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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

STATE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiffs move to amend their first amended complaint on the eve of the dispositive motion deadline. That effort should be rejected. They would replead parties and claims that this Court already dismissed and inject new parties into this case. Such a belated amendment would inflict considerable additional expense and effort on defendants and this Court. Plaintiffs' offer no justification for their delay regarding the addition of individual and official capacity claims against the GIB members, whose names have been publicly available since this case began. Moreover, it would be futile to replead dismissed claims, and some of Plaintiffs' new claims are also futile because

they do not sufficiently relate to the claims set forth against the State Defendants and could not withstand a motion to dismiss. Thus, Plaintiffs' motion for leave to amend should be denied.

BACKGROUND

Plaintiffs challenge the denial of state employee healthcare coverage related to certain treatments for gender dysphoria. They filed their original complaint on April 7, 2017 (Dkt. 1), and their first amended complaint on June 16, 2017. (Dkt. 27.) Plaintiffs' current complaint asserts four causes of action alleging violations of the Fourteenth Amendment's Equal Protection Clause via 42 U.S.C. § 1983, Title VII, and Section 1557 of the Patient Protection and Affordable Care Act (ACA).

State Defendants moved to dismiss the current complaint on June 22, 2017. (Dkt. 28.) Defendant Dean Health Plan similarly moved to dismiss the current complaint on June 28, 2017. (Dkt. 30.) On November 20, 2017, the court granted Dean Health Plan's motion and dismissed it from the case. (Dkt. 44.) This Court later granted in part and denied in part State Defendants' motion to dismiss on May 11, 2018. (Dkt. 67.) In that decision, this Court dismissed all claims against Rebecca Blank, Raymond Cross, Robert Golden, the Board of Regents of the University of Wisconsin System ("Board of Regents"), and the University of Wisconsin School of Medicine and Public

Health (SMPH). (Dkt. 67.) The court also dismissed the ACA claim against the Wisconsin Group Insurance Board (GIB).

The remaining defendants and claims under the first amended complaint are (1) Section 1983 equal protection claims against Robert Conlin, Secretary of the Department of Employee Trust Funds (ETF), in both his individual and official capacities; (2) a Title VII claim against ETF and GIB; and (3) an ACA claim against ETF. (*See generally,* Dkt. 27, 67.)

The Court's Preliminary Pretrial Conference Order was entered on August 3, 2017. (Dkt. 37) Under the order, the discovery cutoff is August 31, 2018. (Dkt. 37:3.) The deadline for dispositive motions was set for May 11, 2018. (Dkt. 37:2.) On May 4, 2018, Plaintiffs were granted an unopposed request to extend the dispositive motion deadline to June 8, 2018. (Dkt. 62.) Just over a week before this new deadline, the State Defendants told Plaintiffs' counsel that they intended to move for summary judgment on May 29, 2018. (Roth Decl. ¶ 3, 6-5-18.) Plaintiffs had asked to depose State Defendants' experts before the summary judgment opposition deadline, and so State Defendants disclosed their filing intention to accommodate Plaintiffs' scheduling request. (*Id.* ¶ 4.)

The day after State Defendants' courtesy call to Plaintiffs about their intent to file their motion for summary judgment ahead of the extended deadline, Plaintiffs filed a proposed second amended complaint. (Dkt. 74-1.)

The proposed complaint repleads claims previously dismissed against defendants Dean Health Plan, Blank, Cross, the Board of Regents, and GIB. (Dkt. 74-1:11–12). It also adds a new plaintiff, Wren Logan (Dkt. 74-1:6–7); a new Title VII claim against a new defendant, University of Wisconsin Hospital and Clinics Authority (UWHCA); and new Section 1983 equal protection claims against new defendants—Alan Kaplan, Chief Executive Officer of UWHCA, and individual GIB members Michael Farrell, Stacey Rolston, Herschel Day, Charles Grapentine, Waylon Hurlburt, Theodore Neitzke, Jennifer Stegall, Francis Sullivan, and Nancy Thompson, J.P. Wieske, and Bob Ziegelbauer—in their official and individual capacities. (Dkt. 74-1:8–12.)

Trial in this case is currently scheduled to commence on October 9, 2018. (Dkt. 37:5.)

ARGUMENT

I. This Court should deny Plaintiffs' request for leave to file a second amended complaint because their proposed claims are futile, it would cause undue prejudice to State Defendants, and there was undue delay by Plaintiffs in seeking leave to amend.

This Court has discretion to deny leave to amend pleadings pursuant to Rule 15(a). *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Continental Bank NA v. Meyer*, 10 F.3d 1293, 1298 (7th Cir. 1993). Denial is appropriate 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). Three of these factors—undue delay, undue prejudice to the defendants, and futility of the amendment—are present here, warranting denial of Plaintiffs' motion.

A. Plaintiffs' proposed claims are futile.

The Court should deny plaintiffs' motion because most of their proposed new claims are futile. "[I]t is well settled that a district court may refuse leave to amend where amendment would be futile." *Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 943 (7th Cir. 2012). "A new claim is futile if it would not withstand a motion to dismiss." *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 974 (7th Cir. 2001).

To survive a motion to dismiss for failure to state a claim, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" are insufficient. *Id.* (quoting *Twombly*, 550 U.S. at 555). Instead, plaintiffs' allegations must allow the Court to "infer more than the mere possibility of misconduct," and support

a "reasonable inference that [defendants are] liable for the misconduct alleged."[1] *Iqbal*, 556 U.S. at 678–79.

1. Plaintiffs fail to state a claim against previously dismissed parties on previously dismissed claims.

Plaintiffs' proposed complaint adds back defendants Dean Health Plan, Blank, Cross, and the Board of Regents, along with an ACA claim against GIB. (Dkt. 74-1:11–12). They note that they are repleading these dismissed parties and claims "in order to preserve our client's rights for appeal." (Dkt. 74-1:12, n. 1.). But Plaintiffs need not replead dismissed claims to preserve them for appeal. *See Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990); *Smith v. Nat'l Health Care Serv. of Peoria*, 934 F.2d 95, 98 (7th Cir. 1991)

Plaintiffs' repleaded claims already failed to withstand a motion to dismiss. And Plaintiffs have not pleaded any new facts regarding these claims in their proposed second amended complaint. The proposed claims are thus futile for the same reasons this Court already explained in its May 11, 2018, order. (*See* Dkt. 67.)

[1] Plaintiffs' "pleading burden should be commensurate with the amount of information available to them." *Olson v. Champaign Cty., Ill.*, 784 F.3d 1093, 1100 (7th Cir. 2015) (quoting *Bausch v. Stryker Corp.*, 630 F.3d 546, 561 (7th Cir. 2010)). Accordingly, the Court should look more strictly at the proposed second amended complaint because Plaintiffs drafted it with the benefit of extensive discovery and prior decisions on motions to dismiss. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 723 (2d Cir. 2013).

2. Plaintiffs fail to state claims against GIB members Day, Thompson, Sullivan, and Stegall.

Plaintiffs also fail to state proposed Section 1983 individual capacity claims against Day, Thompson, Sullivan, and Stegall. Liability against individuals under Section 1983 "require[s] personal involvement in the alleged constitutional deprivation." *Palmer v. Marion Cty.*, 327 F.3d 588, 594 (7th Cir. 2003). To sustain an equal protection claim against individual defendants, "a plaintiff must [prove] that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal,* 556 U.S. 667, 676 (2009). In *Iqbal*, the Supreme Court made clear that an equal protection claim against a government supervisor requires a showing of intentional discrimination—that is, a showing that the official intended to discriminate on the basis of a protected class. *Id.* Purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Id.* (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). It instead involves a decisionmaker acting "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Id.*

Here, the proposed complaint cannot support a Section 1983 claim against these four GIB members. First, the proposed complaint does not mention any individual actions taken by these GIB members. (Dkt. 74-1:8–11.) Instead, it vaguely alleges only that "on December 30, 2016, . . . the GIB took

action to reinstate the exclusion of health benefits and services related to gender reassignment." (Dkt. 74-1:15.) On its face, that pleading is insufficient to establish what any specific GIB member did and thus does not show that any specific GIB member had sufficient personal involvement in the alleged constitutional violation to face Section 1983 liability.

And facts subject to judicial notice show that these four new GIB defendants cast no votes to reinstate the Exclusion.[2] (Dkt. 83-13.) Day and Thompson actually voted against reinstating the Exclusion. (Dkt. 83-13:3.) And neither Sullivan nor Stegall was a member of GIB when it voted to reinstate the Exclusion on December 30, 2016.[3] (Dkt. 83-13.) They both joined later, in June 2017, as anyone can learn from viewing GIB's public website.[4]

It would futile to allow claims against two GIB members who voted against the Exclusion and against two others who did not join GIB until after GIBreinstated the Exclusion. Given these facts, there is no way Plaintiffs could

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[2] The Court may take judicial notice of these facts because ETF minutes and notes are publically available and are "not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b); *Vincent v. Medtronic, Inc.*, 221 F. Supp. 3d 1005, 1009 (N.D. Ill. 2016) (publicly-available government agency determinations that appear on an agency website are subject to judicial notice).

[3] Plaintiffs falsely assert that "[t]he individual members of the GIB who would be added as defendants in the proposed amended complaint voted unanimously, in July 2016, to remove the exclusion" at issue in this case. (Dkt. 75:2.) Sullivan and Stegall did not serve on GIB at the time.

[4] *See* http://etf.wi.gov/boards/board_roster_gib.pdf (last accessed May 30, 2018).

prove that these proposed defendants purposefully discriminated against them on any basis whatsoever.

B. Plaintiffs unduly delayed in seeking to add new parties and claims.

Plaintiffs' motion also should be denied because they have unduly delayed in seeking leave to add these new claims.

Where the party seeking an untimely amendment knows or should have known of the facts upon which the proposed amendment is based, but fails to assert them in a timely fashion, the amendment should be denied. *See Johnson v. Methodist Medical Center of Illinois,* 10 F.3d 1300, 1304, (7th Cir. 1993) (leave to file third amended complaint denied when motion was made six months after plaintiff's learned of the allegations but failed to seek an amendment until faced with summary judgment). While "[d]elay on its own is usually not reason enough for a court to deny a motion to amend," *Soltys v. Costello,* 520 F.3d 737, 743 (7th Cir. 2008), the longer the delay, "the greater the presumption against granting leave to amend." *Id.* (quoting *King v. Cooke,* 26 F.3d 720, 723 (7th Cir.1994)). Plaintiffs have the burden to show a valid reason for delay. *Sanders v. Venture Stores, Inc.,* 56 F.3d 771, 775 (7th Cir. 1995). Denying leave to amend is warranted if the moving party fails to "provide an explanation as to why the amendment did not take place sooner"

and its delay is burdensome to the opposing party. *Hindo v. Univ. of Health Sciences,* 65 F.3d 608, 615 (7th Cir. 1995).

There is no excuse for Plaintiffs' significant delay in seeking leave to add the individual GIB defendants. Plaintiffs could have learned these members' identities and how they voted on the Exclusion even before filing the original complaint in April 2017. Those facts were a matter of public record; Plaintiffs needed no discovery to learn them. (Dkt. 83-13.) Moreover, even after discovery, Plaintiffs have not alleged any facts regarding most of these GIB members that they learned during discovery. The only allegations regarding most proposed GIB defendants are solely a matter of public record. It is thus perplexing why Plaintiffs waited until just before the summary judgment deadline to add these defendants. Plaintiffs offer no excuse at all for this delay, nor can they. It appears only to be a dilatory tactic designed to prejudice State Defendants by injecting new issues and defendants into the case on the eve of summary judgment.

Plaintiffs do add allegations regarding two individual GIB members, but they are minimal: that "Defendant Wieske repeatedly urged the GIB to reconsider its July decision to end the exclusion," and that ETF concluded that the contingencies were met for reinstating the Exclusion "in consultation with Defendant Farrell." (Dkt. 74-1:¶¶ 51, 53.) These two sparse allegations can hardly justify waiting this long to plead individual and official capacity claims

against Wieske and Farrell. The public record had demonstrated how these two GIB members voted just as it did for all the others. Since the factual bases for Plaintiffs' "new" claims against individual GIB members have long been known to them, their decision to assert them the day before the State Defendants planned to file a summary judgment motion (as Plaintiffs' knew) is unjustifiable.

Further this delay burdens State Defendants, since their motion for summary judgment has already been filed. (Dkt. 80–83.) *Garner v. Kinnear Mfg. Co.,* 37 F.3d 263, 269–70 (7th Cir.1994) (district court did not abuse its discretion in denying two motions to amend after opposition had moved for summary judgment); *Johnson v. Methodist Med. Ctr. of Ill.,* 10 F.3d 1300, 1304, (7th Cir.1993) (leave to file third amended complaint denied when motion was made six months after plaintiffs learned of the allegations but failed to seek an amendment until faced with summary judgment). Should new defendants be added, State Defendants would need to conduct additional discovery and file another summary judgment motion to address those new defendants. Leave to amend should be denied given Plaintiffs' lengthy and unjustifiable delay.

C. The proposed complaint would unduly prejudice State Defendants.

Leave to amend should also be denied because the Plaintiffs' eleventh-hour amendments would unduly prejudice State Defendants.

"Undue prejudice occurs when the amendment 'brings entirely new and separate claims, adds new parties, or at least entails more than an alternative claim or a change in the allegations of the complaint' and when the additional discovery is expensive and time-consuming." *In re Ameritech Corp.*, 188 F.R.D. 280, 283 (N.D. Ill. 1999) (quoting *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Corp.*, 68 F.R.D. 383, 385 (N.D. Ill. 1975)).

First, the proposed complaint asserts new Section 1983 and Title VII claims on behalf of a new plaintiff, Wren Logan, against her employer, UWHCA and Kaplan—UWHCA's chief executive. (Dkt. 74-1:12.) Plaintiffs argue that these additional parties will not prejudice State Defendants because UWHCA is a "state entity," "represented by the same attorneys at the Department of Justice already defending the matter," with "identical" claims and remedies. (Dkt. 75:8–9.) These assertions are both factually and legally wrong.

UWHCA is a private entity; it is not a state entity. *Takle v. Univ. of Wisconsin Hosp. and Clinics Auth.*, 402 F.3d 768, 770–72 (7th Cir. 2005). In 1996, UWHCA was created as "a public body corporate and politic." Wis. Stat. § 233.02. As such, it is authorized by statute to sue and be sued in its own name, to own property and borrow against it, to make contracts, including employment contracts, to issue bonds, and, in short, to operate as a private hospital operates. Wis. Stat. § 233.03; *Takle*, 402 F.3d at 770–72. And neither

UWHCA nor Kaplan would be represented by counsel from the Department of Justice. *See* Wis. Stat. § 895.46(1) (state representation and indemnification provisions only apply to "[a]gents of any department of the state . . .").

So, with their proposed amendments, Plaintiffs now interject new private party defendants into this case. Those new defendants will be represented by new, separate counsel, and they likely will have new, separate defenses. For example, it is an open legal question whether Kaplan can even be subject to a Section 1983 claim. *See Allen v. Frank,* 246 F. App'x 388, 390–91 (7th Cir. 2007) (noting uncertainty over whether providers from UWHCA qualify as state actors who can be held liable under Section 1983).

In addition, new discovery would need to explore whether joinder of Logan's claims against UWHCA and Kaplan in this case is proper. Multiple defendants may be joined if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all defendants will arise in the action." *Id.* (citing Fed. R. Civ. P. 20(a)(2)). In *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007), the Seventh Circuit explained that "[u]nrelated claims against different defendants belong in different suits." Multiple plaintiffs may only join if they assert a "right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or

occurrences" and a "question of law or fact common to all plaintiffs will arise in the action." *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 863 (7th Cir. 2018) (citing Fed. R. Civ. P. 20(a)(1)).

To establish proper joinder of Logan, UWHCA, and Kaplan in this case, the relationship between ETF, GIB, and UWHCA would have to be explored, as well as the authority of UWHCA—again, a quasi-private entity—to secure insurance coverage for its employees aside from what is provided to employees of traditional state employers. Plaintiffs' liability theory necessarily turns on the power of various entities and officials to offer health insurance benefits; if UWHCA can provide health insurance benefits that state entities cannot, its decision not to cover the benefits Plaintiffs' seek here would have no relation to GIB's decision, which has long been the focus of this case. The simple fact that the same types of benefits are at issue regarding UWHCA does not create a sufficient relationship to this case, which, again, is focused almost entirely on GIB's decision and what state entities and officials, if any, can be held liable for it. The late addition of a claim against UWHCA would be especially burdensome since it would bear only a tangential relationship to the other claims in this case. *McDavid Knee Guard, Inc. v. Nike USA, Inc.*, No. 08-cv-6584, 2010 WL 151998, *4–5 (N.D. Ill. Jan. 14, 2010) (denying amendments that constituted "new, unrelated claims connected only by their tangential relationship to" existing claims).

Separately, Plaintiffs seek to add claims brought by a new plaintiff against new GIB defendants, and they do this on the eve of summary judgment with a fast-approaching trial date. These new defendants will inevitably file either a motion to dismiss, a motion for summary judgment, or both. Additional discovery will be required regarding these new parties, including additional written discovery, depositions, and possibly expert opinions—all inevitably expensive and time-consuming. Plaintiffs' assertion that adding these new parties "would not interfere with the existing trial schedule" is extremely unrealistic, given all the new discovery and motion practice that would now be required. (Dkt. 75:7.) Under *In re Ameritech Corp*., State Defendants are unduly prejudiced, and leave to amend should be denied. *See, In re Ameritech Corp*., 188 F.R.D. at 283; *Ferguson v. Roberts,* 11 F.3d 696, 706 (7th Cir. 1993).

II. If leave is granted to Plaintiffs to file their second amended complaint, the newly-added State Defendants should be provided a meaningful opportunity to conduct discovery and file dispositive motions.

If leave to proceed on the proposed complaint were granted, further discovery would be needed to ascertain the basis for Plaintiffs' claims against the individual GIB members. Once that discovery is obtained, State Defendants would anticipate filing a dispositive motion on their behalf. (*See*

Dkt. 81.)[5] State Defendants would request an amendment to the current scheduling order to allow discovery and leave to file a dispositive motion on behalf of the individual GIB members. Obviously, the newly-added Hospital defendants have had no opportunity to be heard in this case, but would presumably need significant time to respond to a complaint, conduct their own discovery, potentially seek summary judgment, and prepare for trial.

CONCLUSION

For all the foregoing reasons, Plaintiffs' motion for leave to file a second amended complaint should be denied.

Dated this 5th day of June, 2018.

Respectfully submitted,

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[5] According to the scheduling order in this case, a party may not file more than one motion for summary judgment in this case without leave of court. (Dkt. 37:3.)

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