

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

PATRICK J. FITZGERALD,

Plaintiff,

v.

ORDER
07-C-61-C

JAMES GREER, Health Services Administration WDOC;
HELEN NELSON, Health Services Administrator WDOC;
STEVE CASPERSON, Admin Div of Adult Institutions WDOC;
TIMOTHY CORRELL, MD, Dodge Correctional Institution;
DEB LEMKE, MD, Oshkosh Correctional Institution;
ROMAN Y KAPLAN, Health Services Unit, WDOC/OSCI;
NANCY BOWENS, Nurse Practitioner WDOC/OSCI; and
JENNIFER DELVAUX, Inmate Complaint Examiner, WDOC/OSCI,

Defendants.

In an order dated March 26, 2007, I granted plaintiff Patrick J. Fitzgerald leave to proceed in this action on the following claims:

1) between April 4, 2005 and June 20, 2005, defendant Timothy Correll failed to treat plaintiff's medical conditions, deliberately causing plaintiff months of irregular heartbeat and severe pain, in violation of the Eighth Amendment;

2) beginning in January, 2006 to the present, defendants Roman Kaplan and Nancy Bowens disregarded plaintiff's pleas for increased pain medication for the purpose of causing

plaintiff to suffer needlessly;

3) defendants Jennifer Delvaux, Casperson, Nelson and Greer turned a blind eye to plaintiff's pleas for intervention to obtain proper medical assistance; and

4) defendant Deb Lemke deliberately cancelled an appointment plaintiff had to discuss his pain and isolated him with an inmate with a contagious skin disease in retaliation for plaintiff's having filed a supervisory writ in state court.

In the same order, I denied plaintiff leave to proceed on several other claims and I dismissed former defendants Department of Corrections, Matthew Frank, Judy Smith, Tom Edwards and Donna Larson from the action. Now plaintiff has filed 1) a proposed amended complaint, together with a motion to amend; 2) a third motion for a preliminary injunction; and 3) a letter dated April 25, 2007, seeking reconsideration of the March 26, 2007 decision to deny his request for appointment of counsel; 4) a letter dated April 23, 2007, complaining that he cannot obtain "authenticated" medical records; and 5) a letter dated May 1, 2007, requesting a copy of "the local district rules on 1983 procedures." Also before the court is a field report filed by United States Deputy Marshal P. Sever, notifying the court that he has been unable to serve defendant Steve Casperson with plaintiff's complaint. I will address each of these matters in turn.

A. Plaintiff's Motion to Amend his Complaint

Plaintiff's original complaint consists of 22 pages, 105 paragraphs and multiple claims. In screening plaintiff's complaint, I considered carefully each of his claims and dismissed all of them except for those listed above. Plaintiff's proposed amended complaint is impossible to decipher. The caption is incomplete, making it difficult to know who precisely he is suing. In the body of the proposed amendment under the caption, "Parties," plaintiff lists only three defendants: Judy Smith and Tom Edwards, both of whom have been dismissed from this action, and a Patricia Voermans, who appears to be new. He does not list any of the defendants against whom he already has been allowed to proceed. The "Facts" section of the proposed amended complaint consists of paragraphs numbered 7-42, referring to numerous exhibits, none of which are attached. There is no request for relief. Attached to the proposed amended complaint are two pages listing "counts" numbered four through eight (counts one through three are missing) and what appears to be an identical but unsigned copy of plaintiff's original complaint.

Ordinarily, an amended complaint will take the place of the original complaint. That means that a motion to amend should be accompanied by a proposed amended complaint in which the plaintiff names in the caption each person he wants to sue and describes in the body of the complaint what each defendant did or did not do, when they did or did not do it, and what he wants the court to do about it. It must be clear to the defendants what

plaintiff is saying each one did so that each can answer plaintiff's particular grievance against him or her. To help the court understand what changes a plaintiff is making in an amended complaint, it is this court's policy to ask the plaintiff to file a proposed amended complaint that looks just like the original except that plaintiff is to point out any new defendants by highlighting their names in the caption and he is to highlight all the new or modified allegations he has made to the body of the complaint or to his request for relief. If plaintiff wants to delete certain allegations from the original complaint, he should draw a line through those allegations in his proposed amended complaint. If plaintiff does these things, it will allow the court to screen plaintiff's changes quickly and rule more promptly on his motion.

Because plaintiff's proposed amended complaint is not in a form that allows the court to understand what it is he wants to change, his motion to amend will be denied without prejudice.

B. Plaintiff's Motion for Preliminary Injunction

Before the court had an opportunity to screen plaintiff's complaint, plaintiff filed a motion for a preliminary injunction. In the March 26, 2007 screening order, I denied that motion because plaintiff had neither followed this court's procedures to be followed on motions for injunctive relief nor submitted evidence sufficient to show that he was entitled to preliminary injunctive relief. At that time, I sent plaintiff a copy of the relevant

procedures.

On April 13, 2007, plaintiff filed a second motion for preliminary injunction. Once again I denied the motion for plaintiff's failure to comply with the court's procedures. In particular, I told plaintiff that he had not submitted proposed findings of fact as the procedures required. Further, I explained that to comply with the procedures, each proposed fact was to be individually numbered and each was to be followed by a citation to the location of admissible evidence in the record to support the factual proposition. Finally, I told plaintiff that his "exhibits" did not constitute admissible evidence, because they had not been authenticated and I explained the authentication process.

Like plaintiff's previous motions for preliminary injunctive relief, plaintiff's third motion requests an order requiring defendants to give him the same dose and type of pain medication that doctors at the U.W. Madison Hospital prescribed for him sometime in his past, and for an order directing that he be evaluated at his own expense by Dr. Lang or another doctor at the University of Wisconsin Madison Hospital. Also like plaintiff's previous motions, the form of the motion is defective, but this time only slightly.

Instead of submitting three separate documents, a motion, a brief and proposed findings of fact, plaintiff has submitted one document titled "Motion for Preliminary Injunction." Plaintiff captions the second page of the motion, "Brief in Support of Motion for Preliminary Injunction." However, the numbered paragraphs listed below that caption

are comprised primarily of factual statements followed by references to various paragraphs in plaintiff's verified complaint (which, because it is verified, may be treated as an affidavit). Thus, the numbered factual statements are akin to those that might be presented in a document titled proposed findings of fact. From plaintiff's submission, I conclude that a hearing on plaintiff's motion is appropriate. At the hearing, plaintiff will bear the burden of proving that he has a likelihood of success on the merits of his claim that defendants' refusal to give him pain relief medication stronger than the two tablets of Ibuprofen 800mg he has been prescribed amounts to deliberate indifference to his serious medical needs.

C. Motion for Reconsideration of Decision to Deny Appointment of Counsel

_____ In his motion for reconsideration of this court's decision to deny his motion for appointment of counsel, plaintiff states that if he failed to come close to complying with the court's procedures to be followed on motions for injunctive relief, the court should appoint a lawyer to help him. As noted above, however, plaintiff has come close enough to convince the court that a hearing is necessary on his motion. Moreover, I believe plaintiff is capable of testifying at the hearing about the ineffectiveness of the pain treatment he is presently receiving and that he is capable as well of offering into evidence authenticated medical records showing what medications he has been prescribed in the past and Dr. Kaplan's discontinuation of those medications. If the evidence suggests that Dr. Kaplan's

discontinuation of plaintiff's medication was based on a blanket policy prohibiting narcotic pain medication within the institution or for no reason at all, defendants will have an opportunity to respond with evidence countering plaintiff's evidentiary submissions.

In the March 26, 2007 order denying plaintiff's motion for appointment of counsel, I explained thoroughly why I believed plaintiff is capable of representing himself in this action. Plaintiff has not convinced me that my decision was erroneous. Therefore, his motion for reconsideration of the order denying him appointment of counsel will be denied.

D. April 23, 2007 Letter

In his letter of April 23, 2007, plaintiff states that he has asked the record keeper of his medical records to provide an affidavit certifying that plaintiff's medical records are authentic copies of the originals maintained by the Department of Corrections. He states that he spoke with a Jim Zannon, a Legal Liaison for the Oshkosh Correctional Institution and that Zannon's reply was that medical documents would be authenticated "only with a court order." It should not be necessary for this court to issue orders in every case in which a prisoner seeks certified copies of his medical records directing the record keeper to authenticate the documents. If Mr. Zannon's response was what plaintiff indicates it was, I find it unlikely that it complies with institutional policy. In any event, plaintiff will need authenticated copies of certain portions of his medical records for the hearing on the motion

for preliminary injunction. To insure that he is not blockaded by the questionable decision of one person, I am requesting that defense counsel insure that plaintiff has access to his medical records as promptly as possible and that prison officials be instructed to provide written verification of the authenticity of the records that plaintiff wishes copied for the purpose of the hearing. Alternatively, defendants may stipulate to the records' authenticity, in which case written verification will be unnecessary.

E. Letter dated May 1, 2007

_____ In his letter of May 1, plaintiff asks for a copy of "the local district rules on 1983 procedures." A copy of the court's local rules are enclosed to the parties with a copy of this order although, as plaintiff will note, they are very particularized and in large part not applicable to this action. The procedures governing § 1983 actions in this court are the general rules of civil procedure recorded in a book titled "Federal Civil Judicial Procedure and Rules." A copy of this publication may be found in the prison law library.

F. Notice of Inability to Serve Steve Casperson with Plaintiff's Complaint

_____ Finally, this court has received a field report filed by United States Deputy Marshal P. Sever, together with an unexecuted "Process Receipt and Return" form showing that he has been unable to locate defendant Steve Casperson to serve him with plaintiff's complaint.

According to the notations on the report, Sever contacted the Wisconsin Department of Corrections to obtain a forwarding address for Casperson, who retired from his position with the DOC on December 31, 2006. The department provided Sever with the post office box address and telephone number that it has on file for Casperson. Deputy Marshal Sever called the phone number and left a voice mail message. Later, Sever received a return call from an adult male who indicated he was not Steve Casperson and that he had never heard of a Steve Casperson. U.S. Postal Service Regulations prohibit disclosure of subscriber information to members of the general public. Therefore, Deputy Marshal Sever was unable to learn whether the post office box provided by the department still belongs to defendant Casperson.

I conclude that the United States Marshal has made a reasonable effort to locate defendant Casperson and has been unsuccessful. See Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990) (once defendant is identified, marshal to make reasonable effort to obtain current address).

A plaintiff cannot maintain a lawsuit against a defendant who has not received notice of the claim against him and is therefore unable to defend against allegations of wrongdoing. Instead, the action must be dismissed as to defendant Casperson, without prejudice to plaintiff's filing a new action against him at some future time if he is able to locate Casperson to serve him with his complaint.

ORDER

IT IS ORDERED that

- 1) plaintiff's motion to amend his complaint is DENIED without prejudice;
- 2) a decision is STAYED on plaintiff's motion for a preliminary injunction. The clerk of court is requested to set this case on for an evidentiary hearing on the motion;
- 3) plaintiff's letter of April 25, 2007, construed as a motion for reconsideration of the March 26, 2007 order denying his motion for appointment of counsel is DENIED;
- 4) defense counsel is to insure that plaintiff has access to his medical records as promptly as possible and that prison officials be instructed to provide written verification of the authenticity of the records that plaintiff wishes copied for the purpose of the hearing on his motion for preliminary injunction. Alternatively, defendants may stipulate to the records' authenticity, in which case written verification will be unnecessary; and
- 5) defendant Steve Casperson is DISMISSED from this action, without prejudice to

plaintiff's filing a lawsuit against him sometime in the future.

Entered this 14th day of May, 2007.

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