claim that defendants' policies are violating his substantive due process right to treatment. In reaching this conclusion, I rely on the same reasoning set forth in the opinion and order of November 30, 1999, which I incorporate herein by reference. Defendants have offered no arguments that convince me that application of the Rule 12(b)(6) standard compels a different result.

I disagree with defendants to the extent they contend that plaintiff has not alleged facts that would enable him to overcome the presumptive validity of defendants' decisions. See Youngberg, 457 U.S. at 323 (decisions made by professionals exercising professional judgment presumed valid). Petitioner's allegations that the Wisconsin Resource Center is not certified and that staff are not educated or trained sufficiently to oversee a sex offender treatment program or to make professional judgments about treatment are sufficient to allow an inference to be drawn that defendants are not exercising professional judgment with respect to the treatment of Chapter 980 patients at the Wisconsin Resource Center. As noted in the November 30, 1999 opinion and order, an allegation that plaintiff is being treated by people unqualified to provide treatment is equivalent to an allegation that he is not receiving treatment at all. Assuming that plaintiff's allegation regarding the absence of qualified staff at the Wisconsin Resource Center is true, it supports an inference that defendants have not exercised professional judgment.

3. Equal protection

In his proposed third amended complaint, plaintiff alleges that he is being subjected to more restrictive conditions of confinement and a lesser quality of mental health treatment than mentally ill patients committed under Chapter 51 of the Wisconsin Statutes, to whom he is similarly situated for equal protection purposes. Defendants argue that even if this allegation is true, any difference between the way the state treats Chapter 980 versus Chapter 51 patients is justified by the higher level of danger that Chapter 980 patients pose to the community.

In support of their position, defendants rely on the Wisconsin Supreme Court's opinion in State v. Post, 197 Wis. 2d 252, 541 N.W. 2d 105 (1995), in which the court found that the Wisconsin legislature had determined that, "as a class, persons predisposed to sexual violence are more likely to pose a higher level of danger to the community than do other classes of mentally ill or mentally disabled persons." Post, 197 Wis. 2d at 322-23, 541 N.W.2d at 130. However, as I noted in the November 30, 1999 opinion, in Post, the court addressed only substantive differences in the statutory schemes for *initial* commitment under Chapters 51 and 980; it did not address differential treatment of patients once committed. I also noted that "[b]ecause involuntarily committed patients under both Chapter 980 and Chapter 51 are dangerous, applying different levels of security to the two groups is not necessarily logical." Opinion and Order, Nov. 30, 1999, dkt. #5, at 23. Indeed, the Wisconsin legislature's inclusion of Chapter 980 patients among those classes of patients entitled to the protections of

Wisconsin's patient's rights statute, Wis. Stat. § 51.61, suggests that Chapter 980 patients are to be treated the same as other civilly committed patients insofar as treatment after commitment is concerned. This undermines any presumptive validity that must be afforded to defendants' claims that different treatment is warranted for Chapter 980 patients. There may be other valid, legislative policies aside from the dictates of § 51.61 that reflect a legislative determination that Chapter 980 patients may be treated differently from Chapter 51 patients once they are committed, but that is a matter that can be determined only on summary judgment or at trial. Plaintiff may proceed on his equal protection claim.

4. Procedural due process

In his proposed third amended complaint, plaintiff adds a claim of procedural due process. Although plaintiff did not specifically articulate a procedural due process claim in his second amended complaint and therefore defendants have not had an opportunity to challenge this claim by way of a motion to dismiss, I found from plaintiff's initial *pro se* complaint that an arguable basis in law and fact existed to support a claim that plaintiff's procedural due process rights were violated by the deprivation of a state-created liberty interest in treatment. See Opinion and Order, Nov. 30, 1999, dkt. # 5, at 18-19, 22. The Fourteenth Amendment prohibits a state from depriving a person of life, liberty, or property without due process of law.

State statutes may create liberty interests that are entitled to the procedural protections of the Fourteenth Amendment. Vitek v. Jones, 445 U.S. 480, 487 (1980). As noted in this court's opinion granting plaintiff leave to proceed *in forma pauperis*, the Wisconsin Supreme Court has interpreted Chapter 980 as requiring that offenders detained under the statute receive treatment; therefore, it is arguable that Wisconsin has created a liberty or property interest in treatment that cannot be denied without adequate procedural protections.

I have reviewed this issue again under the more strict failure-to-state-a-claim standard and conclude that it adequately states a claim upon which relief could be granted; therefore, it would not be futile to allow plaintiff to amend his complaint to include this claim.

C. Leave to Add Additional Defendants

Finally, plaintiff has asked for permission to name different or additional parties if it becomes necessary to do so after he receives discovery relating to the identity of persons responsible for setting and enforcing policy with respect to patient treatment at the Wisconsin Resource Center. I decline to offer an advisory opinion on this matter but simply repeat that leave to amend the complaint shall be freely given when justice so requires.

D. Conclusion

Plaintiff's motion for leave to file a third amended complaint will be granted. However, principles of sovereign immunity bar his state law claims and claims for money damages against defendants in their official capacities. As for plaintiff's remaining claims for prospective injunctive relief under § 1983 for violations of substantive and procedural due process and equal protection, each sufficiently states a claim upon which relief could be granted. Therefore, allowing plaintiff to amend his complaint with respect to these claims would not be futile.

Because I have concluded that plaintiff's § 1983 claims, as amended, would survive a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6), there is no reason for defendants to file a new motion to dismiss plaintiff's third amended complaint. Instead, the parties should focus on summary judgment or preparing for trial.

ORDER

Plaintiff Richard Thielman's motion to file his third amended complaint is GRANTED. This means that defendants State of Wisconsin, Wisconsin Department of Health and Family Services and Wisconsin Department of Corrections are no longer parties to this case. The third amended complaint will be considered as having been filed this date. However, plaintiff's First Cause of Action, state law claims against defendants in their official capacities, is DISMISSED.

Defendants may have until October 16, 2000 to in which to file a responsive pleading.

Entered this 4th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge