IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY CORDOVA,

Plaintiff, ORDER

v. 05-C-487-C

THOMAS BOSTON,

Defendant.

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In this action, plaintiff Anthony Cordova contends that defendant Thomas Boston, a dentist at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, violated his Eighth Amendment rights when he allowed prison officials to take plaintiff's dental bite plate and refused to issue a new one, causing plaintiff to suffer severe migraine headaches and attempt suicide. Defendant moved for summary judgment on February 27, 2006. Promptly thereafter, a briefing schedule was established on the motion, pursuant to which plaintiff had until March 29, 2006, in which to oppose the motion. Subsequently, plaintiff's deadline was moved at his request to April 12, 2006. On April 11, 2006, plaintiff filed his opposition brief, together with evidentiary materials and a response to defendant's proposed findings of fact. In addition, plaintiff has filed a document titled "Plaintiff's Notice of Motion and

Motion to Stay Defendant's Motion for Summary Judgment." That motion is presently before the court.

In support of his motion to stay, plaintiff contends that "the defendant's motion for summary judgment should be denied and dismissed as a matter of law" because defendant failed to serve plaintiff with a copy of Fed. R. Civ. P. 56(e) and warn him of the consequences of a failure to respond to a motion for summary judgment with evidentiary materials. The record appears to confirm that at the time defendant served plaintiff with his motion, he did not advise plaintiff of the consequences of a failure to respond to the motion and give him a copy of Rule 56(e). Nevertheless, plaintiff's motion will be denied, because this court has provided plaintiff with ample instruction on the rules governing summary judgment motions and cautioned him more than once about the consequences of his failure to respond to defendant's submissions. Moreover, although plaintiff did not receive a copy of Rule 56(e), the omission has caused him no prejudice.

In arguing that defendant committed a grievous error by failing to provide him proper notice with his motion for summary judgment, plaintiff relies on Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982). In that case, the defendant filed in the district court a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment, which was supported with an affidavit. When the plaintiff did not respond to the motion, the district judge dismissed the case, relying heavily on the affidavit supporting the motion.

The court of appeals reversed. It noted that Rules 56 and 12(b)(6) each imply that a court cannot properly act on a motion for summary judgment without giving the opposing party a "reasonable opportunity to submit affidavits that contradict the affidavits submitted in support of the motion." Id. at 101. It held that in all cases involving a prisoner not represented by counsel, the prisoner had to be given notice of the consequences of failing to respond with evidentiary materials to a motion for summary judgment. It did not demand that the moving party be responsible for providing such notice. Rather, the court stated,

> We are naturally reluctant to impose additional duties on our overburdened district courts. But we trust that counsel for the defendants in prisoner civil rights cases in this circuit will lift this new burden from the judges' shoulders, by henceforth including in any motion for summary judgment in a case where the plaintiff is not assisted by counsel a short and plain statement that any factual assertion in the movant's affidavits will be accepted by the district judge as being true unless the plaintiff submits his own affidavits or other documentary evidence contradicting the assertion. The text of Rule 56(e) should be part of the notice, but in addition to rather than instead of the statement in ordinary English that we are requiring.
>
> If counsel for defendants fail to provide the required information it will be the district judge's responsibility to do so, but we hope this will rarely be necessary.

Id. at 102-103.

Subsequently, in Timms v. Frank, 953 F.2d 281(7th Cir.1992), the court of appeals extended this holding to all cases involving pro se litigants. However, in Timms, the court found that although the plaintiff had not received proper notice, she was not prejudiced by

it because her case lacked merit in any event.

In this district, the court provides the parties in all of its cases with a document titled "Procedures to be Followed on Motions for Summary Judgment." These procedures are attached to the magistrate judge's preliminary pretrial conference order, which is sent to the parties early in the case. They are sent again in pro se cases with the briefing schedule letter issued by clerk of court after a summary judgment motion is filed. The procedures describe clearly how a litigant is to respond to the moving party's submissions. In a document titled "Helpful Tips . . ." attached to the face of the procedures, the parties are cautioned that "[a] fact properly proposed by one side will be accepted by the court as undisputed unless the other side properly responds to the proposed fact and establishes that it is in dispute." In addition, in a separate document titled "Memorandum to Pro Se Litigants Regarding Summary Judgment Motions" which accompanies the procedures, pro se litigants are warned, "[i]f a party fails to respond to a fact proposed by the opposing party, the court will accept the opposing party's proposed fact as undisputed. If a party's response to any proposed fact does not comply with the court's procedures or if the party cites evidence that is not admissible, the court will take the opposing party's factual statement as true and undisputed." These warnings are sufficient to give plaintiff ample notice of the consequences of his failure to respond to defendant's evidentiary materials, as Lewis requires.

True, plaintiff did not receive from the court or defendant a copy of Rule 56(e). The

rule reads as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, plaintiff was instructed in the court's procedures that "affidavits must be made by persons who have first hand knowledge and must show that the person making the affidavit is in a position to testify about those facts." Procedure I.C.1.e. He was told in plain language that he could submit documentary evidence that is shown to be true and correct, either by an affidavit or by stipulation of the parties. Procedure I.C.1.f. Procedure I.C. makes it clear that additional evidence may be submitted in the form of depositions, answers to interrogatories and admissions, and, as noted above, the procedures advise the non-moving party that if he does not oppose the moving party's proposed facts that properly rely on evidentiary submissions in the record, the court will accept the facts as unopposed. These instructions relay in layman's terms the full import of the text of Rule 56(e).

In light of the fact that plaintiff was provided clear notice of the consequences of his

failure to respond with appropriate evidentiary materials to defendant's motion for summary judgment, plaintiff's obvious awareness of Rule 56 as evidenced by his reference to the rule in his own motion, and plaintiff's submission of evidentiary materials in opposition to defendant's motion, his motion to "stay" summary judgment and deny or dismiss defendant's motion will be denied.

ORDER

IT IS ORDERED that plaintiff Anthony Cordova's "Motion to Stay Defendant's Motion for Summary Judgment" is DENIED.

Entered this 24th day of April, 2006.

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