

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

DENNIS STRONG,

Plaintiff,

v.

STATE OF WISCONSIN, *et al.*

Defendants.

ORDER

07-C-086-C

Before the court is defendant Kelly Vitense's ("defendant" in this order) objection to providing plaintiff with a DNA sample for testing and comparison. For the reasons stated below, I am ordering defendant to provide a DNA sample by means of a blood draw, buccal swab or hair sample. Focusing objectively on the discovery request actually before the court reveals that plaintiff's demand falls well within the limits of F.R. Civ. Pro. 26(b), 26(c) and 35.

I have read all of the parties' submissions and the applicable case law.¹ The salacious allegations in plaintiff's complaint are attention-grabbing and alarming. Plaintiff alleges, among other things, that defendant, while an employee at Mendota Mental Health Institute, had sexual intercourse with plaintiff while he was a patient there. Plaintiff's various civil rights claims in this court derive directly and indirectly from this claim of sexual contact. Not surprisingly, defendant vehemently denies them all, noting her accuser's history of psychosis and violence

¹ See, e.g., *McGrath v. Nassau Health Care Corp.*, 209 F.R.D. 55, 59 - 64 (E.D.N.Y. 2002) (surveying the law on DNA discovery and granting such discovery so that defendant could attempt to prove his allegation of consensual sexual contact with plaintiff on a blanket stained with their bodily fluids); see also *D'Angelo v. Potter*, 224 F.R.D. 300, 302-04 (D. Mass. 2004)(applying *McGrath* and reaching same result).

against women. Plaintiff rejoins by alleging forensic corroboration of his story in the form of a pubic hair from defendant that plaintiff claims to possess as a result of their sexual contact. Plaintiff requests a DNA sample from defendant in order to provide the missing link in his chain of proof. Defendant denies that the hair is hers, asserts that even if it is, it proves nothing, and in any event, plaintiff has not made a sufficient predicate showing to justify a DNA comparison.

Defendant is incorrect. The fact that plaintiff has a sordid past does not permit this court to prejudge his claim as false and to deny him discovery on that basis alone.² As plaintiff points out, due to his inherent impeachability and the surface incredibility of his allegations, the most persuasive evidence he likely will muster in support of his claims would be his possession of defendant's pubic hair. If this hair came from defendant, does it *prove* plaintiff's claim of sexual intercourse? No, not by itself. But it would be a fact tending to make the existence of a fact that is of consequence to the determination of this action more probable or less probable than it would be without the evidence. *See* F.R. Ev. 401.³ Pursuant to Rule 26(b)(1), as a general matter, parties may obtain discovery regarding any matter, not privileged, that is relevant to that party's claim, although Rule 26(c) protects parties from annoyance, embarrassment, oppression and undue burden or expense. It goes without saying that defendant views this entire

² According to an April 9, 2007 report by ABC News, 47% of reported prison sexual abuse cases from 2000 to 2004 involved women employees and their male charges. *See* www.abcnews.go.com/US/story?id=3024521&page=1.

A recent criminal case in this court provides an example of this counterintuitive phenomenon: in *United States v. Colleen McQueen*, 05-115M-X (W.D. Wis. 2005), a female officer at FCI-Oxford admitted and pleaded guilty to having an ongoing sexual relationship with a male prisoner under her supervision, to whom she also provided money and home-cooked meals.

³ Of course if the DNA test establishes that this hair is *not* from defendant, plaintiff's credibility plummets even further. That said, defendant is not obliged to indulge what she views as an objectionable discovery demand merely to vindicate her version of events.

lawsuit as annoying, embarrassing and oppressive, but given the nature of plaintiff's constitutional claims—which are legally cognizable and not inherently incredible—Rule 26(c) does not forbid plaintiff from obtaining a DNA sample for the purpose of attempting to corroborate his allegations. However mortifying defendant finds this lawsuit in general, the requested discovery is minimally intrusive and highly relevant to the accurate determination of a lynchpin factual dispute. For the same reason, this discovery passes the “good cause” threshold of Rule 35(a).

Accordingly, it is ORDERED that plaintiff's request to obtain a DNA sample from defendant Kelly Vitense is GRANTED. The parties forthwith shall make the necessary arrangements.

Entered this 25th day of May, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge