IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

Plaintiff, ORDER

v. 01-C-0589-C

C.O. LOCKWOOD,

Defendant.

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In this action, plaintiff is proceeding on a claim that while he was a prisoner at the Dodge Correctional Institution in Waupun, Wisconsin, defendant Lockwood, a correctional officer, deliberately exposed him to second hand cigar smoke, knowing that plaintiff had been tortured with cigars as a child and that the smell of cigar smoke caused him great mental anguish and pain. Twice before, this case was dismissed without prejudice because plaintiff was unable to locate defendant to serve him with his complaint. In November 2002, plaintiff filed a proposed amended complaint naming Lockwood's supervisors and other high prison officials as defendants. I construed this submission as a motion to reopen the case and denied it on the ground that the proposed amended complaint was untimely and, in any event, nothing in the complaint suggested that the proposed new defendants had

the required personal involvement in promoting or failing to stop Lockwood's alleged misbehavior. On March 11, 2003, I construed a letter from plaintiff as another request for permission to reopen the case. This motion was granted, because it appeared that Lockwood could be located. Defendant Lockwood was served with plaintiff's complaint on April 14, 2003.

Now, defendant Lockwood has filed an answer personally. In addition, Assistant Attorney General Corey Finklemeyer has filed an answer on defendant Lockwood's behalf. In addition, plaintiff has written a letter dated April 29, 2003, which I construe as motions for permission to reply to defendant Lockwood's answer, reconsider the earlier denial of leave to amend the complaint to add defendants, find defendant Lockwood in default, and appoint plaintiff counsel. In addition, plaintiff has filed a document titled "Plaintiff's Proposed Findings of Fact and Conclusions of Law in Favor of Summary Judgment Motions."

Plaintiff does not indicate that he served his submissions on counsel for defendant Lockwood as he is required to do pursuant to Fed. R. Civ. P. 5. Perhaps this is because he is confused by the fact that he has received answers from defendant and from defendant's lawyer. This is understandable. Ordinarily, a defendant does not answer for himself when he is represented by a lawyer. In this case, however, it appears that at the time he filed his answer, defendant Lockwood did not realize that he would be represented by Assistant

Attorney General Corey Finklemeyer. He may have filed his own answer because the record of this case showed that in December 2001, when the court asked the Attorney General's office to accept informal service of process on Lockwood's behalf, the request was declined for the stated reason that defendant was no longer employed by the Wisconsin Department of Corrections. However, defendant appears to have been unaware that the Attorney General's refusal to accept informal service of process on defendant's behalf was because the Attorney General could not locate defendant to get his permission to be represented by the Attorney General. I presume that in an abundance of caution, defendant filed his own answer to insure that he would not be held in default and later learned that the Attorney General would represent him. Now that the Attorney General has appeared on defendant's behalf, defendant Lockwood's April 28, 2003 answer (Dkt. #27) will be stricken on the court's own motion as redundant. The operative answer is the answer filed by Assistant Attorney General Corey Finklemeyer on May 5, 2003 (Dkt. #28).

Ordinarily, a plaintiff's failure to show that he served a copy of his communications on opposing counsel means that the communications cannot be considered by the court. However, in this one instance, I am sending a copy of plaintiff's communications to Mr. Finkelmeyer with a copy of this order. Therefore, I will address plaintiff's motions.

First, plaintiff asks whether he should file a reply to defendant's answer. The answer is "no." Under Fed. R. Civ. P. 7(a), a plaintiff may not reply to an answer unless the court

orders him to. Because the court assumes that plaintiff denies each of the statements made in the answer, see Fed. R. Civ. P. 8(a)(a party is deemed to deny averments in pleadings to which a response is not allowed), there is no need to enter an order asking plaintiff to submit a reply.

Second, plaintiff moves for reconsideration of the order of November 14, 2002, denying him leave to amend the complaint to add defendant Lockwood's superiors as additional defendants. The request will be denied. I do not intend to delay the progress of this case by allowing plaintiff to amend his complaint to add defendants plaintiff could have asked to add before the case was closed the first time. More important, I remain convinced that plaintiff's amended complaint fails to allege facts from which an inference could be drawn that defendants' supervisors were personally involved in depriving plaintiff of his Eighth Amendment rights.

Third, plaintiff requests the entry of default against defendant Lockwood. This request, too, will be denied. Defendant Lockwood is not in default. He had twenty days from the date of service of the complaint upon him in which to file an answer. When the 20th day falls on a weekend or holiday, which it does in this case, the deadline is the first week day following the weekend or holiday. Defendant's answer was due on May 5, 2003. The operative answer was filed that day.

Fourth, plaintiff moves for appointment of counsel. Before I can consider a motion

for appointed counsel, I must find that plaintiff made a reasonable effort to find a lawyer on his own and was unsuccessful. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he made a reasonable effort, plaintiff must provide the court and opposing counsel with the names and addresses of at least three lawyers that he has asked to represent him in this case and who have refused to do so.

Plaintiff should be aware that if he makes a reasonable effort to find a lawyer and is unsuccessful, that does not mean that I will appoint one for him automatically. At that point, I will determine whether plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995), citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). At this time, the case is simply too new to allow me to assess plaintiff's abilities or the potential outcome of the lawsuit. Therefore, the motion will be denied without prejudice to plaintiff's renewing it at some later stage of the proceedings.

Finally, plaintiff has filed a document titled "Plaintiff's Proposed Findings of Fact and Conclusions of Law in Favor of Summary Judgment Motions." However, no party has filed a motion for summary judgment. Therefore, I will place the document in the court's file but I will not consider it. As plaintiff is aware, the court has scheduled a preliminary pretrial conference to be held in this case before United States Magistrate Judge Stephen Crocker

on May 22, 2003. At that time, the magistrate judge will set a trial date and schedule deadlines for completing discovery and filing and serving motions that may resolve the case before trial, such as motions for summary judgment. During the conference, the magistrate judge will answer any further questions plaintiff might have about the procedure to be followed in prosecuting his case to completion.

ORDER

IT IS ORDERED that

1. The answer filed by defendant Lockwood on April 28, 2003 (Dkt. #27) is STRICKEN on the court's own motion as redundant.

2. The operative answer in this case is the answer filed by defendant Lockwood through his lawyer on May 5, 2003 (Dkt. #28).

3. Plaintiff's motions for permission to reply to defendant Lockwood's answer, reconsider the order denying him leave to amend his complaint and finding defendant Lockwood in default are DENIED.

4. Plaintiff's motion for appointment of counsel is DENIED without prejudice to plaintiff's filing another such motion at a later stage of these proceedings.

5. Plaintiff's "Plaintiff's Proposed Findings of Fact and Conclusions of Law in Favor

of Summary Judgment Motions" will be placed in the court's file but will not be considered.

Entered this 9th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge