IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEPHEN WENDELL JONES,

ORDER

Plaintiff,

07-C-141-C

v.

SECRETARY M. FRANK, WDOC,
in his official capacity;
WARDEN R. SCHNEITER, WSPF;
G. BOUGHTON, a Security Director;
B. KOOL, a Unit Manager; and
P. HUIBREGTSE, Under Warden,

Defendants.

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Plaintiff was granted leave to proceed in this action for declaratory and injunctive relief on April 19, 2007. On May 29, 2007, defendants answered plaintiff's complaint, raising various affirmative defenses. Now plaintiff has filed a document titled "Brief-Reply by Plaintiff, Pro Se, in Opposition to Answers and Motions by Defendants to Dismiss 42 U.S.C. § 1983 Suit," in which he replies to factual statements made in the answer and argues that certain of defendants' affirmative defenses are not valid. In addition, plaintiff notes that defendant Schneiter has been replaced as warden at the Wisconsin Secure Program

Facility by P. Huibregtse, whom he wants added to this case. I will address each of these matters in turn.

Fed. R. Civ. P. 12(b) permits defendants to avoid litigation of a case if the plaintiff's allegations of fact, even if accepted as true, would be insufficient to make out a legal claim against the defendants. Although defendants have raised certain affirmative defenses in their answer they have not filed a motion to dismiss. If such a motion were to be filed, plaintiff would be allowed to respond to it. Otherwise, it is not necessary for plaintiff to respond to defendants' answer. Indeed, Fed. R. Civ. P. 7(a) forbids a plaintiff to submit a reply to an answer unless the court directs a reply to be filed. No such order has been made in this case. Plaintiff should be aware, however, that he is not prejudiced by Rule 7(a). Fed. R. Civ. P. 8(d) provides that averments in pleadings to which a response is not allowed are assumed to be denied. Therefore, although plaintiff is not permitted to respond to defendants' answer, the court assumes that he has denied the factual statements and affirmative defenses raised in that answer. Therefore, the court will give no consideration to that portion of plaintiff's submission that is intended to be a reply to defendants' answer.

With respect to P. Huibregtse, plaintiff notes that Huibregtse has succeeded defendant Schneiter as warden of the Wisconsin Secure Program Facility. He notes that he is adding Huibregtse to the caption of his lawsuit, but leaving Schneiter there as well, because he "still allege[s] that Schneiter is a proper person needed [for] just adjudication."

I agree that warden Huibregtse should be a named party in this action, but I disagree that Schneiter should remain a party. He will be dismissed.

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 and injunctive relief only. Liberally construing the complaint, I understood plaintiff to be suing defendant Schneiter in his official capacity to enjoin him from requiring plaintiff to move through the standard phases of the High Risk Offender program, to the last phase, which requires prisoners to congregate

outside their cells in education and programming groups. Plaintiff contends in his complaint that once he is moved into "phase green," he will be forced to congregate with other prisoners who wish him harm, including gang members and prisoners on whom plaintiff has "snitched." So long as plaintiff remains subject to movement into the green phase of the High Risk Offender program, it is possible to infer that the ultimate prison official responsible for administering the program and exposing plaintiff to a serious risk of harm is the warden of the institution in which the program operates. Therefore, to the extent that plaintiff seeks declaratory and injunctive relief, it is entirely appropriate to substitute P. Huibregtse in place of defendant R. Schneiter. However, plaintiff can no longer benefit from such relief directed at R. Schneiter because Schneiter is no longer enforcing the program with respect to plaintiff. Therefore, plaintiff's claims against Schneiter are moot.

ORDER

IT IS ORDERED that plaintiff's reply to the answer will be placed in the court's file but will not be considered.

Further, IT IS ORDERED that pursuant to Fed. R. Civ. P. 25(d)(1), P. Huibregtse is substituted for defendant R. Schneiter on plaintiff's claims for declaratory and injunctive

relief previously against Schneiter, and defendant R. Schneiter is DISMISSED from this action.

Entered this 8th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge