IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RONALD LEWIS JONES, 58412-A,

Plaintiff,

v.

JON E. LITSCHER, Secretary,

Defendant.

OPINION AND ORDER

00-C-0204-C

- -

This is a civil action for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. In an order entered June 8, 2000, I granted petitioner leave to proceed in forma pauperis on his claim that his rights under the Fourteenth Amendment were violated when he was deprived without due process of his liberty interests in good time credits and in not being labeled a sex offender. Defendant Jon Litscher has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that plaintiff failed to allege that defendant was personally involved in the decisions and actions giving rise to the claim. In response to defendant's motion, plaintiff has filed a proposed amended complaint in which he adds nine additional defendants and specifies the involvement of defendant Litscher. I will evaluate the

two motions together.

In his proposed amended complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

I. BACKGROUND

In 1978, plaintiff pleaded guilty to attempted murder and kidnapping in exchange for the dismissal of an alleged sex offense charge. It was understood that plaintiff was making no admission of guilt to the dismissed charge and that the charge would not be read in to the record.

In a letter dated April 28, 1994, the Governor of Wisconsin directed the Department of Corrections to pursue all available legal avenues to block the release of violent offenders sentenced under the pre-1984 sentencing laws and to keep them in prison past their mandatory release dates. The governor stated that it was the administration's policy to keep violent offenders in prison for as long as possible under the law.

Since August 1995, the Wisconsin Department of Corrections and its employees have done everything possible to suggest that plaintiff has a history of aggressive and violent behavior and psychological problems, have labeled plaintiff a sex offender, placed sex offender and "denier's program" treatment needs on his record and placed him under rules of parole

supervision that pertain to those who have been convicted of sex offenses.

Plaintiff believes that each proposed defendant has and will continue to block plaintiff's release and has acted jointly and individually to label him a sex offender, deny him security reductions and parole consideration and subject him to repeated attempts at civil commitment under Wis. Stat. ch. 980 in order to confine him indefinitely.

II. PROPOSED DEFENDANT BRIAN CAGEL

On August 5, 1995, Brian Cagel was employed at the Oshkosh Correctional Institution as a staff psychologist. Cagel told plaintiff that he had done a sex offender evaluation of plaintiff's records. Relying on information in plaintiff's 1978, CR-1993 presentence investigation report and the fact that plaintiff had once been charged with a sex offense, Cagel determined that plaintiff would be required to complete sex offender treatment. When plaintiff objected, Cagel told plaintiff that he was in denial and would also have to complete the denier's program. Cagel made these recommendations to the Classification Committee, which placed the need for sexual offender and denier's treatment on plaintiff's records and stated that plaintiff would not be considered for custody reductions unless he completed both programs. Since then, plaintiff has been denied custody reductions and parole consideration consistently.

III. PROPOSED DEFENDANT DIANE FERGOT

On August 1, 1995, Diane Fergot was employed at Oshkosh Correctional Institution as the Program Review Classification Coordinator. Fergot sent a memorandum to the Oshkosh Correctional Institution Clinical Services Department, asking for a sex offender evaluation on plaintiff. In the memorandum, Fergot states that she knew plaintiff had not been convicted of the dismissed sex offense charge. Before this evaluation, plaintiff had received a number of eleven-month deferrals from the parole commission and minimum security had been recommended. At plaintiff's parole hearing in 2000, the commission stated that plaintiff would not be considered for parole until he had completed the sex offender program, which required him to state that he was guilty of the dismissed charge. Plaintiff received a twenty-four month deferral from the commission.

Fergot knew that by placing the requirements on plaintiff's records, plaintiff would be labeled a sex offender and be required to state that he was guilty of sexually deviate acts of which he was not convicted. The treatment needs have remained on plaintiff's program review inmate classification summaries since 1995 and also appear in parole decisions.

IV. PROPOSED DEFENDANT STEPHEN PUCKETT

At all relevant times, Stephen Puckett was employed by the Wisconsin Department of

Corrections as Director of the Office of Offender Classification. In that position, Puckett reviews all custody classifications and institution placement decisions. On several occasions, plaintiff has appealed the classification decisions to place sex offender treatment needs on his records and the decision to deny him custody reductions because of those treatment needs. Puckett has denied plaintiff's requests for review. Although Puckett did not personally take part in classifying plaintiff a sex offender, he did nothing to correct the actions and decisions of his subordinates.

V. PROPOSED DEFENDANT MARGARET WHITE

Margaret White is employed by the Wisconsin Department of Corrections as an agent supervisor at the Beloit, Wisconsin Office of Community Corrections. White told plaintiff he would be required to sign and comply with the global rules of supervision that pertain to convicted sex offenders. As a condition of these rules, plaintiff would be required to participate weekly in a sex offender treatment program led by White and proposed defendant Dr. Robert Gordon, PhD.

In June 1998, White and parole agent Larry Harding told plaintiff's fiancée that plaintiff was a convicted sex offender and a threat to her and her family. They also told plaintiff's fiancée that her own parole would be revoked if she married plaintiff. When plaintiff

told White that he had no history of or conviction for a sex offense, White said that plaintiff had admitted guilt to the dismissed charge even though he had not been convicted. White knew that plaintiff had not stated that he was guilty of a sex offense because his parole was being revoked for his failure to make such an admission.

VI. PROPOSED DEFENDANT ELAINE STIPETICH

Elaine Stipetich is employed by the Wisconsin Department of Corrections as a parole agent at the Beloit, Wisconsin, Office of Community Corrections. Stipetich was plaintiff's parole agent and the person responsible for determining that plaintiff sign and follow the rules of supervision pertaining to convicted sex offenders. In December 1997, Stipetich gave plaintiff permission to seek out and rent a place of residence. On January 6, 1998, Stipetich told plaintiff that he had to tell his landlord that he was a sex offender. Stipetich said that her supervisor had instructed her to inform the landlord that plaintiff was a sex offender. Plaintiff refused to tell his landlord that he was a sex offender and told Stipetich that he would sue her if she told the landlord. Stipetich told the landlord that plaintiff was a violent sex offender and that he had admitted committing the offense charged in CR-1993, even though she knew that plaintiff had not been convicted of a sex offense.

VII. PROPOSED DEFENDANT ROBERT GORDON, PH.D

Robert Gordon is employed by the Wisconsin Department of Corrections as a psychologist and facilitator of the sex offender treatment program operated by the Beloit, Wisconsin, Office of Community Corrections. Every Tuesday from 10/28/97 until 1/6/98, plaintiff was required to attend the sex offender treatment group led by Gordon and White. Gordon knew that plaintiff had no history of or conviction for a sex offense but continued to use any means necessary to try to force plaintiff to admit that he was guilty of the dismissed sex offense and other sexually deviate behavior.

During the sex offender treatment group session on January 6, 1998, plaintiff was confronted by Gordon, White and Stipetich about his refusal to tell his landlord that he was a sex offender. Gordon and White tried to force plaintiff to admit guilt to the dismissed charge. When plaintiff refused, he was told that his parole would be revoked. Gordon told plaintiff that he and White would testify at plaintiff's revocation hearing to insure that plaintiff's parole was revoked if plaintiff refused to admit he was a sex offender. Plaintiff refused to admit guilt, left the group and went to the county jail.

On or about January 16, 1998, plaintiff was served with a Notice of Violation and Receipt alleging that he violated seven issues of his parole rules. With the exception of paragraphs six and seven, all the rules that plaintiff was alleged to have violated involved his

refusal to admit guilt to the dismissed sex offense. Gordon and White testified at the revocation hearing that plaintiff had stated he was guilty of the dismissed sex offense but also stated that they had no proof that plaintiff had made such a statement.

VIII. PROPOSED DEFENDANT JEFFERY PATZKE

Jeffery Patzke is employed by the Wisconsin Department of Corrections as an administrative law judge for the Wisconsin Division of Hearings and Appeals. In a June 1, 1998 decision revoking plaintiff's parole, Patzke stated that he knew plaintiff had never been convicted of a sex offense. No evidence was submitted at the revocation hearing that proved plaintiff had ever committed a sex offense, stated that he had committed a sex offense or was in any way a threat to the public. Patzke stated that plaintiff's refusal to tell his parole agent and others that he is a sex offender violated the rules of his parole. Patzke also stated that plaintiff was a risk to the public and in need of confined sex offender treatment; he ordered that plaintiff's parole be revoked and that plaintiff forfeit fifteen years of good time. Patzke's decision and actions caused plaintiff to be reimprisoned.

IX. PROPOSED DEFENDANT DAVID H. SCHWARZ

David Schwarz is employed by the Wisconsin Department of Corrections as the

Administrator of the Division of Hearings and Appeals. In that position, Schwarz reviews all appeals from the decisions and actions of administrative law judges in administrative law hearings. On June 17, 1998, Schwarz denied plaintiff's appeal of the administrative law judge's findings and actions, giving as reasons that plaintiff was an untreated sex offender and danger to the public and that plaintiff clearly needed to participate in sex offender treatment and was not a good risk for continued supervision. Schwarz knew that plaintiff had never been convicted of a sex offense and that his decision to deny plaintiff's appeal would result in plaintiff's re-imprisonment. Schwarz had the authority and duty to correct decisions and acts of his subordinates.

X. DEFENDANT JON LITSCHER

Defendant Litscher is Secretary of the Wisconsin Department of Corrections and is responsible for the administration of the entire department and each division and agent of the department. The secretary sets the policies, practices and procedures implemented by all corrections departments. Litscher has the authority and duty to change any policy, practice or custom employed by the department and its agents that violates plaintiff's due process rights.

Plaintiff wrote a letter to Litscher seeking redress. Litscher did not instruct his

subordinates to cease the acts that violated plaintiff's rights. Litscher knew that plaintiff had never been convicted of a sex offense and knew the harm that his failure to correct the violations would cause plaintiff.

Since plaintiff was returned to prison, he has been required to complete sex offender and denier's treatment programs and has been denied security reductions and parole consideration.

XI. PROPOSED DEFENDANT JOHN DOE

John Doe is the individual who set in action the acts that caused plaintiff to be labeled a sex offender.

OPINION

I. DUE PROCESS CLAUSE

In the June 8, 2000 order, I concluded that plaintiff's allegations suggested that he did not receive due process before being deprived of his liberty interest in good time credits and not being labeled a sex offender. I am persuaded that before being labeled a sex offender and required to complete sex offender treatment programs, a prisoner is entitled to all of the process due under the standards set out in Wolff v. McDonnell, 418 U.S. 539 (1974). See Neal v.

Shimoda, 131 F.3d 818, 830 (9th Cir. 1997). In Wolff, the Supreme Court held that prisoners were entitled to minimum procedures in disciplinary hearings that could result in the forfeiture of good-time credits. See Wolff, 539 U.S. at 557. The required procedural protections include "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." Id. at 563. See also Neal, 131 F.3d at 830 ("Due process requires that the inmate be notified of the reasons for his classification as a sex offender without the inmate's having to request that information."). In Wolff, the Supreme Court explained the minimum procedures required in the disciplinary hearing itself:

> [T]he inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution.

Wolff, 418 U.S. at 566. The Court of Appeals for the Ninth Circuit concluded that "[t]he same protections should be provided to inmates whom the Hawaii Parole Authority intends to classify as sex offenders" and noted that such a hearing does not implicate the same safety concerns that were present in the disciplinary hearings at issue in Wolff. Neal, 131 F.3d at 830-31 ("an inmate whom the prison intends to classify as a sex offender is entitled to a hearing

at which he must be allowed to call witnesses and present documentary evidence in his defense"). Neal was situated similarly to plaintiff: he had never been convicted of a sex offense and had never had an opportunity to formally challenge in an adversarial setting the imposition of the sex offender label. See id. at 831. As in this case, Neal wrote letters protesting the label. The court held that Neal's ability to write letters did not satisfy the procedural requirements of Wolff. See id.

Plaintiff was not afforded the procedural protections detailed in Wolff before he lost good-time credits because of his refusal to admit that he was a sex offender; Wolff indicates that this alone was in violation of the due process clause. (The analysis is slightly more complicated than in Wolff, since plaintiff may have been given a hearing and found guilty of refusing to state he was a sex offender before his good-time credits were taken. However, he was never given a hearing on the underlying issue, which was whether he was a sex offender in fact.) Furthermore, in Sandin v. Conner, 515 U.S. 472, 487 (1995), the Supreme Court implied that a prisoner is entitled to the procedural protections set forth in Wolff before he may be denied any protectible liberty interest. See also Neal, 131 F.3d at 830 (citing Sandin and holding that the plaintiffs were "constitutionally entitled to all of the process due under the standards set forth in Wolff"). I conclude that plaintiff must be afforded a hearing at which he may call witness and present documentary evidence in his defense before he may be labeled a sex offender and

required to complete a sex offender treatment program that requires him to admit guilt to a sex offense.

II. MOTIONS TO AMEND AND TO DISMISS THE COMPLAINT

Plaintiff requests leave to file an amended complaint pursuant to Fed. R. Civ. P. 15 to add as defendants Stephen J. Puckett, Brian Cagel, Diane Fergot, Margaret White, Elaine Stipetich, Jeffery Patzke, David Schwarz and John Doe and to specify the basis for his claims against defendant Litscher. Because defendant Litscher has not yet filed an answer to plaintiff's complaint, Fed. R. Civ. P. 15(a) indicates that plaintiff may amend his complaint as a matter of course. However, the Prison Litigation Reform Act requires that the court deny leave to proceed on claims in plaintiff's proposed amended complaint that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2). It appears that plaintiff has exhausted his available administrative remedies by requesting that references to his being a sex offender be removed from his prison records.

For the reasons discussed above and in the June 8, 2000 order, I conclude that plaintiff has stated a claim upon which relief may be granted that his rights under the due process clause of the Fourteenth Amendment were violated when he was labeled a sex offender without being

afforded a hearing. However, plaintiff does not state a claim against all of the defendants he proposes to add in his proposed amended complaint. The allegations in the proposed amended complaint suggest that proposed defendants White, Stipetich, Gordon, Patzke and Schwarz acted on the basis of plaintiff's records indicating that he is a sex offender and did not themselves classify plaintiff without first affording him a hearing; therefore, they did not participate in any deprivation of plaintiff's rights under the due process clause. Plaintiff will not be allowed to amend his complaint to add these individuals. Also, plaintiff's allegation that John Doe "set[] in motion the acts which caused plaintiff to be labeled as a sex offender" does not suggest that John Doe actually labeled plaintiff a sex offender. Plaintiff will not be allowed to amend his complaint to add a John Doe defendant. Because proposed defendants Cagel and Fergot are alleged to have been involved directly in classifying plaintiff a sex offender, plaintiff will be allowed to proceed against them.

Also, as Director of Classification, Stephen Puckett may be responsible for insuring that plaintiff was not classified as a sex offender without first receiving due process. It also may be that Puckett is the only appropriate individual to provide plaintiff with any injunctive relief that might be ordered if plaintiff were to prevail on his claim, such as a proper hearing. Therefore, plaintiff will be allowed to proceed against Puckett. Plaintiff may also proceed against Puckett to conduct formal discovery to uncover the names of the persons directly

responsible for violating his constitutional rights. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know person or persons directly responsible absent formal discovery).

Defendant Litscher is correct that plaintiff fails to allege that he personally violated plaintiff's due process rights. The doctrine of respondeat superior does not apply in a § 1983 action. Supervisors are not held responsible for the acts of their subordinates, only for their own acts. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Defendant Litscher's motion to dismiss the complaint against him will be granted.

ORDER

IT IS ORDERED that

1. The motion of plaintiff Ronald L. Jones to amend the complaint is GRANTED;

2. The motion of defendant Jon Litscher to dismiss the complaint against him is GRANTED;

3. The complaint is DISMISSED against proposed defendants Jeffery Patzke, David

H. Schwarz, Margaret White, Elaine Stipetich, Robert Gordon and John Doe;

4. Service of the amended complaint will be made promptly after plaintiff submits to the clerk of court three identical copies of his proposed complaint and the attached exhibits, three completed marshals service forms and four completed summonses, one for each defendant and one for the court. Enclosed with a copy of this order is a set of the necessary forms. If petitioner fails to submit the required copies of the complaint and completed marshals service and summons forms before October 10, 2000, his complaint will

be subject to dismissal for failure to prosecute.

Entered this 25th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge