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

TITUS HENDERSON,

Plaintiff,

v.

MATTHEW FRANK, *et al.*

Defendants.

ORDER

06-C-012-C

Before the court is plaintiff's third motion to compel discovery in this prisoner civil rights lawsuit. *See* dkt. 39. Although discovery ended on February 23, 2007 and trial will commence in three weeks, on March 26, 2007, plaintiff dated his current motion February 18, so that under the Mailbox Rule, defendants' response was due on the date discovery ended. Therefore, plaintiff's motion technically is timely.[1]

In a February 15, 2007 order, this court re-iterated the 13 claims that will be tried starting March 26, 2007. *See* dkt. 48 at 1-2. These claims run the gamut from First Amendment challenges to written institutional policies to allegations of correctional officers sexually assaulting prisoners. Plaintiff's motion to compel seeks evidence requested in his December 15, 2006 request for production of documents (RFPs), which defendants answered on February 5, 2007. These are his specific requests in his motion:

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[1] This court will not always accept the signing date as the date on which a prisoner put his submission into his institution's mail stream, but there is no factual basis to separate the two in this instance.

RFP (1): plaintiff seeks to compel production of the institutional files of all female officers who worked at WSPF from 1999-2005. Plaintiff contends that these records are necessary so that plaintiff can identify 'the female officer who wrote incident reports against Sgt. Bausch and other staff giving notice to Peter Huibregtse that a pattern of sexual assault and sexual misconduct has continued at WSPF. The claim on which plaintiff is proceeding to trial is that Huibregtse did not prevent Bausch from fondling plaintiff. Although I can hypothesize an evidentiary chain between plaintiff's claim and the evidence he seeks, his request is much too broad, much too invasive of the officers' privacy and much too late. If evidence of this nature were important to plaintiff, he could have and should have fashioned a much narrower discovery request and served it much earlier in this case (in which discovery opened on May 17, 2006).

RFP (2): plaintiff seeks to compel production of all "incident reports forms DOC # 98" of forced cell extractions of Rafael Colon from April 2005 to December 1, 2005, plus any videotapes thereof." Plaintiff contends that these documents and videos are relevant "to set forth accurate dates and times of Mr. Colon request for medical care which was denied by Sgt. Sickniger as a pattern, resulting in Mr. Colon cell extraction." Dkt. 49 at 2. Defendants claim no responsive documents exist; plaintiff doesn't believe them. Perhaps the requested evidence might be tangentially relevant to plaintiff's ninth claim, which involves Sickniger as an actor, but this court cannot order a party to produce evidence that it claims it does not have. If defendants had a duty to create and maintain this evidence, then plaintiff might be

able to impeach them at trial with the absence of such evidence, if such evidence even would be relevant at trial. That is a matter to take up at the final pretrial conference.

RFP (3): Plaintiff's third RFP is similar to his second but involves a different prisoner and different dates. The state also claims to have no documents responsive to this request. Therefore, the court's position on this request is the same as its position on the second.

RFP (6): plaintiff seeks all disciplinary files, incident reports and memoranda concerning Sickniger, Bausch, Shannon and Kool, to prove a patter of habit and character of defendants. According to the court's file, only Bausch and Shannon are defendants. Character evidence generally is inadmissible at trial, *see* F.R. Ev. 404(a) and habit evidence is admissible only pursuant to Rule 406. Plaintiff has not proffered how this evidence would be admissible at trial; maybe his theory is that these officers have a character trait or a habit of inmate abuse. This is not going to fly. In any event, such a "trait" or "habit" would not be ascertainable from disciplinary records.

RFP (8): plaintiff seeks information regarding other inmates' locations in Foxtrot Unit, Range 4 to determine where inmate Rafael Colon was living between March 1-December 1, 2005. Defendants object, claiming this is unduly burdensome, and that plaintiff can simply ask Mr. Colon. Plaintiff has not disputed this, but he contends that defendants' failure to provide this "one piece of paper" to lay a foundation for when Colon was at WSPF is indicative of defendants' dilatory and obstructionist approach to discovery. If plaintiff had asked defendants merely to verify Colon's cell location, he probably would

have obtained a substantive answer, but he asked for a printout of the entire range. This was overkill. If plaintiff wishes to pose a request for admission relating solely to Colon during this March-December period, he has court permission to do so. But plaintiff is not entitled to the information requested in his RFP.

ORDER

IT IS ORDERED that plaintiff's motion to compel discovery is DENIED.

Entered this 6th day of March, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge