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

JOHNSON W. GREYBUFFALO,

Plaintiff,

v.

DANIEL BERTRAND,
MICHAEL BAENEN, and
ROBERT NOVITSKI,

Defendants.

ORDER

03-C-559-C

This is a First Amendment and RLUIPA case in which plaintiff claims that defendants interfered with his practice of Native American religion. Before the court is defendants' motion to strike plaintiff's expert witness. Although there are grounds to grand defendants' motion, I am denying it without prejudice and expanding the deadlines slightly to give plaintiff one chance to remedy his errors.

On November 4, 2003, this court granted plaintiff leave to proceed on some of his claims against defendants in this case. In doing so, the court drew all reasonable inferences in plaintiff's favor. For instance, the court allowed plaintiff to proceed on his interference claims involving the practice of smudging and his participation in the Native American drug singers based in part on her inference that these were necessary religious exercises within the meaning of the First Amendment and the RLUIPA. The court also inferred that the new

religious group proposed by plaintiff and vetoed by defendants would have engaged in religious exercises that were distinct from those of the study group in which plaintiff already was participating. *See* dkt. 2 at 9-17.

In its February 4, 2004 preliminary pretrial conference order, this court advised plaintiff that

> as a party to a federal civil lawsuit, it is your duty to understand what you are supposed to do and when you are supposed to do it. To help you, this order explains what your duties are and what your deadlines are. This court has a number of rules that you must follow. It will not be easy to do everything that you are supposed to do, and you will not have a lot of time. Therefore, it is important for you to read this order now so that you can do things the right way.
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> * * *
>
> The Federal Rules of Civil Procedure are the rules that control much of what happens in this lawsuit. . . .It is your duty to know the rules of procedure that apply to you in this case.
>
> Dkt. 8 at 1-2

The court then set June 4, 2004 as the deadline for plaintiff to disclose any expert witnesses, July 2 as the deadline for defendants to disclose any expert witnesses, and July 15, 2004 as the deadline for any party to file a motion for summary judgment. With regard to expert witnesses, the court advised the parties that

> Because expert witnesses are different from other witnesses, there is a special rule telling how plaintiffs and defendants must name their experts and explain what those experts are going to say at trial. That rule is Rule 26(a)(2) of the Federal Rules of Civil Procedure. If a party does not follow the requirements of Rule 26(a)(2) by his deadline to disclose expert witnesses, then

> this court will not allow that expert witness to present evidence in this case.
>
> * * *
>
> The parties are on their own and they should keep this in mind if they think they might want expert witnesses in this case. There is no extra time in the schedule to allow for extensions, so the parties should begin looking for expert witnesses right away if this type of witness might be important for summary judgment or for trial.

Id. at 5.

Plaintiff timely served (and filed) his expert witness disclosure which stated in its substantive entirety that

> Richard E. Watkins is a long recognized Spiritual Advisor by the WDOC and the BOP. Mr. Watkins is Vice President of the United Indians of Milwaukee, he is also a Pipe Carrier. Mr. Watkins will be providing his expert opinion without compensation and freely on behalf of the plaintiff.
>
> Mr. Watkins will be providing testimony directly related to the plaintiff's allegations allowed to proceed from his original complaint. This testimony will be of a religious nature as related to Traditional Native American Religious beliefs.
>
> Mr. Watkins opinions on these matters are based from his status as a Pipe Carrier and a recognized Spiritual Advisor for the WDOC and the BOP.
>
> Dkt. 10 at 1-2.

Defendants promptly moved to strike Watkins as an expert witness on the ground that plaintiff's disclosure failed in five ways to comply with Rule 26(a)(2). *See* Dkt. 11 at 2. Defendants argued that was not substantially justified and it was not harmless. Quoting from *Salgado by Salgado v. General Motors Corp.*, 150 F.3d 735, 741 n.6 (7th Cir. 1998),

defendants observed that Rule 26(a) expert reports must be detailed and complete so that opposing counsel is not forced to depose an expert in order to avoid ambush at trial; the report must not be sketchy, vague or preliminary, but must include the "how" and "why" the expert reached a particular result, not merely the expert's conclusory opinions.

Plaintiff responds that his disclosures

> when read with some common sense is total, and meets all requirements of said Rule. . . .The plaintiff's Disclosure Report speaks for itself completely, any information not provided is not available, making such silence on this information harmless. Any information available to the plaintiff on Mr. Watkins for disclosure has been disclosed . . .."
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> Dkt. 15 at 1.

Plaintiff is incorrect. His expert disclosure does not come close to meeting the requirements of Rule 26(a)(2). A common sense reading of his disclosure reveals nothing useful. For instance, what, is Mr. Watkins's expert opinion about the religious *necessity,* as opposed to desirability, of smudging? Is there an acceptable alternative to smudging? Where must it be done? Are there alternative materials that are acceptable for the ceremony? What is Mr. Watkins's expert opinion in response to the same sorts of questions regarding participation in Native American drum singing? Does Mr. Watkins intend to offer an opinion regarding any material distinctions between plaintiff's proposed-but-vetoed religious group and the study group that already existed? If so, what is it, and what are the specific facts that support his opinion?

It was plaintiff's obligation to obtain from Mr. Watkins a detailed written report that explained his opinions on each and every one of these issues, along with his opinions on any other issues relevant to plaintiff's pending claims. Plaintiff also was required to provide Mr. Watkins's resume and his history as a trial witness. All of this was–and is–required by Rule 26(a)(2), by this court's clear order, as well as by common sense and fair play. The point of the expert disclosure rule is to put everybody's cards on the table early so that there are no surprises later. Plaintiff has not done this, leaving defendants to guess as to what they should expect from Mr. Watkins. This is not acceptable.

I am not sure how plaintiff could have misunderstood the clear directions he received, but because he has named an apparently qualified expert, and because the calendar has about one lungful of breathing room, I will give plaintiff one last, fast shot to try to remedy his error. Plaintiff is not entitled to a second chance but I am giving him one; there shall not be a third. Part of the trade-off is that plaintiff must surrender nine days of his response time on a summary judgment motion.

ORDER

Accordingly, it is ORDERED that:

1) Defendants' motion to strike plaintiff's expert witness is denied without prejudice.

2) Plaintiff may have until July 26, 2004 within which to file and serve an actual and complete expert report from Richard E. Watkins and that meets all the other requirements of Rule 26(a)(2). There shall be no extensions of this deadline.

3) Defendants may have until August 9, 2004 within which to supplement their expert disclosures if they wish.

4) The summary judgment motion deadline is moved to August 16, 2004.

5) Plaintiff's response to any summary judgment motion must be filed and served within 21 days of his receipt of defendants' motion. Defendants may have ten calendar days within which to file and serve any reply.

Entered this 12th day of July, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge