IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon C. Tubby,

Plaintiffs,

vs.

Erik O'Brien, Andrew Smith, Todd J. Delain, Heidi Michel, City of Green Bay, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, Thomas Zeigle, and John Does 1-5,

Defendants.

Case No. 1:19-cv-00137-WCG

FORREST TAHDOOAHNIPPAH DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE SCHEDULING ORDER AND FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

I, Forrest Tahdooahnippah, state and declare as follows:

1. I am an attorney licensed to practice law in this District. I am a Partner in the law firm Dorsey & Whitney LLP, and am one of the attorneys representing Plaintiffs in the above captioned action. I submit this Declaration in support of Plaintiffs' Motion for Leave to File a Third Amended Complaint. I have personal knowledge of the matters set forth in this Declaration, and if called to testify in this case, I would and could competently testify as to such matters.

2. Attached as **Exhibit 1** to this Declaration are true and correct copies of relevant excerpts of the deposition of Officer Eric Allen, which was taken on January 9, 2020.

3. Attached as **Exhibit 2** to this Declaration are true and correct copies of relevant excerpts of the deposition of Lieutenant Nathan Allen, which was taken on January 9, 2020.

4. Attached as **Exhibit 3** to this Declaration are true and correct copies of relevant excerpts of the deposition of Lieutenant Thomas Ziegle, which was taken on January 10, 2020.

5. Plaintiffs received an expert report discussing the importance of the testimony of Officer Allen, Lieutenant Allen, and Lieutenant Ziegle on January 31, 2020. The complete significance of this testimony was known to Plaintiffs only after consulting with their expert.

6. Attached as **Exhibit 4** to this Declaration is a true and correct copy of the unpublished case *Eads v. Prudential Ins. Co. of Am.*, No. 1:13-cv-01209-TWP-MJD, 2014 U.S. Dist. LEXIS 94305 (S.D. Ind. July 11, 2014).

7. Attached as **Exhibit 5** to this Declaration is a true and correct copy of the unpublished case *Erickson v. Wis. Dep't of Corr.*, No. 04-C-265-C, 2004 U.S. Dist. LEXIS 20770 (W.D. Wis. Sept. 29, 2004).

8. Attached as **Exhibit 6** to this Declaration is a true and correct copy of the unpublished case *Vettel v. Bassett Trucking LLC*, No. 1:17-CV-400-PRC, 2018 U.S. Dist. LEXIS 52961 (N.D. Ind. March 29, 2018).

9. Attached hereto as **Exhibit 7** to this Declaration is a true and correct copy of an email chain between myself and counsel for Defendants, the top email is from Jasmyne Baynard to myself date and time stamped February 20, 2020, 12:07 pm.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on February 27, 2020 in Minneapolis, Minnesota

/s/ Forrest Tahdooahnippah
Forrest K. Tahdooahnippah

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

- -

Susan Doxtator, Arlie Doxtator,
and Sarah Wunderlich, as Special
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vs. Case No.
1:19-cv-00137-WCG

Erik O'Brien, Andrew Smith, Todd
J. Delain, Heidi Michel, City of
Green Bay, Brown County, Joseph P.
Mleziva, Nathan K. Winisterfer,
Thomas Zeigle, Bradley A.
Dernbach, and John Does 1-5,

Defendants.

- -

DEPOSITION OF: ERIC ALLEN

TAKEN AT: GREEN BAY CITY HALL

LOCATED AT: 100 North Jefferson Street
Green Bay, Wisconsin
January 9, 2020
1:50 p.m. to 5:12 p.m.

REPORTED BY: VICKY L. ST. GEORGE, RMR.

- -

JOB NO. 3786670

see what was happening?
A. Who is "he?"
Q. Lieutenant Zeigle.
A. I have no idea where Lieutenant Zeigle was during any of this.
Q. All right. So was any attempt made to communicate to him this is what we got, what do you want us to do next?
A. Not by myself, no.
Q. Was it -- did Sergeant Katers do that?
A. Not that I recall.
Q. Did someone else do that?
A. I do not know.
Q. So at this point forward you kind of -- are you operating essentially without a plan?
A. No. The next step would be pepper spray, OC.
Q. All right. So that was part of the plan?
A. I don't know that it was ever specifically said that that is step two. That would be the normal progression.
Q. All right. So after the window is broken, is there a plan for any subsequent steps?
A. Well, now we have a continued risk factor where now he can see everybody because there is no longer a window there. He's not complying after repeated

1 commands to show his hands. The next step would be
2 to go to OC.
3 Q. But so at the time the window is being broken as far
4 as I understood it, but correct me if I'm wrong, the
5 plan was to see what we got, right?
6 A. Yes.
7 Q. Was there any other plan beyond that?
8 A. Not specifically that I recall.
9 Q. So when you start doing things like OC spray, K-9
10 unit, that's all unplanned?
11 A. Well, I wouldn't say it's unplanned. That's the next
12 course of action.
13 Q. It's just reacting to the situation, right?
14 A. Well, it's the next course. I mean we're not going
15 to walk up on him. So the next step would have to be
16 using the least intrusive method to get compliance.
17 Q. But there is nothing about it was decided ahead of
18 time. It's just reacting to whatever Jonathan is
19 doing; is that fair?
20 A. Somewhat fair. I'm not -- I don't like the word
21 reacting. But generally, yes.
22 Q. The OC spray in your duty belt, is there a reason you
23 didn't use that?
24 A. Mine was a small cannister. I don't know how many
25 ounces it was. I didn't feel I could effectively

C E R T I F I C A T E

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, VICKY L. ST. GEORGE, Registered Merit Reporter and Notary Public in and for the State of Wisconsin, do hereby certify that the preceding deposition was recorded by me and reduced to writing under my personal direction.

I further certify that said deposition was taken at the offices of GREEN BAY CITY HALL, 100 North Jefferson Street, Green Bay, Wisconsin on January 9, 2020, commencing at 1:50 p.m. and concluding at 5:12 p.m.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

In witness whereof, I have hereunto set my hand and affixed my seal of office at Milwaukee, Wisconsin, this 10th day of January, 2020.

Vicky L. St. George

VICKY L. ST. GEORGE
Notary Public in and for the
State of Wisconsin
Commission Expires 1/29/2021

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

- -

Susan Doxtator, Arlie Doxtator,
and Sarah Wunderlich, as Special
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1:19-cv-00137-WCG

Erik O'Brien, Andrew Smith, Todd
J. Delain, Heidi Michel, City of
Green Bay, Brown County, Joseph P.
Mleziva, Nathan K. Winisterfer,
Thomas Zeigle, Bradley A.
Dernbach, and John Does 1-5,

Defendants.

- -

DEPOSITION OF: NATHAN ALLEN

TAKEN AT: GREEN BAY CITY HALL

LOCATED AT: 100 North Jefferson Street
Green Bay, Wisconsin
January 9, 2020
8:30 a.m. to 1:38 p.m.

REPORTED BY: VICKY L. ST. GEORGE, RMR.

- -

JOB NO. 3786670

A. I couldn't tell you the number or the exact wording of it.
Q. What is your understanding of that exact policy?
A. That you would, like I just explained, that you go up to them and, you know, to the best of your ability explain hey, this is what's happening and I need you to stand here, stand there for containment.
Q. And that's for all the officers on the scene?
A. Yes.
Q. And you did that to the best of your ability?
A. I believe so.
Q. But you didn't know they were going to break the rear window so you couldn't have explained that to --
A. No.
MR. GUNTA: Got to let him finish his question, please.
BY MR. TAHDOOAHNIPPAH:
Q. Couldn't explain that to the other officers on the scene?
A. Yes.
Q. Did you explain to the other officers on the scene that OC spray was going to be deployed if necessary?
A. No, there was no -- I don't believe I told anyone about the OC spray.
Q. Okay. But that was part of the plan was to use it if

1 necessary, right?
2 A. Yeah, it's an option.
3 Q. Is it a reason why you didn't tell people that it
4 might be used?
5 A. They weren't the ones going to use it I guess.
6 Q. Did you tell the other officers on the scene that the
7 goal was to get Mr. Tubby to surrender and to be
8 looking for signs of surrender?
9 A. I think that was everybody's plan.
10 Q. That was an unspoken assumption that was shared?
11 A. Yes.
12 Q. Did you do anything to vocalize it to anyone?
13 A. That was the understanding that was -- that's the
14 goal. Everybody was under that same goal.
15 Q. So you didn't feel a need to specifically say, you
16 know, look for signs of surrender?
17 A. I -- you know what it looks like so -- when you're an
18 officer.
19 Q. So no?
20 A. What were you asking me, were you asking me if I
21 communicated that?
22 Q. Yeah.
23 A. No, no, I did not.
24 Q. Did you communicate to anyone that a K-9 officer or a
25 K-9 unit, excuse me, would be used?

can't -- it wasn't like decided like I said hey, Eric, you need to use UC. I don't think anybody told him that hey, we're going to use OC. He brings out that small cannister that we hold on our belt. And from my perspective where I was sitting back, he brought it out and pointed it towards Tubby and the broken window.

Q. Yeah.

A. But it appeared that it malfunctioned or it wasn't working.

Q. Okay. And then the Exhibit 14 it says what happened next is that Lieutenant Zeigle had a large -- large cannister of OC and passed it up to Officer Eric Allen?

A. Well, yeah, he -- Lieutenant Zeigle got my attention and says here, use this, grabbed the cannister out of the back of his squad car, wherever he got it from because he was behind me at the time.

Q. Ah-hah.

A. Said here. So I took that, and then I passed that up to whoever was in the front of -- is this Haack's squad? Or Denney's?

MR. GUNTA: It's Haack's.

BY MR. TAHDOOAHNIPPAH:

Q. That's Haack.

C E R T I F I C A T E

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, VICKY L. ST. GEORGE, Registered Merit Reporter and Notary Public in and for the State of Wisconsin, do hereby certify that the preceding deposition was recorded by me and reduced to writing under my personal direction.

I further certify that said deposition was taken at the offices of GREEN BAY CITY HALL, 100 North Jefferson Street, Green Bay, Wisconsin on January 9, 2020, commencing at 8:30 a.m. and concluding at 1:38 p.m.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

In witness whereof, I have hereunto set my hand and affixed my seal of office at Milwaukee, Wisconsin, this 10th day of January, 2020.

Vicky L. St. George

VICKY L. ST. GEORGE
Notary Public in and for the
State of Wisconsin
Commission Expires 1/29/2021

EXHIBIT 3

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

* *

Susan Doxtator, Arlie Doxtator,
and Sarah Wunderlich, as
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Erik O'Brien, Andrew Smith,
Todd J. Delain, Heidi Michel,
City of Green Bay, Brown
County, Joseph P. Mleziva,
Nathan K. Winisterfer, Thomas
Zeigle, Bradley A. Dernbach,
and John Does 1-5,
Defendants.

* *

DEPOSITION OF: LT. THOMAS ZEIGLE

TAKEN AT: Brown County Sheriff's Office
LOCATED AT: 2684 Development Drive
Green Bay, Wisconsin

January 10, 2020

11:02 a.m. to 3:57 p.m.

* *

REPORTED BY PAULA A. ERICKSON, C.S.R., R.P.R.,
C.L.R.

Sgt. Dernbach. Was he on the scene when the bear cat went into the sally port?

A. Yes.

Q. All right. And we talked a little bit before about sharing the plan, and I believe you said the plan was shared with Katers and Dernbach; is that right?

A. I am not a hundred percent sure if Dernbach was aware of the plan but Katers was.

Q. Okay. Did you do anything to try to share the plan with Dernbach?

A. If he wasn't aware -- If he wasn't on scene when it was talked about, I don't remember if I had a chance to talk to him or not. I don't recall.

Q. All right. So same question for Mleziva, did you do anything to share the plan with him?

A. No. He would not have been part of the planning process.

Q. So when he arrived, there was no attempt made to communicate to him this is what's about to happen or this is what's going on?

A. No.

1 Q. Why not?
2 A. Because we had our primary players in
3 place that were going to move forward with the
4 plan as far as people being in the bear cat.
5 Q. Wouldn't it be important for all the
6 officers on the scene to know what to expect?
7 MR. SPARKS: Object to form. Go ahead.
8 THE WITNESS: There was a number of
9 officers on scene and to go to each individual
10 officer with a game plan, that wouldn't -- I
11 don't know what I want to say here. I don't
12 want to say it would have been a waste of time,
13 but to go to each individual officer and tell
14 them the exact game plan, that just would have
15 been a waste of time in my eyes.
16 BY MR. TAHDOOAHNIPPAH:
17 Q. You couldn't have just huddled everyone
18 up and said one time here's what we are going to
19 do and have everyone go do it?
20 A. Based on the situation, no.
21 Q. Why not?
22 A. Just because it would have taken
23 guys -- some of the guys probably had an area of
24 responsibility or certain job and to bring
25 everybody away from whatever job they were

doing, it would have taken eyes off of whatever they were watching at the time and taking their eyes off their area of responsibility.

Q. Couldn't you have gotten on the radio and said, okay, everyone stay where you are but here's the plan, what's going to happen?

A. Again, the individuals that were aware of the plan were the ones that needed to be aware of the plan, so...

Q. So if you weren't aware of the plan, you didn't need to know what the plan was?

A. No. That's not what I am saying.

Q. Well, some people they didn't get the plan shared with them, right?

MR. SPARKS: Object to form. Lack of foundation.

THE WITNESS: Correct.

BY MR. TAHDOOAHNIPPAH:

Q. And so I am just curious as to why it wasn't shared with them and is it your testimony that they didn't need to know?

A. No.

Q. Okay. So why didn't they know then?

MR. SPARKS: Object to form. Go ahead.

THE WITNESS: Because, again, to tell

each individual officer what the game plan was, was just not in the best interest of what was going on at the time.

BY MR. TAHDOOAHNIPPAH:

Q. And why not?

A. Just for times' sake, it would have been a big undertaking to go around to each individual officer and say this is what we are going to do.

Q. And you couldn't have used the radio to just tell everyone at one time?

A. Again, at the time I didn't think that was necessary.

Q. So you just didn't think it was necessary that everyone on the scene knew the plan?

MR. SPARKS: Object to form.

THE WITNESS: No. That's not what I am saying. I just said I am saying that I didn't think it was important. I thought the main players that were part of the plan --

BY MR. TAHDOOAHNIPPAH:

Q. Uh-huh.

A. -- were aware but some of the other people that were around there, no. They didn't

1 know the plan.
2 Q. And you didn't think it was necessary
3 for them to know the plan even though they were
4 at the sally port?
5 MR. GUNTA: Objection to the form.
6 MR. SPARKS: Join.
7 THE WITNESS: Yeah. I guess I don't,
8 no.
9 BY MR. TAHDOOAHNIPPAH:
10 Q. Even though if something were to happen
11 they are there and they are on duty, they would
12 be required to act?
13 MR. SPARKS: Object to form. Vague.
14 Calls for speculation. Go ahead.
15 MR. GUNTA: Join.
16 THE WITNESS: Do you want me to answer?
17 MR. SPARKS: Yeah. Go ahead.
18 THE WITNESS: I'm sorry. Can you
19 repeat the question one more time.
20 MR. TAHDOOAHNIPPAH: Can you please
21 read it back?
22 (Whereupon, the record was read
23 as requested.)
24 MR. SPARKS: Same objection. Go ahead.
25 MR. GUNTA: Renewed.

THE WITNESS: Again, in a situation like that, officers are required to respond based on what is put in front of them, so...

BY MR. TAHDOOAHNIPPAH:

Q. So it's not important that they know what to expect other people will be doing?

MR. SPARKS: Same objection.

MR. GUNTA: Join.

THE WITNESS: Again, based on the I'll call it the totality of the circumstances, the situation, I informed the major players that were involved in putting forward the plan what the plan was. I didn't have time to let everybody know exactly what was going on.

BY MR. TAHDOOAHNIPPAH:

Q. Okay. But in an ideal world, you'd agree that it would be important for everyone that was there to know what the plan was?

MR. SPARKS: Same objection. Go ahead.

THE WITNESS: In an ideal world, correct.

BY MR. TAHDOOAHNIPPAH:

Q. After the window was breached, Sgt. Katers used some sort of implement to knock out the glass; is that correct?

C E R T I F I C A T E

I, Paula Ann Erickson, Certified Professional Reporter, Registered Professional Reporter and Notary Public, do hereby certify:

That the witness in the foregoing deposition named was present at the time and place therein specified;

That the said proceeding was taken before me as a Notary Public at the same time and place and was taken down in shorthand writing by me;

That this transcript is a true and accurate transcript of my shorthand notes so taken, to the best of my ability.

I further certify that I am neither counsel for nor related to or employed by any of the parties to this action and that I am not a relative or employee of any counsel employed by the parties hereto or financially interested in the action.

Paula Ann Erickson
Certified Shorthand Reporter
Registered Professional Reporter
License No. 084-003899
Notary Public

Dated this 12th day

of January, 2020.

EXHIBIT 4

Eads v. Prudential Ins. Co. of Am.

United States District Court for the Southern District of Indiana, Indianapolis Division

July 11, 2014, Decided; July 11, 2014, Filed

No. 1:13-cv-01209-TWP-MJD

Reporter
2014 U.S. Dist. LEXIS 94305 *; 2014 WL 3405951

LORRENE EADS, Plaintiff, vs. PRUDENTIAL INSURANCE COMPANY OF AMERICA, DEPARTMENT OF VETERANS AFFAIRS, UNITED STATES OF AMERICA, SLOAN D. GIBSON Acting Secretary of Veterans Affairs, Defendants.

Subsequent History: Dismissed by, in part Eads v. Prudential Ins. Co. of Am., 2014 U.S. Dist. LEXIS 99250 (S.D. Ind., July 22, 2014)

Later proceeding at Eads v. Prudential Ins. Co. of Am., 2014 U.S. Dist. LEXIS 107688 (S.D. Ind., Aug. 5, 2014)

Core Terms

proposed claim, futile, equal protection claim, discovery, benefits, deadline, asserts, delayed, amend, amend a pleading, motion to amend, intentionally, unduly, factual allegations, good cause, allegations, Disability, guidelines, disparate, situated

Counsel: [*1] For LORRENE EADS, Plaintiff: William Joseph Spalding, SPALDING LAW LLC, Bloomington, IN.

For PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant: Gregory W. Pottorff, Katherine A. Winchester, ICE MILLER LLP, Indianapolis, IN; Katelyn O'Reilly, Liza Walsh, Tricia B. O'Reilly, CONNELLY FOLEY LLP, Roseland, NJ.

For DEPARTMENT OF VETERANS AFFAIRS, UNITED STATES OF AMERICA, SLOAN D. GIBSON, Acting Secretary of Veterans Affairs, Defendants: Jill Z. Julian, UNITED STATES ATTORNEY'S OFFICE, Indianapolis, IN.

Judges: Mark J. Dinsmore, United States Magistrate Judge.

Opinion by: Mark J. Dinsmore

Opinion

ORDER ON MOTION FOR LEAVE TO AMEND

This matter comes before the Court on Lorrene Eads's ("Plaintiff") Motion to Modify Case Management Plan and for Leave to File Amended Complaint for Damages, which was filed on May 8, 2014. [Dkt. 73.] For the following reasons, the Court hereby **DENIES** Plaintiff's motion.

I. Background

On July 30, 2013, Plaintiff filed this action against the Secretary of Veterans Affairs, the United States Department of Veterans Affairs, the United States (collectively referred to as "the VA"), and the Prudential Insurance Company of America ("Prudential") (collectively "Defendants"), alleging that Defendants failed **[*2]** to deliver benefits from her late husband's insurance policy under the Servicemembers' Group Life Insurance ("SGLI") program. Plaintiff's Complaint for Damages ("Original Complaint") includes allegations

that the Defendants engaged in disparate treatment, that Prudential made coverage determinations in some cases while the VA ordered the payment of benefits in others, and that the Defendants failed to follow VA-issued guidelines for determining service member disability. [*Id.* at 6, 12.]

Pursuant to the Court's scheduling order, discovery commenced on October 25, 2013, and the deadline for amending the pleadings passed on December 30, 2013. [Dkt. 36 at 3.] Plaintiff served her initial discovery requests on January 2, 2014, and on April 8, 2014 Prudential produced two allegedly relevant documents: (1) the Job Aid Disability Extension, which includes criteria for determining whether a service member has been engaged in substantially gainful employment and (2) the VA Outreach for SGLI Disability Extensions, which indicates that the VA became solely responsible for handling the SGLI disability extension process in 2011. [Dkts. 75 at 4-5; 75-1; 75-2.]

One month later, Plaintiff moved to amend **[*3]** her Original Complaint to include "class of one" equal protection claims against the Defendants, alleging that Defendants engaged in disparate treatment of beneficiaries contrary to the requirements of the Servicemembers' Group Life Insurance Act and that such disparate treatment was irrational, arbitrary, and capricious. [Dkt. 76 at 16-18.] In response, Prudential submitted a letter that it had received from Plaintiff's counsel six months prior to the filing of the Original Complaint, accusing the Defendants of having "violated the Equal Protection Clause . . . by paying benefits to some beneficiaries . . . but not others identically situated." [Dkt. 79-2 at 5.] Oral Argument was held on Plaintiff's motion to amend on June 13, 2014, which motion the Court now addresses.

II. Discussion

Leave to amend a complaint shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). While denials of motions to amend the pleadings are disfavored, the Court may deny such a motion when there is "**undue delay**, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of **[*4]** allowance of the amendment, and **futility of amendment**." *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) (emphasis added). Rule 15's flexibility to grant motions to amend the pleadings must be tempered by the deadlines set forth in the Court's scheduling order, which Rule 16 provides "may be modified only for good cause." *See* Fed. R. Civ. P. 16(b)(4); *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). Thus, a motion to amend must first be examined under the heightened standard of Rule 16 before Rule 15 can be applied. *Alioto*, 651 F.3d at 719; *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005).

Plaintiff asserts that there is "good cause" to grant her motion because the proposed claims and scheduling order modifications arise from new information that Prudential produced months after the deadline to amend the pleadings passed. [Dkt. 75 at 7-9.] Defendants, in response, assert that Plaintiff has not shown good cause because (1) the motion was unduly delayed and (2) the proposed claims are futile. [Dkt. 78 at 2; 79 at 1.] The Court will address each of Defendants' assertions in turn.

A. Undue Delay

Defendants first contend that the **[*5]** motion to amend is unduly delayed because Plaintiff did not file her motion until May 8, 2014, several months after the scheduling order deadline for amending the pleadings had passed. [*See* Dkts. 78 at 5; 79 at 7.] Plaintiff, in reply, asserts that she was not dilatory in serving discovery requests and that any consequential delay was not undue. [*See* Dkt. 80 at 6-7.] Determining whether any delay precludes a finding of good cause primarily requires examination of the diligence of the moving party. *Trustmark Ins. Co.* 424 F.3d at 553.

Here, although the deadline for filing amended pleadings passed months before Plaintiff filed this motion, the Court notes that Plaintiff did not receive the relevant discovery responses until April 8, 2014, and Plaintiff filed this motion just one month later. Based on this timeline, even if Plaintiff had served her discovery requests the day of the parties' Rule 26(f) conference on October 25, 2013, Plaintiff would likely not have received the relevant responses until February of 2014 — well after the December 30, 2013 deadline to amend the pleadings. *See* Fed. R. Civ. P. 26(d)(1) (stating that discovery commences after the Rule 26(f) conference). Therefore, **[*6]** the Court finds that the timing of Plaintiff's discovery requests do not render her motion to amend unduly delayed.

However, Prudential also contends that the motion to amend is unduly delayed because Plaintiff already knew

of the "core factual allegations" of her proposed claims well before she moved to amend, as evidenced by the letter from Plaintiff's attorney dated January of 2013, six months prior to the filing of her Original Complaint in July of 2013. [Dkt. 79 at 7.] Plaintiff, however, argues that the newly-produced criteria, provided to Prudential by the VA, which she did not receive until April of 2014, are the "factual underpinning" of her proposed claims. [Dkt. 80 at 6.]

Where a party delays in seeking to add a claim based upon a previously-available factual basis, the Court is entitled to deny the party's request for leave. *Trustmark Ins. Co.*, 424 F.3d at 553; *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). In the January 2013 letter to Prudential, Plaintiff's counsel wrote that, if a lawsuit were to be filed, it would allege that Defendants "violated the Equal Protection Clause . . . by paying benefits to some beneficiaries . . . but not others **[*7]** identically situated." [Dkt. 79-2 at 5.] This would indicate that Plaintiff was aware of facts and circumstances giving rise to a class of one equal protection claim months before even filing her Original Complaint, and over a year before she moved to amend. Additionally, the allegations of her Original Complaint already claim that the Defendants' issuance of benefits was disparate and improper, asserting, for example, that "Prudential makes SGLI coverage determinations in some cases" but "in other cases . . . the [VA] . . . unilaterally orders Prudential to pay SGLI benefits," even when the beneficiaries are identically situated. [Dkt. 1 at 12.] Plaintiff's proposed claims are substantially similar: alleging that the Defendants "intentionally deny[ ] some beneficiaries' claims while granting others." [Dkt. 76 at 17-18]

Further, although the details of the VA's guidelines were not produced to Plaintiff until April of 2014, Plaintiff's Original Complaint, filed nine months earlier (and five months prior to the motion to amend deadline), contemplated and plead the existence of such guidelines. [*See* Dkt. 1 at 12 ("The [VA is] required by law to issue certain **guidelines** as part of . . . **[*8]** the SGLI program, including criteria for determining whether a service member was 'totally disabled'") (emphasis added).] While Plaintiff's proposed claims may allege further detail with regard to these guidelines than do the allegations in her Original Complaint, her proposed claims are merely *new claims* and fail to allege a claim based upon *new facts*. The Seventh Circuit in *Trustmark* and *Bethany Pharmacal* clarifies that, when the plaintiff was aware of the factual basis of her proposed claims prior to moving to amend, the court is entitled to deny such motion as unduly delayed. Thus, because Plaintiff is seeking to add claims based upon previously-available facts, her motion was unduly delayed and Plaintiff has not shown good cause to amend.

B. Futility

Proposed amendments to a complaint should be denied as futile only "when the new pleading would not survive a motion to dismiss." *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 869 (7th Cir. 2013) (citing *Brunt v. SEIU*, 284 F.3d 715, 720-21 (7th Cir. 2002)). In order to survive a motion to dismiss, a complaint must contain factual allegations that "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 668, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). **[*9]** In evaluating a party's proposed complaint under this standard, the Court must "accept well-pleaded facts as true but not legal conclusions or conclusionary allegations that merely recite a claim's elements." *Munson v. Gaetz*, 673 F. 3d 630, 632-33 (7th Cir. 2012) (citing *McCauley v. City of Chicago*, 671 F.3d 611, 614 (7th Cir. 2011) (citing *Iqbal*, 556 U.S. at 681)). Should a party fail to state a claim or should the claim otherwise fail as a matter of law, the court should deny the amendment. *Gandhi*, 721 F. 3d at 869; *Brooks v. Ross*, 578 F.3d 574, 577 (7th Cir. 2009).

Defendants assert that Plaintiff has failed to sufficiently plead a "class of one" equal protection claim. [Dkts. 78 at 2; 79 at 14-15.] The VA further asserts that the proposed claims against the VA are futile because 38 U.S.C. § 511 precludes review of the claim by this Court. [Dkt. 78 at 18.] The Court addresses each argument in turn.

1. Class of One Equal Protection Claim

Defendants assert that Plaintiff's proposed claims do not sufficiently plead a class of one equal protection claim because Plaintiff fails to allege an "intentional" action. [Dkts. 78 at 2; 79 at 14-15.] Plaintiff, in reply, contends that her proposed **[*10]** claims are sufficient, as they "fall squarely within the scope of the 'class of one' doctrine." [Dkt. 80 at 8.]

The Seventh Circuit pleading standard for a class of one claim, to which this Court adheres, provides that a plaintiff must allege: "(1) that he has been **intentionally treated differently** from others similarly situated, and (2) that there is no rational basis for the difference in

treatment."[1] *Fares Pawn, LLC v. Indiana Dep't of Fin. Institutions*, No. 13-3240, 755 F.3d 839, 2014 U.S. App. LEXIS 11813, 2014 WL 2782012 at *5 (7th Cir. June 20, 2014). "Intentionally," in this context, does not merely denote a voluntary act and instead denotes a "sense of wanting her to be made worse off than . . . others." *Tuffendsam v. Dearborn County Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004) (Posner, J.); *see also Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 913 (7th Cir. 2012) (en banc) (Wood, J., dissenting) (proposing a requirement of "intentional discrimination," a lower standard than that proposed by the lead opinion); *Crowley v. McKinney*, 400 F.3d 965, 972 (7th Cir. 2005) (citing *Tuffendsam* with approval). A class of one plaintiff must, therefore, allege facts that "plausibly suggest" that the plaintiff was intentionally **[*11]** treated worse than similarly-situated individuals. *Scherr v. City of Chicago*, 12 C 5913, 2013 U.S. Dist. LEXIS 50751, 2013 WL 1446304 at *5 (N.D. Ill. Apr. 9, 2013) *aff'd*, 13-1992, 757 F.3d 593, 2014 U.S. App. LEXIS 12516, 2014 WL 2958611 (7th Cir. July 2, 2014); *see Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Allegations couched in conclusory characterizations, such as "animosity," are insufficient without plausible factual support. *Scherr*, 2013 U.S. Dist. LEXIS 50751, 2013 WL 1446304 at *5.

In support of her assertion that her pleadings **[*12]** are sufficient, Plaintiff cites to a case from the district of New Jersey where the court permitted a SGLI class of one claim to advance beyond the pleading stage even though the plaintiff did not plead that the discrimination was intentional. [Dkt. 75 at 9; *See* Dkt. 75-3.] However, the Third Circuit class of one pleading standard merely requires that "an allegation of an equal protection violation . . . contain a claim that a plaintiff has been **treated differently** from others who are similarly situated." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 244 (3d Cir. 2008). While Plaintiff's proposed claims do allege that Defendants "intentionally denied" Plaintiff benefits, such language reflects Plaintiff's factual allegation that Defendants' actions were voluntary and is not an allegation that the conduct was intentionally discriminatory. [Dkt. 76 at 17-18.] While such disparate treatment might be enough to meet the Third Circuit pleading standard that a plaintiff be "treated differently," it is not enough to rise to the level of intentional discrimination required by the Seventh Circuit, as seen in *Tuffendsam*. Plaintiff's proposed claims do allege that Defendants' actions were "arbitrary **[*13]** and capricious" and "without a rational basis" [*Id.*], but these conclusory characterizations of Defendants' alleged actions are not further supported by factual allegations, which *Munson* clarified is not sufficient after the Supreme Court's decision in *Iqbal*. Because Plaintiff's proposed claims are devoid of factual allegations of intentional discriminatory treatment, Plaintiff has failed to satisfy the pleading requirements of a class of one equal protection claim and the amendment would, therefore, be futile.[2]

2. 38 U.S.C. § 511

Finally, the VA asserts that Plaintiff's proposed claims against the VA are barred by 38 U.S.C. § 511 because the decision of the Secretary of Veterans Affairs was final and therefore is unreviewable by this Court. [Dkt. 78 at 18-21.] Plaintiff, in reply, argues that her claim is exempt from the Section 511 bar because it is "founded upon 38 U.S.C. § 1975 (the subchapter governing the SGLI program)." [Dkt. 80 at 8-9 (internal quotations **[*14]** omitted).] The VA contends that Plaintiff's proposed equal protection claims are actually founded upon the Constitution, not the SGLI subchapter, and thus not subject to the exception to the Section 511 bar. [Dkt. 78 at 20-21.]

"[A] claim arises under the law that creates the cause of action." *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 909 (7th Cir. 2007) (internal quotation omitted). In order to state a claim under Section 1975, the claim "must allege 'breach of an explicit or implicit duty under the SGLI subchapter.'" *McNabb v. U.S. Dep't of the Army*, 12-CV-6038-RBL, 2013 U.S. Dist. LEXIS 68677, 2013 WL 2099724 at *1218 (W.D. Wash. May 14, 2013) (quoting

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[1] While the Seventh Circuit has consistently required an allegation of **intentional** discrimination in a class of one claim, it is unclear in the wake of the Seventh Circuit's split in *Del Marcelle v. Brown County Corporation* whether an allegation of **malice** is additionally required within the Seventh Circuit. 680 F.3d 887 (7th Cir. 2012) (en banc) (Wood, J., dissenting); *see Fares Pawn, LLC v. Indiana Dep't of Fin. Institutions*, No. 13-3240, 755 F.3d 839, 2014 U.S. App. LEXIS 11813, 2014 WL 2782012 at *5 (7th Cir. June 20, 2014) (stating that there is "no controlling opinion" on whether malice is required for class of one claim in the Seventh Circuit); *Thayer v. Chiczewski*, 705 F.3d 237, 254 (7th Cir. 2012) ("Unfortunately, the class-of-one standard [on a requirement of malice] in this circuit is in flux").

[2] Prudential also asserts that Plaintiff has failed to sufficiently allege that Prudential is a state actor. [Dkt. 79 at 21-22.] Because the Court finds that the Motion is futile on other grounds, it need not address this argument.

Denton v. U.S., 638 F.2d 1218, 1220 (9th Cir. 1981)); *see also Williams v. United States*, CIV.A. 08-5081, 2009 U.S. Dist. LEXIS 23208, 2009 WL 799974 (E.D. La. Mar. 19, 2009). It is the source of the remedy that determines the law under which a claim arises—the subject matter of the dispute is irrelevant. *See Edgenet, Inc. v. Home Depot U.S.A., Inc.*, 658 F.3d 662, 664 (7th Cir. 2011).

On their face, Plaintiff's proposed claims allege "violations . . . of the Equal Protection Clause" and expressly seek a remedy due to an alleged violation of the Equal Protection Clause, not due to any breach **[*15]** of a duty under the SGLI subchapter. [*See* Dkt. 76 at 16-17]. As a result, even though the VA's administration of the SGLI program may be the factual basis of Plaintiff's proposed claims, the claim against the VA arises under the Constitution. Accordingly, Plaintiff's proposed claims do not fall under the exception to the Section 511 bar, and the Court cannot exercise jurisdiction over Plaintiff's proposed claims against the VA. Thus, Plaintiff's proposed claims as asserted against the VA would be futile.

III. Conclusion

For the aforementioned reasons, the Court hereby **DENIES** Plaintiff's Motion to Modify Case Management Plan and for Leave to File Amended Complaint for Damages. [Dkt. 73.]

Date: 07/11/2014

/s/ Mark J. Dinsmore

Mark J. Dinsmore

United States Magistrate Judge

Southern District of Indiana

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EXHIBIT 5

Neutral
As of: February 19, 2020 3:36 PM Z

Erickson v. Wis. Dep't of Corr.

United States District Court for the Western District of Wisconsin

September 29, 2004, Decided

04-C-265-C

Reporter
2004 U.S. Dist. LEXIS 20770 *; 2004 WL 2309045

GEORGIA ERICKSON, Plaintiff, v. STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Defendant.

Subsequent History: Summary judgment denied by, Summary judgment granted by Erickson v. Wis. Dep't of Corr., 2005 U.S. Dist. LEXIS 2812 (W.D. Wis., Feb. 22, 2005)

Prior History: Erickson v. Wis. Dep't of Corr., 2004 U.S. Dist. LEXIS 13918 (W.D. Wis., July 19, 2004)

Disposition: Plaintiff's Motion for Leave to Amend the Complaint and Add Parties Absent Stipulation granted, and defendant's Motion to Strike or Declare Invalid the Amended Complaint denied.

Core Terms

individual defendant, amend, allegations, inmate, amended complaint, parties, assault, guard, sexual, qualified immunity, district court, state-created, passenger, pretrial, assured, argues, tape

Case Summary

Procedural Posture

Plaintiff female correctional employee filed an employment discrimination action in a state court against defendant, the Wisconsin Department of Corrections, after she was assaulted by an inmate while working at a prison. The Department removed the suit to the court. The employee moved for leave to amend her complaint to add additional parties and a 42 U.S.C.S. § 1983 claim. The Department moved to strike the proposed amended complaint.

Overview
The employee worked at a prison. She complained to her supervisors after she was left alone in an office with a prisoner who had a violent criminal history and had interacted inappropriately with other employees at the prison. Eight days later, the employee found herself alone with the prisoner again; he raped her and stole her car. The employee filed a Title VII of the Civil Rights Act of 1964 suit against the Department; she later sought to assert a claim under 42 U.S.C.S. § 1983 against her supervisors. The court found that a pretrial conference order did not bar the amendment. It held that allowing the amendment at so early a stage in the litigation would not cause undue prejudice to the supervisors or violate their due process rights. Although the question was close, the amendment would not be futile. The employee had stated an actionable claim for the violation of her substantive due process rights. She alleged that the supervisors had taken affirmative steps to assign the inmate to work in her office while knowing that he was a dangerous inmate, that the employee was unarmed, and that her work schedule required her to remain in the office beyond normal business hours.

Outcome
The court granted the motion to amend and denied the Department's motion to strike the amended complaint. It ordered that the employee's amended complaint would be treated as having been filed as of the date of the court's order.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[] **Judges, Discretionary Powers**

Although a district court shall freely grant leave to amend when justice so requires, the civil procedure rule does not command that leave be granted every time. Fed. R. Civ. P. 15(a). A court may deny leave to amend when (1) there is undue delay; (2) there is a dilatory motive on the movant's part; (3) the movant has failed repeatedly to cure previous deficiencies; or (4) amendment would be futile. The decision to grant or deny leave to amend rests within the sound discretion of the district court.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2[] **Pleadings, Amendment of Pleadings**

Once a responsive pleading has been filed, a plaintiff needs permission from the court to amend his or her complaint. Fed. R. Civ. P. 15(a).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] **Motions to Dismiss, Failure to State Claim**

A proposed amendment is futile if it would not survive a motion to dismiss for failure to state a claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] **Motions to Dismiss, Failure to State Claim**

A district court may dismiss a claim under Fed. R. Civ. P. 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The district court must accept all of the plaintiff's well-pleaded facts as true, draw all inferences in favor of the plaintiff, and resolve all ambiguities in favor of the plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN5[] **Motions to Dismiss, Failure to State Claim**

To state a claim under 42 U.S.C.S. § 1983, a plaintiff must allege that a party acting under color of state law deprived the plaintiff of a federal right.

Constitutional Law > Substantive Due Process > Scope

Governments > State & Territorial Governments > Employees & Officials

Constitutional Law > Substantive Due Process > General Overview

HN6[] **Constitutional Law, Substantive Due Process**

The substantive component of the Due Process Clause bars certain government actions regardless of the fairness of the procedures used to implement them. The United States Supreme Court has expressed reluctance to expand the concept of substantive due process and has stated that the Due Process Clause does not guarantee state employees a workplace free of unreasonable risks of harm.

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > Substantive Due Process > Scope

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN7[] **Scope, Government Actions**

Although a state's failure to protect citizens from private violence does not violate due process, the United States Court of Appeals for the Seventh Circuit recognizes two situations in which a state's failure to protect may give rise to liability under 42 U.S.C.S. § 1983. The first situation arises where the state has a special relationship with an individual such that the individual's ability to protect himself is limited. The second, or state-created danger situation, arises where state action creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

Constitutional Law > Substantive Due Process > Scope

Civil Rights Law > ... > Elements > Color of State Law > State Agents

Civil Rights Law > ... > Elements > Color of State Law > State-Authorized Actions

HN8[] **Elements, Protected Rights**

To state a 42 U.S.C.S. § 1983 claim under the state-created danger exception to the general rule, that a state's failure to protect citizens from private violence does not violate due process, the United States Court of Appeals for the Seventh Circuit requires a plaintiff to plead facts showing some affirmative act on the part of the state that either created a danger to the plaintiff or rendered him more vulnerable to an existing danger. Mere inaction by state officials, even in the face of a known threat, will not suffice. Because allegations of mere inaction are insufficient, cases finding or suggesting § 1983 liability under the state-created danger exception are rare and often egregious. The questions to be asked are (1) what actions did the state actor affirmatively take, and (2) what dangers would the victim otherwise have faced?

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > Substantive Due Process > Scope

HN9[] **Motions to Dismiss, Failure to State Claim**

The word "allowed" implies passivity, as when a person lets something occur without acting to make it occur. The word "allow" is defined as to let do, happen. Allegations of mere inaction, even in the face of a known threat, will not state a 42 U.S.C.S. § 1983 claim for a substantive due process deprivation. Where a claim is made against the police, the plaintiff must establish that the police failed to protect her from a danger which they created or made worse.

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > Substantive Due Process > Scope

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN10[] **Scope, Government Actions**

Courts finding valid substantive due process claims under the state-created danger theory have noted that the affirmative acts taken by the defendants were taken with actual knowledge of the danger they were creating.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Prison Officials

Constitutional Law > Substantive Due Process > Scope

Civil Rights Law > ... > Elements > Color of State Law > State-Authorized Actions

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN11[] **Law Enforcement Officials, Prison Officials**

A prison employee states a substantive due process claim under 42 U.S.C.S. § 1983 where she alleges that prison officials affirmatively created a significant risk of harm to her, and did so with a sufficiently culpable mental state.

Counsel: [*1] For Erickson, Georgia, PLAINTIFF: Robert J Kasieta, Marc T McCrory.

For State of Wisconsin Department of, Secretary, Department of Corrections, State of WI Dept of Corrections, DEFENDANTS: Richard Moriarty, Assistant Attorney General, Madison, WI.

Judges: BARBARA B. CRABB, District Judge.

Opinion by: BARBARA B. CRABB

Opinion

OPINION and ORDER

This is a civil suit for monetary and injunctive relief in which plaintiff alleges violations of Title VII of the Civil Rights Act of 1964. Plaintiff's claims stem from an incident in which plaintiff was sexually assaulted by a prisoner employed as a janitor at the Oregon Correctional Center System, a facility operated by defendant. Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court are plaintiff's Motion for Leave to Amend the Complaint and Add Parties Absent Stipulation and defendant's Motion to Strike or Declare Invalid the Amended Complaint. For the reasons that follow, I will grant plaintiff's motion and allow her amended complaint. Defendant's motion will be denied.

HN1[] Although a district court shall freely grant leave to amend "when justice so requires," the rule does not command that leave be granted **[*2]** every time. Fed. R. Civ. P. 15(a); Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750, 759 (7th Cir. 2002). A court may deny leave to amend when (1) there is undue delay; (2) there is a dilatory motive on the movant's part; (3) the movant has failed repeatedly to cure previous deficiencies; or (4) amendment would be futile. See Cognitest Corp. v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995); Moore v. State of Indiana, 999 F.2d 1125, 1128 (7th Cir. 1993) (well settled that leave to amend complaint should not be granted in situations in which amendment would be futile). The decision to grant or deny leave to amend rests within the sound discretion of the district court. J.D. Marshall Int'l Inc. v. Redstart, Inc., 935 F.2d 815, 819 (7th Cir. 1991).

As a threshold matter, the parties dispute the meaning of a section of the pretrial conference order entered by the magistrate judge. At issue is the section governing amendments to the pleadings, which states that "amendments to the pleadings pursuant to Rules 13, 14 and 15 must be filed and served not later **[*3]** than [June 25, 2004]." Plaintiff argues that she thought this language applied to amending the pleadings to add parties. Defendant argues that Fed. R. Civ. P. 21 governs the addition of parties and that since the pretrial conference order does not refer to Rule 21, the order does not constitute leave to add parties. This court has long understood this section of the pretrial conference report to cover amendments adding either claims or parties or both. The fact that the pretrial conference order refers only to amending the pleadings pursuant to Rules 13, 14 and 15 does not change this

understanding. Defendant also argues, correctly, that ***HN2***[] once a responsive pleading has been filed, a plaintiff needs permission from the court to amend his or her complaint. See Fed. R. Civ. P. 15(a). This objection is moot because plaintiff has filed a motion to amend her complaint.

In addition, defendant hints that allowing plaintiff to amend her complaint will violate the due process rights of the proposed individual defendants, apparently because they will not have timely notice of the claim against them. In support **[*4]** of this argument, defendant cites Nelson v. Adams USA, Inc., 529 U.S. 460, 146 L. Ed. 2d 530, 120 S. Ct. 1579 (2000), and Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001). Neither case is analogous. In Nelson, 529 U.S. at 463, a court granted leave to amend and immediately made the added party subject to a previously entered judgment without allowing the added party a opportunity to respond. The Supreme Court held that this violated due process. Id. Nelson does not apply to this case, however, because plaintiff seeks only to amend her complaint to bring the individual defendants into the case. No pre-existing judgment awaits the individual defendants. They will be given a full and fair opportunity to respond to plaintiff's allegations. In Chavez, 251 F.3d at 631, a group of plaintiffs sought to add an individual as a named representative of their class. The plaintiffs sought leave to amend three years after learning of the individual's claims, after fact discovery had been completed and two months before trial. Id. at 633. The district court denied leave to amend and this decision was upheld on appeal. Id. In the **[*5]** present case, plaintiff seeks to amend her complaint only four months after it was removed to this court and approximately two months after defendant filed its answer. Also, the deadline for discovery has not passed; indeed, the pretrial conference order sets the discovery deadline for February 18, 2005. In sum, allowing plaintiff to amend her complaint will not cause undue prejudice or violate the fundamental due process rights of the individual defendants.

Finally, defendant argues that plaintiff should be denied leave to amend because the amendment would be futile. ***HN3***[] A proposed amendment is futile if it would not survive a motion to dismiss for failure to state a claim. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1085 (7th Cir. 1997) (internal citations omitted). Thus, I must determine whether the allegations in plaintiff's amended complaint state a claim against the individual defendants. ***HN4***[] A district court may dismiss a claim under Rule 12(b)(6) only when "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). **[*6]** In addition, the district court must accept all of plaintiffs well-pleaded facts as true, draw all inferences in favor of plaintiff and resolve all ambiguities in favor of plaintiff. Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992). After examining the relevant case law and the arguments submitted by the parties, I conclude that, although the question is close, plaintiff has alleged facts that state a claim on which relief may be granted.

With respect to the individual defendants, plaintiff's amended complaint alleges the following.

ALLEGATIONS OF FACT

In December 2001, plaintiff worked as a payroll and benefit specialist for the Wisconsin Department of Corrections. On December 20, 2001, plaintiff was working by herself at the Oregon Correctional Center System in Oregon, Wisconsin, as her job duties required her to do on a regular basis. At 4:30 in the afternoon, plaintiff found herself alone in the office with John Spicer, an inmate at the Oregon Correctional Center who worked for the Department of Corrections as a janitor. Plaintiff's understanding was that she would not have unsupervised contact with any violent inmates. Upon realizing she was **[*7]** alone with Spicer, plaintiff left the office and went to a local establishment where Department of Corrections supervisors, proposed defendants Thompson, Johnson, Mixdorf and Bambrough, were attending a holiday celebration.

The individual defendants approved plaintiff's work schedule and knew that plaintiff often worked late. These individuals also were responsible for allowing Spicer to enter her area of the office. In addition, they knew or reasonably should have known that Spicer, an inmate with a violent criminal history, presented a significant and unreasonable risk of immediate and serious harm to plaintiff if left alone with her. Defendants knew or should have known also that three women, including another Department of Corrections employee, had lodged complaints against Spicer for leering at them, and in the case of the Department of Corrections employee, for "explicit sexual conduct." Defendants knew or should have known that Spicer had been convicted of numerous violent crimes and had exhibited a general disregard for the law and prison regulations. In fact, at the time of Spicer's assault on plaintiff, the Department of Corrections classified Spicer as a "high

risk" inmate.

[*8] At the party, plaintiff informed Thompson, Johnson, Mixdorf and Bambrough about Spicer's presence in her area and complained about the lack of security. Plaintiff was told by a supervisor (she does not provide a specific name) that the situation with Spicer would not be allowed to occur again. Nevertheless; the individual defendants knowingly and intentionally allowed plaintiff to be left alone with Spicer. On December 28, 2001, at approximately 5:00 pm, plaintiff was alone again with Spicer in her office. Spicer put a knife to plaintiff's throat, forced her into a restroom and repeatedly sexually assaulted her and threatened her life. Spicer then stole personal property from plaintiff, including her car, some clothing and a purse. On January 3, 2002, Spicer was convicted of kidnapping, armed robbery and sexual assault among other charges in connection with this incident.

DISCUSSION

HN5[] To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a party acting under color of state law deprived the plaintiff of a federal right. Gomez v. Toledo, 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980); Lehn v. Holmes, 364 F.3d 862, 872 (7th Cir. 2004). **[*9]** Plaintiff alleges that the individual defendants acted at all relevant times under color of Wisconsin law and violated her substantive due process rights under the Fourteenth Amendment.

HN6[] The substantive component of the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). However, the Supreme Court has expressed reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). The Court has stated further that the due process clause does not guarantee state employees a workplace free of unreasonable risks of harm. Collins, 503 U.S. at 129. ***HN7***[] Although a state's failure to protect citizens from private violence does not violate due process, DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 197, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), the Court of Appeals for the Seventh Circuit recognizes two situations in which a state's failure to protect may give rise to liability **[*10]** under § 1983. The first situation arises where the state has a "special relationship" with an individual such that the individual's ability to protect himself is limited. Wallace v. Adkins, 115 F.3d 427, 429 (7th Cir. 1997). The second, or state-created danger situation, arises where state action "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993). Plaintiff argues that her claim falls within the state-created danger exception.

HN8[] To state a claim under the state-created danger exception, the Court of Appeals for the Seventh Circuit requires a plaintiff to "plead facts showing some *affirmative act* on the part of the state that either created a danger to the plaintiff or rendered him more vulnerable to an existing danger." Stevens v. Umsted, 131 F.3d 697, 705 (7th Cir. 1997) (emphasis in original). Mere inaction by state officials, even in the face of a known threat, will not suffice. See DeShaney, 489 U.S. at 203 ("the most that can be said of the state functionaries **[*11]** in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them"); Hernandez v. City of Goshen, 324 F.3d 535, 538-39 (7th Cir. 2003) (affirming dismissal of § 1983 claim based on police department's refusal to investigate phoned-in threat); Windle v. City of Marion, 321 F.3d 658, 660-62 (7th Cir. 2003) (upholding summary judgment for police officer who did not intervene for two months after learning about sexually explicit phone conversations between school teacher and student); Stevens, 131 F.3d at 705 (affirming dismissal of claim where school superintendent failed to take action after learning of sexual assaults against student). Because allegations of mere inaction are insufficient, cases finding or suggesting § 1983 liability under the state-created danger exception are "rare and often egregious." Allen v. City of Rockford, 349 F.3d 1015, 1022 (7th Cir. 2003). The questions to be asked are (1) what actions did the state actor affirmatively take, and (2) what dangers would the victim otherwise have faced? Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1999) **[*12]** (quoting Wallace, 115 F.3d at 430).

In Reed, 986 F.2d at 1123-24, police officers stopped a car and arrested the driver, leaving the car keys and a passenger behind. The passenger was intoxicated and crashed head on into another car several hours later. Assuming that the arrested driver had been sober, the court found possible liability under § 1983 in the officers' action of removing the sober driver and leaving the passenger behind, knowing that the passenger was intoxicated. Id. at 1125. In Monfils, a paper mill worker

informed the police that a co-worker was planning to steal some office equipment. Later, when the co-worker made known his intent to discover who informed the police, Monfils made several calls to the police asking that they not release a tape of the conversation to the co-worker. 165 F.3d at 513-14. The defendant, a deputy chief in the police department, assured Monfils that the tape would not be released but did nothing more to prevent its release. 165 F.3d at 514. After speaking with the defendant, Monfils telephoned the local district attorney's office and spoke with an assistant district attorney. The district **[*13]** attorney then called the defendant, who assured the district attorney that the tape would not be released. 165 F.3d at 515. Despite the defendant's assurances, the co-worker did obtain a copy of the tape and later murdered Monfils. Id. In rejecting the defendant's claim of qualified immunity, the court stated that the defendant had created a danger that Monfils would not otherwise have faced by making assurances that the tape would not be released and then not following through. 165 F.3d at 518. By contrast, in Wallace v. Adkins, 115 F.3d 427 (7th Cir. 1997), the court upheld dismissal of a prison guard's § 1983 claim against prison officials who failed to take any actions to prevent an inmate from attacking the guard. After being informed of a threat made by the inmate against the guard, the officials ordered the guard to report for duty. Id. at 428. Although the officials assured the guard that they would take action to insure that the inmate did not come into contact with the guard, they took no such action. The court affirmed dismissal of the guard's § 1983 claim, stating that the defendants had not placed the guard in a position that he otherwise **[*14]** would not have faced. "Even without the actual order that was issued, Wallace would have had a duty to remain on his post whether or not the prison officials said a word." Id. at 430.

In this case, I must determine initially what affirmative actions were taken by the individual defendants. From the amended complaint, it is not clear exactly what affirmative actions the individual defendants took. Plaintiff alleges that the individual defendants (1) approved plaintiff's work schedule requiring her to work late hours; (2) knew or should have known that at least three women had filed complaints against Spicer in the past for "leering at them and for explicit sexual conduct"; (3) knew that plaintiff was unarmed while at work; and (4) "allowed or were responsible for allowing" Spicer to enter plaintiff's workspace while she was alone. Plaintiff also alleges that, after reporting her concerns about being left alone with Spicer on December 20, she was told by a supervisor that the "situation would not be allowed to happen again." However, plaintiff does not provide the name of the supervisor who made this statement.

The difficulty in analyzing plaintiff's complaint stems **[*15]** from her use of ***HN9***[] the word "allowed." The word implies passivity, as when a person lets something occur without acting to make it occur. See WEBSTER'S NEW WORLD COLLEGE DICTIONARY 39 (4th ed. 2001) (defining "allow" as "to let do, happen"). By using the word "allow," plaintiff's amended complaint can fairly be read to suggest that the individual defendants took no affirmative steps that placed plaintiff in danger. Read this way, the complaint alleges that Thompson, Mixdorf, Bambrough and Johnson are guilty at most of inaction, of not taking steps to protect plaintiff after learning of her concerns about Spicer. Allegations of mere inaction, even in the face of a known threat, would not state a claim for a substantive due process deprivation. See DeShaney, 489 U.S. at 197; Windle, 321 F.3d at 662 ("appellant fails to grasp that she has to establish that the police failed to protect her from a danger *they created or made worse*") (emphasis in original); Stevens, 131 F.3d at 705. Additionally, I note that plaintiff frames several allegations in her complaint in terms of what the individual defendants "knew or should have known." Plaintiff **[*16]** should be aware that ***HN10***[] courts finding valid substantive due process claims under the state-created danger theory have noted that the affirmative acts taken by the defendants were taken with *actual knowledge* of the danger they were creating. See Reed, 986 F.2d at 1125 ("It was the police action in removing [the driver], combined with their *knowledge* of [the passenger]'s intoxication, which creates their liability for the subsequent incident") (emphasis added); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992) (discussing prison nurse's allegations that prison officials selected an inmate to work with her despite their knowledge that the inmate would likely assault her).

However, drawing the inferences and resolving the ambiguities in plaintiff's favor, as I must at this stage of the litigation, I conclude that plaintiff has alleged facts sufficient to state a claim. It is arguable that plaintiff will be able to prove that the individual defendants took the affirmative act of assigning Spicer to work in plaintiff's office knowing that (1) Spicer was a dangerous inmate; (2) plaintiff was unarmed while at work; and (3) plaintiff's work schedule **[*17]** required her to remain at work beyond normal business hours. In this light, plaintiff's allegations are similar to those in Grubbs. In that case, a

nurse at a correctional facility was kidnapped, assaulted and raped by an inmate who had been chosen to work with her in the facility's medical clinic. She alleged that several prison officials had assigned the inmate to work with her despite knowing the inmate's history of violence against women, the likelihood that he would assault a female if left alone with her and the nurse's unpreparedness for an attack. Id. at 121. In Grubbs, the court held that ***HN11***[] plaintiff had stated a claim under § 1983 because she alleged that the officials "affirmatively created a significant risk of harm to her, and did so with a sufficiently culpable mental state." Id. at 123. Plaintiff alleges similar conduct on the part of the individual defendants in the present case. Thus, she has alleged facts sufficient to support her claim.

Finally, I note that both parties have submitted arguments on the question whether qualified immunity applies to the individual defendants. Instead of deciding the qualified immunity question **[*18]** at this time, I believe that the more orderly course is to allow plaintiff's amended complaint to be served on the individual defendants and wait for the individual defendants to raise the affirmative defense of qualified immunity if it applies to them. If the new defendants are represented by counsel for the existing defendant and wish to support a motion to dismiss with the brief already submitted on the qualified immunity question, they have that option.

ORDER

IT IS ORDERED that

1. Plaintiff Georgia Erickson's Motion for Leave to Amend the Complaint and Add Parties Absent Stipulation is GRANTED. Defendant Wisconsin Department of Corrections' Motion to Strike or Declare Invalid the Amended Complaint is DENIED. Plaintiff's amended complaint will be treated as having been filed as of the date of this order.

2. Plaintiff should arrange promptly to serve her complaint on the new defendants.

3. Defendant Wisconsin Department of Corrections may file its response to the amended complaint at the same time that the new defendants file their responsive pleading.

Entered this 29th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB

District Judge

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EXHIBIT 6

Vettel v. Bassett Trucking LLC

United States District Court for the Northern District of Indiana, Fort Wayne Division

March 29, 2018, Decided; March 29, 2018, Filed

CAUSE NO.: 1:17-CV-400-PRC

Reporter
2018 U.S. Dist. LEXIS 52961 *; 2018 WL 1531784

RAYMOND M. VETTEL, JR., et al., Plaintiffs, v. BASSETT TRUCKING LLC, et al., Defendants.

Core Terms

punitive damages, depositions, deadline, amend, leave to amend, expiration, pleadings, good cause

Counsel: [*1] For Raymond M Vettel, Jr, Joshua D Vettel, Michael E Tournor, Shari K Vettel, Plaintiffs: Kevin J Schneider PHV, LEAD ATTORNEY, PRO HAC VICE, Cline Williams Wright Johnson & Oldfather LLP, Lincoln, NE; Robert T Keen, Jr, Barrett McNagny LLP, Fort Wayne, IN.

For Bassett Trucking LLC, a Wisconsin Limited Liability Corporation, Bassett Transportation Services Inc, a Wisconsin Corporation, Mark A Harmon, an Individual, Defendants: Michael T Terwilliger, LEAD ATTORNEY, Whitten Law Office - Val/IN, Valparaiso, IN.

Judges: PAUL R. CHERRY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: PAUL R. CHERRY

Opinion

OPINION AND ORDER

This matter is before the Court on Plaintiffs' Motion for Leave to Amend Complaint [DE 22], filed by Plaintiffs Raymond M. Vettel, Jr., Joshua D. Vettel, Michael E. Tournor, and Shari K. Vettel on March 1, 2018. Defendants filed a response in opposition on March 6, 2018, and Plaintiffs filed a reply on March 12, 2018.

PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint against Defendants Massett Trucking LLC, Bassett Transportation Services Inc., and Mark A. Harmon on September 15, 2017, alleging injuries resulting from a motor vehicle accident involving two semi-trucks, one of which was driven by Plaintiff **[*2]** Raymond M. Vettel, Jr. and in which Plaintiff Joshua D. Vettel and Michael E. Tournor were passengers, and the other of which was driven by Defendant Mark A. Harmon, who was employed by one or both of the other Defendants.

Defendants filed their Answer on October 4, 2017. On November 1, 2017, the Court held a Rule 16(b) preliminary pretrial conference and set the deadline for Plaintiffs to file motions for leave to amend the pleadings for January 26, 2018, and the discovery deadline for July 27, 2018.

ANALYSIS

In the instant motion, Plaintiffs seek leave of Court to amend their complaint to withdraw Plaintiff Joshua Vettel's claim for past, present, and future loss of income and loss of earning capacity and to add a request for punitive damages and language supporting that request.

Plaintiffs indicate that, during the discovery process,

Plaintiffs counsel uncovered evidence that Defendant Harmon made statements at the scene of the accident admitting that he and his employer knew that Harmon was driving on very little sleep and that he had significantly exceeded the number of federally allowed driving hours before beginning the trip he was on at the time of the accident.

As an initial matter, this **[*3]** case is governed by Federal Rules of Civil Procedure 6(b) and 16 because the instant motion was filed after the deadline for the amendment of pleadings. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 719-720 (7th Cir. 2011) (discussing the interplay between Federal Rules of Civil Procedure 15(a) and 16(b)). Rule 6(b)(1) provides:

> When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Fed. R. Civ. P. 6(b)(1). Rule 16(b)(4) provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).

Plaintiffs explain that they uncovered what they believe to be evidence sufficient to support a request for punitive damages during the course of discovery. Plaintiffs represent that, on February 7 and 8, 2018, Defendants deposed Plaintiffs. At the depositions, two of the Plaintiffs testified that Defendant Harmon made specific statements at the scene of the accident of knowingly driving over the permitted hours and with very little sleep and that the same was known to the other Defendants as well. Based on this information, Plaintiffs believe that Defendants acted knowingly and intentionally **[*4]** regarding Defendant Harmon's fatigue and excess of driving hours.

Plaintiffs represent that they acted promptly after the depositions to amend their complaint. They state that they delivered a draft of an amended complaint to Defendants on February 16, 2018, just over one week after Plaintiffs' depositions concluded. The instant motion was filed just under five weeks after the expiration of the deadline to seek to amend pleadings and under one month after Plaintiffs' depositions. Plaintiffs' counsel represents that prior to Plaintiffs' depositions, counsel was unaware of the alleged statements made by Defendant Harmon at the scene of the accident. Defendants argue that there is no good cause for extending the deadline to seek leave to amend the pleadings because the information learned at Plaintiffs' depositions should have been known to Plaintiffs and their counsel prior to the depositions. Nonetheless, the Court finds that, based on the representations about information that came to light at the depositions, Plaintiffs have shown both good cause under Rule 16(b) and excusable neglect under Rule 6(b) for seeking leave to amend their Complaint after the expiration of the court-imposed deadline of January **[*5]** 26, 2018.

Motions for leave to amend complaint are freely granted when "justice so requires." Fed. R. Civ. P. 15(a)(2). However, "district courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002)).

Defendants do not oppose the request to withdraw certain claims of Plaintiff Joshua Vettel, but Defendants oppose the request to amend the complaint to add a demand for punitive damages and language supporting that demand on the basis that such an amendment would be unduly prejudicial and is the result of undue delay.

Delay itself is not a sufficient ground to deny a motion to amend. *See Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (citing *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792-93 (7th Cir. 2004); *Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir. 1992)). But delay is a factor to consider, and "the longer the delay, the greater the presumption against granting leave to amend." *Id.* (citations and quotation marks omitted). "Delay must be coupled with some other reason" to deny a motion for leave to amend. *Dubicz*, 377 F.3d at 793. The "some other reason" is usually prejudice to the opposing party. *Id.*

Defendants argue that the delay in bringing the demand for punitive damages is inexcusable. Defendants assert that Plaintiffs' **[*6]** counsel should have long been aware of the facts supporting punitive damages. This argument has some merit, as all of the "new evidence" cited by Plaintiffs in support of allowing amendment after the passing of the deadline to seek leave to amend

was provided by Plaintiffs themselves. However, this testimony was provided in response to questions posed by Defendants at Plaintiffs' depositions, and Plaintiffs' counsel represent that they were not aware of the basis for punitive damages until February 7 and 8, 2018.

Regarding prejudice, Defendants argue that they are prejudiced because they concluded, after the statute of limitations for actions occurring on the date of the motor vehicle accident passed on September 17, 2017, that there was no demand for punitive damages. Defendants then "prepared their defense accordingly." (Resp., 3, ECF No. 23). Defendants further state that allowing amendment would undercut the statute of limitations' purpose of providing a date after which a person can "move on, psychologically and otherwise" from the threat of a particular claim. *Id.* at 5.

However, Federal Rule of Civil Procedure 15 allows an amended complaint to relate back to the date of the original complaint when the law that provides **[*7]** the applicable statute of limitations allows relation back or when the amendment asserts a claim that arises out of the conduct, transaction, or occurrence set out in the original pleading. Fed. R. Civ. P. 15(c)(1)(A), (B). Amended pleadings are common in federal civil litigation. Though Defendants may have prepared their defense on the basis that no punitive damages demand had yet been made, they—or, at least, their counsel—should not have assumed that Plaintiffs would under no circumstances be allowed to make a punitive damages demand at a future date. For example, Defendants appear to concede that if, instead of Plaintiffs' testimony, an independent witness provided evidence to support a punitive damages claim, then the addition of a punitive damages claim would not be prejudicial and would be allowable. (*See* Resp., 5, ECF No. 23).

Further, the desire to remove the cloud of litigation over a person is tempered by Rule 15's provision regarding relation back. The passing of the deadline set by the statute of limitations does not render unsuccessful every attempt to amend pleadings regarding claims with expired statute of limitations periods.

Defendants contend that they have been prejudiced because they would have questioned **[*8]** Plaintiffs differently at the depositions had they known that punitive damages were a possibility. However, as stated above, defense counsel should have known that punitive damages were still a possibility. Notwithstanding this, the Court notes that, if amendment is allowed, some prejudice will occur in the form of the expense of redeposing Plaintiffs, and perhaps other deponents, on matters relevant to punitive damages. However, there are still almost four months until the currently scheduled discovery deadline expires, and Plaintiffs inform the Court that they do not object to sitting for additional depositions on the punitive damages issue. The prejudice to Defendants is not undue, the delay is slight, and good cause has been shown. The Court finds that justice requires leave to amend be granted under the circumstances in this case.

CONCLUSION

Based on the foregoing, the Court hereby **GRANTS** the Plaintiffs' Motion for Leave to Amend Complaint [DE 22]. The Court **ORDERS** Plaintiff to **FILE** the Amended Complaint on or before **April 4, 2018**.

SO ORDERED this 29th day of March, 2018.

/s/ Paul R. Cherry

MAGISTRATE JUDGE PAUL R. CHERRY

UNITED STATES DISTRICT COURT

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EXHIBIT 7

From: Jasmyne Baynard
To: Tahdooahnippah, Forrest
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O"Brien et al--Amended Complaint
Date: Thursday, February 20, 2020 12:06:58 PM
Attachments: image001.png

Forrest,

Sorry for the delay I've been wrapped up in trial preparation.

I spoke to Attorney Sparks yesterday and we will also likely oppose the amended complaint.

Jasmyne M. Baynard, Esq.
Attorney at Law
GUNTA LAW OFFICES, S.C.
9898 West Bluemound Road, Suite 2
Wauwatosa, WI 53226
P: (414) 291-7979
F: (414) 291-7960

From: forrest@dorsey.com <forrest@dorsey.com>
Sent: Tuesday, February 18, 2020 10:00 AM
To: Jasmyne Baynard <jmb@guntalaw.com>; BSparks@CrivelloCarlson.com; Ann Wirth <acw@guntalaw.com>; Gregg Gunta <gjg@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; SHall@CrivelloCarlson.com; JCastro@CrivelloCarlson.com
Cc: david.armstrong4@gmail.com; durocher.skip@dorsey.com
Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al--Amended Complaint

Hi everyone, it has been a week and I have not heard anything regarding this amended complaint . Please let me know your respective positions by tomorrow morning.

From: Tahdooahnippah, Forrest
Sent: Tuesday, February 11, 2020 10:44 AM
To: 'Jasmyne Baynard' <jmb@guntalaw.com>; Sparks, Ben A. <BSparks@CrivelloCarlson.com>; Ann Wirth <acw@guntalaw.com>; Gregg Gunta <gjg@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: david.armstrong4@gmail.com; Durocher, Skip <durocher.skip@dorsey.com>

Subject: RE: [EXTERNAL] RE: Doxtator et al v. O'Brien et al--Amended Complaint

Sure. Attached is the proposed Third Amended Complaint in redline.

From: Jasmyne Baynard <jmb@guntalaw.com>
Sent: Tuesday, February 11, 2020 10:43 AM
To: Sparks, Ben A. <BSparks@CrivelloCarlson.com>; Tahdooahnippah, Forrest <forrest@dorsey.com>; Ann Wirth <acw@guntalaw.com>; Gregg Gunta <gjg@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: david.armstrong4@gmail.com; Durocher, Skip <durocher.skip@dorsey.com>
Subject: [EXTERNAL] RE: Doxtator et al v. O'Brien et al--Amended Complaint

I share the same sentiments as Ben.

Thanks

Jasmyne M. Baynard, Esq.
Attorney at Law
GUNTA LAW OFFICES, S.C.
9898 West Bluemound Road, Suite 2
Wauwatosa, WI 53226
P: (414) 291-7979
F: (414) 291-7960

From: Sparks, Ben A. <BSparks@CrivelloCarlson.com>
Sent: Tuesday, February 11, 2020 10:40 AM
To: 'forrest@dorsey.com' <forrest@dorsey.com>; Ann Wirth <acw@guntalaw.com>; Gregg Gunta <gjg@guntalaw.com>; Jasmyne Baynard <jmb@guntalaw.com>; John Wolfgang <jaw@guntalaw.com>; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: david.armstrong4@gmail.com; durocher.skip@dorsey.com
Subject: RE: Doxtator et al v. O'Brien et al--Amended Complaint

Hi Forrest,

Could you provide a copy of the proposed amended complaint? We'll need to see exactly what changes are proposed before we can agree one way or the other as to whether we'll oppose the

motion (which I believe will have to have a copy of the proposed amended complaint attached to it anyways).

Thanks much,

Ben

Benjamin A. Sparks | Attorney
CRIVELLO CARLSON, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, WI 53203
(414) 271-7722 Main
(414) 271-4438 Fax
Email: bsparks@crivellocarlson.com
Licensed to practice in Wisconsin and Illinois.

From: forrest@dorsey.com <forrest@dorsey.com>
Sent: Tuesday, February 11, 2020 10:32 AM
To: acw@guntalaw.com; gjg@guntalaw.com; jmb@guntalaw.com; jaw@guntalaw.com; Sparks, Ben A. <BSparks@CrivelloCarlson.com>; Hall, Samuel C. <SHall@CrivelloCarlson.com>; Castro, Jose A. <JCastro@CrivelloCarlson.com>
Cc: david.armstrong4@gmail.com; durocher.skip@dorsey.com
Subject: Doxtator et al v. O'Brien et al--Amended Complaint

Counsel,

In light of the discovery that has occurred in the Tubby matter to date, Plaintiffs would like to amend their complaint. In particular, to remove Zeigle and Dernbach from Count II, remove the supervisory claim Count IV, and add Green Bay to Counts VI and IX. Plaintiffs would also like to adjust some of the allegations in the paragraphs to be consistent with information learned in discovery.

Please let me know whether you oppose this request or consent to these amendments, or if you would like to discuss further. Because the deadline to amend has past, Plaintiffs will need to seek leave of court regardless, but I would like to know whether that motion will be opposed or unopposed.

Forrest K. Tahdooahnippah
Partner

DORSEY & WHITNEY LLP
Suite 1500, 50 South Sixth Street | Minneapolis, MN 55402-1498
P: 612.492.6876 **F:** 612.486.8897 **C:** 6513071658
WWW.DORSEY.COM :: MINNEAPOLIS :: BIO :: V-CARD