

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

JOSEPH D. KOUTNIK,

Plaintiff,

v.

GERALD BERGE, JON E. LITSCHER,
CAPTAIN LINJER and CAPTAIN BLACKBOURN,

Defendants.

ORDER

03-C-345-C

Counsel for defendant Jon E. Litscher, former Secretary of the Department of Corrections for the State of Wisconsin, has moved for permission to substitute Matthew J. Frank as a defendant in place of Litscher. In support of the request, counsel notes that Frank has succeeded defendant Litscher as Secretary.

Fed. R. Civ. P. 25(d) provides:

When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party. . . .

Ordinarily, a plaintiff sues a state official in his official capacity when he is seeking

injunctive or declaratory relief from the official's enforcement of a policy or custom believed to be unlawful. See, e.g., Kentucky v. Graham, 473 U.S. 159, 165 (1985). If the plaintiff seeks money damages from a state official, however, the suit must be brought against the official in his individual capacity. This is because a suit for money damages brought against a defendant in his official capacity only is really a suit for money damages against the state that is barred by the Eleventh Amendment. Shockley v. Jones, 823 F.2d 1068, 1070 (7th Cir. 1987)("A suit for damages against a state official in his or her official capacity is a suit against the state for Eleventh Amendment purposes.").

In his complaint, plaintiff seeks declaratory, injunctive and monetary relief. Liberally construing the complaint, I understood plaintiff to be suing defendant Litscher in his official capacity (see complaint at p. 13, last sentence) with respect to the injunctive and declaratory relief he seeks, and in his individual capacity with respect to the monetary relief he seeks. Plaintiff alleges that defendant Litscher is responsible for the allegedly unconstitutional enforcement of DOC §§ 303.20 and 303.31, and that he was personally involved in depriving plaintiff of his rights when he sanctioned the alleged unconstitutional acts of the other defendants by dismissing plaintiff's inmate complaint. To the extent that plaintiff seeks declaratory and injunctive relief, it is entirely appropriate to substitute Matthew J. Frank in place of defendant Litscher. However, because plaintiff seeks monetary relief against defendant Litscher, Litscher must remain a party to this lawsuit.

ORDER

IT IS ORDERED that defendants' motion to substitute Matthew J. Frank for defendant Jon E. Litscher in this lawsuit is GRANTED in part and DENIED in part. Pursuant to Fed. R. Civ. P. 25(d)(1), Matthew Frank is substituted for defendant Jon E. Litscher on plaintiff's claims for declaratory and injunctive relief previously against Litscher. However, defendant Litscher remains a party to this lawsuit on plaintiff's claim for monetary relief.

Entered this 30th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge