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

LLOYD T. SCHUENKE,

Plaintiff,

v.

RICK RAEMISCH, MICHAEL THURMER, JOHN DOES and JANE DOES,

Defendants.

ORDER

10-cv-788-bbc

Plaintiff Lloyd Schuenke is proceeding on a Eighth Amendment claim that the air quality in his cell triggers his severe asthma, forces him to use his asthma medications excessively and causes other health problems. Plaintiff has filed a motion for extension of time to submit supplemental materials in support of his motion for preliminary injunctive relief, dkt. 29, along with a motion for a court-appointed expert, dkt. 8, a motion to substitute parties, dkt. 9 and a motion to compel, dkt. 10.

In his "Motion to Substitute a Party," plaintiff seeks to replace Michael Thurmer with a John Doe defendant because Thurmer is no longer the warden of the Waupun Correctional Institution.

Fed. R. Civ. P. 25(d) provides:

> When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party. . . .

Ordinarily, a plaintiff sues a state official in his official capacity when he is seeking injunctive or declaratory relief from the official's enforcement of a policy or custom believed to be unlawful. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985). If the plaintiff seeks

money damages from a state official, however, the suit must be brought against the official in his individual capacity. This is because a suit for money damages brought against a defendant in his official capacity only is really a suit for money damages against the state that is barred by the Eleventh Amendment. *Shockley v. Jones*, 823 F.2d 1068, 1070 (7th Cir. 1987)("A suit for damages against a state official in his or her official capacity is a suit against the state for Eleventh Amendment purposes.").

In his complaint, plaintiff seeks injunctive and monetary relief. Liberally construing the complaint, I understand plaintiff to be suing defendant Thurmer in his official capacity with respect to the injunctive relief he seeks and in his individual capacity with respect to the monetary relief he seeks. Therefore, to the extent that plaintiff seeks injunctive relief, it is appropriate to replace Thurmer with his successor. There is no need to replace Thurmer with a Doe defendant, however, because I will take judicial notice of the Department of Corrections' website and add William Pollard to the caption. *See Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of federal agency's website). In addition, because plaintiff seeks monetary relief against defendant Thurmer, Thurmer must remain a party to this lawsuit.

Along these same lines, the court will take judicial notice that defendant Rick Raemisch has been replaced by Gary Hamblin as secretary of the Department of Corrections. Accordingly, Hamblin will be added to the caption for the purposes of plaintiff's claim for injunctive relief, but Raemisch will remain in the case for purposes of plaintiff's claim for monetary damages.

Next, plaintiff has filed a motion for the appointment of an expert witness to inspect and take pictures of the ventilation system at Waupun Correctional Institution and then report on the condition of the system. Rules 614 and 706 of the Federal Rules of Evidence give district courts discretion to appoint impartial expert witnesses in a civil case to assist the court in

evaluating complex scientific evidence. *See McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir. 1991) *vacated and remanded on other grounds*, 502 U.S. 903 (district court might appoint impartial expert to help court evaluate scientific evidence on health effects of exposure to secondary cigarette smoke). The court has the discretion to apportion the costs of its expert to one side. *Ledford v. Sullivan*, 105 F.3d 354, 361 (7th Cir. 1997). In this case, however, plaintiff fails to show that an expert is necessary at this point. Plaintiff has yet to even provide evidence showing that he suffered from medical problems that might be tied to air quality. Therefore I will deny plaintiff's motion.

In addition, plaintiff has filed a motion to compel defendants to produce various documents. Plaintiff asks for, among other things:

- An alphabetical list of all correctional officers and other staff in every prison in the state, along with a description of their job duties;
- An alphabetical list of all prisoners incarcerated by the Department of Corrections;
- A copy of every financial transaction made by the Department of Corrections since 1990;
- A copy of the correctional officers' labor union contracts;
- A copy of all inmate grievances filed throughout the Wisconsin prison system since 1990; and
- A copy of all pending litigation against defendants and potential witnesses.

Plaintiff lists "grounds for production" that include "to demonstrate a gross pattern of mismanagement of both federal and state funds," "to demonstrate a gross pattern of disregard for complaints filed by [inmates]," and "to demonstrate a gross pattern of continued employment of persons who have pending criminal charges or have been convicted of committing a crime."

Plaintiff's motion to compel will be denied because he asks for materials that are irrelevant to his lawsuit and far too voluminous for defendants to respond. Judging from his "grounds for production," it appears that plaintiff thinks he can litigate a wide assortment of different claims in this lawsuit dealing with large-scale endemic problems affecting every prison in the state. He is mistaken. Plaintiff's complaint contained no such claims, and as was made clear in the January 31, 2011 screening order in this case, plaintiff was allowed to proceed *only* on his claim that the air quality of his cell is endangering his health.

Plaintiff is a serial litigant in this court who knows–or should know–better than to serve such frivolous and vexatious discovery demands, and he certainly could not have expected the court to indulge such patent overreaching. Hereafter, plaintiff must limit his discovery requests to information relevant to the claim allowed in this lawsuit. If he does not, then he faces the possibility of sanctions under Rule 37, including the court closing his discovery in this case.

Finally, plaintiff has filed a motion for extension of time to submit supplemental materials in support of his motion for preliminary injunctive relief. Plaintiff states that there was a delay in receiving his medical records, he has had limited library time and he did not receive this court's procedures to be followed on motions for injunctive relief until March 25, 2011, only six days before his supplement was due. Plaintiff asks for a 30-day extension. I will grant plaintiff's request in part, giving him 14 days, since he has had plenty of time since filing the motion to work on his materials.

ORDER

It is ORDERED that

(1) Plaintiff Lloyd Schuenke's motion to substitute a John Doe defendant for defendant Michael Thurmer in this lawsuit, dkt. 9, is GRANTED in part and DENIED in part. Pursuant to Fed. R. Civ. P. 25(d)(1), William Pollard is substituted for defendant Thurmer on plaintiff's claims for injunctive relief previously against Thurmer. However, Thurmer remains a party to this lawsuit on plaintiff's claim for monetary relief. The state should inform the court whether it accepts service on behalf of Pollard.

(2) On the court's own motion, pursuant to Fed. R. Civ. P. 25(d)(1), Gary Hamblin is substituted for defendant Rick Raemisch on plaintiff's claims for injunctive relief previously against Raemisch. However, Raemisch remains a party to this lawsuit on plaintiff's claim for monetary relief. The state should inform the court whether it accepts service on behalf of defendants Pollard and Hamblin.

(3) Plaintiff's motion for a court-appointed expert, dkt. 8, is DENIED.

4) Plaintiff's motion to compel, dkt. 10, is DENIED.

(5) Plaintiff's motion for an extension of time to supplement his motion for preliminary injunctive relief, dkt. 29, is GRANTED in part and DENIED in part. Plaintiff may have until May 17, 2011 to file his supplement. Defendants may have until June 1, 2011 to file a response.

Entered this 3rd day of May, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge