

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

WILLIE SIMPSON,

Plaintiff,

v.

TIMOTHY HAINES,

Defendant.

ORDER

11-cv-851-bbc

Plaintiff Willie Simpson is proceeding on Eighth Amendment conditions of confinement and failure to protect claims against defendant Warden Timothy Haines, alleging that Haines was aware that correctional officers have been pumping toxic chemicals into his cell and has done nothing to stop it. Plaintiff's complaint included a request for injunctive relief, so I set briefing on the preliminary injunction motion. In a December 17, 2012 order, I noted that the proposed findings of fact submitted by the parties "present[ed] a muddled picture, making it difficult to rule on the motion." Dkt. #63. I directed plaintiff to submit further proposed findings, stating as follows:

Perhaps part of the reason the factual picture is so murky at this point is that under the terms of this court's procedure for briefing preliminary injunction motions, plaintiff was not given an opportunity to provide a reply and thus has not had a chance to directly rebut proposed findings of fact raised by defendant. Therefore, I will direct plaintiff to submit (1) a reply to each numbered factual statement made by defendant in response to plaintiff's proposed findings of fact; (2) a reply to each of defendant's own proposed findings of fact; (3) evidentiary materials supporting these documents; and (4)

a reply brief.

In addition, I remain concerned that the parties have not fully provided the court with details surrounding the use of chemical agents, lawfully authorized or not. Accordingly, I will direct plaintiff to provide (5) supplemental proposed findings of fact, along with supporting evidence, providing as much detail as possible regarding *each time* chemical agents were used on him. He should explain when each event occurred (if plaintiff does not know the exact dates, he should explain how often they occurred over a particular time period), whether the use of chemicals was done to insure compliance with directives from staff or whether staff was just trying to harm him, and whether he believes pepper spray or some other, unauthorized, chemical agent was used on him. Defendant will be given a chance to respond to plaintiff's supplemental proposed findings.

Unfortunately, as has been customary in this case, the court's ruling has not settled the matter. Plaintiff has now filed motions to stay briefing on the preliminary injunction motion and a motion to preserve evidence in the form of the prison's video recordings taken outside his cell. Plaintiff states that he is unable to submit additional proposed filings because defendant has intentionally destroyed the recordings showing prison staff pumping toxic chemicals into his cell. Defendant has responded, stating that the recording system automatically overwrites video after 48 hours unless otherwise preserved, that recordings of the use of chemical agents are preserved and that the recordings are available for plaintiff's viewing. Defendant states further that it would be unduly burdensome to begin preserving 24-hour surveillance outside plaintiff's cell.

Given defendant's explanation, I will deny plaintiff's motion to preserve video evidence. There is no reason to believe that prison staff intentionally destroyed evidence of the use of chemical agents and I agree that it would be burdensome (and of questionable relevance) for the prison to preserve records of their 24-hour surveillance of the cell moving

forward.

Turning to plaintiff's motion to stay briefing, I will deny the motion but give the parties a short extension to submit the proposed findings of fact discussed in the December 17, 2012 order. I do so with the proviso that this is the last extension that will be granted in the briefing of plaintiff's preliminary injunctive motion—the resolution of this motion and the attendant discovery issues has taken far too long already.

Finally, I note that plaintiff should be aware that the lack of any particular video recording does not mean that he is “unable” to submit the proposed findings of fact requested by the court. Plaintiff has firsthand knowledge of the events concerning his claims and will have to rely on that knowledge to provide his responses.

ORDER

IT IS ORDERED that

1. Plaintiff Willie Simpson's motion to preserve evidence, dkt. #65, is DENIED.
2. Plaintiff's motion to stay briefing on his motion for preliminary injunctive relief, dkt. #64, is DENIED.
3. Plaintiff may have until February 6, 2013 to submit the proposed findings of fact he was directed to submit in the court's December 17, 2013 order. Defendant may have until February 13, 2013 to respond as directed in that order.

Entered this 31st day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge