IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MONTELL M. HORTON,

Plaintiff, ORDER

v. 02-C-0470-C

GERALD BERGE, PETER HUIBREGTSE,
PAMELA BARTELS and LINDA HODDY-TRIPP,

Defendants.

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Plaintiff filed this case in the Dane County Circuit Court in July 2002. The circuit court found plaintiff financially eligible for pauper status and then granted defendants' motion to remove the case to this court. In an order dated September 23, 2002, I screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A and denied him leave to proceed on several claims that were legally meritless. I granted plaintiff leave to proceed on a claim that defendant Pamela Bartels was deliberately indifferent to his serious medical needs when she refused to let him see an optometrist for over 21 days for his eye condition and on additional unrelated claims against defendants Berge, Huibregtse and Hoddy-Tripp. On December 18, 2002, all defendants except defendant Bartels filed a motion to dismiss, arguing that plaintiff

had failed to exhaust his administrative remedies on the claims relating to them. That motion is being briefed.

Separately, in an order dated December 30, 2002, I noted that the United States Marshals Service had notified the court that it could not serve defendant Bartels with plaintiff's complaint because Bartels was no longer employed at the Wisconsin Secure Prison Facility. I gave plaintiff until January 19, 2003, in which to complete a new Marshals Service form showing an address at which Bartels could be served. I told plaintiff that if he failed to complete the form and return it to the court by January 19, I would dismiss the complaint against defendant Bartels without prejudice to plaintiff's suing her again at some future time. On January 16, 2003, plaintiff filed a motion to compel discovery and extend the time to serve defendant Bartels. Also, plaintiff has filed motions for a preliminary injunction and for a court-appointed medical expert. I will address each motion in turn.

A. Motion to Compel Discovery and Extend Time to Serve Defendant Bartels

In his motion to compel, plaintiff asks the court to order defendant Berge to give him defendant Bartels's last known address or, alternatively, to order Berge to allow plaintiff access to "public means and information to discover same." I will deny both of plaintiff's requests. However, I will direct the United States Marshals Service to submit additional information about its efforts to locate defendant Bartels and, if those efforts did not include

an Internet search of public records for Bartels's current address or contact with her former employer or both, then I will require the Marshal to pursue these avenues and advise the court of the results of its efforts in the remarks section of the process receipt and return the form.

The Court of Appeals for the Seventh Circuit has ruled that a prisoner is required to furnish the United States Marshals Service with no more than the information necessary to identify prison employee defendants and that once the employee is properly identified, it is up to the marshal to make a reasonable effort to obtain a former prison employee's current address and effect service on the basis of that information. Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990). In Graham v. Satkowski, 51 F.3d 710 (7th Cir. 1995), the court of appeals reiterated this holding, finding that it was improper for a district court to dismiss a prisoner's claims against a former Department of Corrections' employee who no longer worked at the prison address provided by the prisoner because there was nothing in the record to show that the marshal had made an effort to learn the defendant's new location. Citing its holding in Sellers, the court noted that

> the use of marshals to effect service alleviates two concerns that pervade prisoner litigation, state or federal: 1) the security risks inherent in providing the addresses of prison employees to prisoners; and 2) the reality that prisoners often get the "runaround" when they attempt to obtain information through governmental channels and needless attendant delays in litigating a case result.

Graham, 51 F.3d at 713. The court of appeals directed the district court on remand to "evaluate the Marshals Service's efforts and the adequacy of the state disclosure procedures in light of Sellers." Id.

In this case, it is not clear from the deputy marshal's notation on the relevant service forms whether the deputy marshal took reasonable steps to obtain the defendants' current addresses. The remarks section of the forms read as follows: "12/27/02 JP END Subj no longer employed at Correctional Ctr - No forwarding address."

I am aware from the proceedings in another case in this court, Jones'el v. Berge, 00-C-421-C, that health services employees at the Wisconsin Secure Prison Facility are employed by a private corporation, Prison Health Services, Inc., and not the prison or the Wisconsin Department of Corrections. Therefore, it is unlikely that the prison or the Department of Corrections would have personnel records relating to health services employees. Thus, if the deputy marshal made no effort to learn Bartels's whereabouts except to ask prison or Department of Corrections' employees whether they knew Bartels's forwarding address, that would not be enough. Instead, reasonable efforts to locate Bartels would require the deputy to contact the private employer or conduct a public records search on the Internet or do both in an attempt to learn the former employee's address.

In requiring the United States Marshals Service to conduct its own investigation of a former prison or prison contract employee's whereabouts, I am mindful of the limited

resources available to the service. The steps I am asking the deputy marshals to take are not unduly time consuming. Indeed, I do *not* understand the court of appeals to suggest, nor do I suggest, that deputy marshals should become private investigators for civil litigants or that they should use software available only to law enforcement officers to discover addresses for defendants whose whereabouts are not discoverable through public records. Reasonable efforts require only that the marshals service use a public Internet website to search for a defendant's address and, if possible, contact the former employee's employer to obtain a forwarding address if the employer is willing to give it. Because it is not clear from the court's records that the Marshal took these reasonable steps in its attempt to serve defendant Pamela Bartels, I will direct the Marshal to either amend the service process receipt and return form to show clearly what steps were taken before it was determined that no forwarding address could be found or take the steps articulated above and advise the court no later than February 7, 2003, of the results of that effort.

On more comment on the subject of service of process under these circumstances is warranted. In Sellers, the Court of Appeals for the Seventh Circuit recognized the serious security concerns that arise when prisoners have access to the personal addresses of former or current prison employees. Sellers v. United States, 902 F.2d at 602. The concerns are no less serious when the employees are contract employees. For this reason many, if not all, prison or prison contract employees may take steps to insure that their personal addresses

are not available in public records accessible through the Internet. If the Marshals Service is successful in obtaining Bartels's personal address, however, it should take great care to maintain that address in confidence rather than reveal it on the marshals service form, copies of which are filed in the court's public file and mailed to the prisoner.

B. Plaintiff's Motion for a Preliminary Injunction

A plaintiff asking for emergency or preliminary injunctive relief is required to make a showing with admissible evidence that (1) he has no adequate remedy at law and will suffer irreparable harm if the injunction is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest. See Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985). Plaintiff has failed to produce any evidence to support his motion. Instead, he has made unsworn allegations that show at most that he disagrees with the kind of medical treatment he is receiving rather than that defendants are being deliberately indifferent to his serious medical needs. In particular, plaintiff alleges that in April 2001, he asked for medical treatment for problems he was having with his eyes. He received an eye examination on April 9, 2001, and was prescribed eye drops. The eye drops did not do the trick. Plaintiff asked for a follow-up appointment and had to wait "over 21 days" until May 21, 2001, to see the

optometrist. At that time, the optometrist discovered that plaintiff's lower lids were "torn, filled with puss and swollen," and were causing plaintiff great pain. The optometrist prescribed additional eye drops and eye ointment, but would not grant plaintiff an appointment with the university hospital in Madison. On August 1, 2001, plaintiff asked again to be seen for the same problems with his eyes. On August 2, he was advised that he'd been scheduled for an appointment. After a month of not being seen, plaintiff submitted another request on September 25, 2002. On October 3, 2002, plaintiff saw an optometrist and was told that he had allergies that were causing the continued eye condition. Plaintiff was prescribed "useless" eye drops and eye ointment and promised a follow-up. He has not been seen at the university hospital.

In addition to the fact that plaintiff's allegations are not sworn to under oath and therefore are inadmissible as evidence, there are two other major problems with plaintiff's attempt to gain preliminary injunctive relief on his claim that he was denied medical care. First, the only medical care claim on which plaintiff was allowed to proceed in this case is his claim that defendant Bartels denied him the opportunity to see an optometrist for 21 days from May 1 to May 21, 2001. Plaintiff has not been granted leave to proceed against defendant Bartels or any other defendant on a claim that he is presently being denied constitutionally adequate medical care. Second, even if plaintiff were to file a proposed amended complaint naming additional defendants personally involved in allegedly denying

him medical care for his eyes, his factual allegations about the care he has received undercut any claim he has that prison officials are being deliberately indifferent to his serious medical needs in violation of the Eighth Amendment.

The Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). This does not mean that prisoners are entitled to whatever medical treatment they want. Prison officials violate their Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Inadvertent error, negligence, ordinary malpractice, or even gross negligence does not constitute deliberate indifference, Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002); see also Snipes, 95 F.3d at 590-91; neither does a difference of opinion about the type of care provided. See Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996). To show deliberate indifference, the plaintiff must establish that the defendant was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Plaintiff has made no such showing in connection with his motion for preliminary injunction. His factual allegations suggest that he would have chosen a different course of treatment, but that is not enough to sustain an Eighth Amendment

claim for inadequate medical care.

Because plaintiff has not been granted leave to proceed in this lawsuit against any defendant on a claim of ongoing deliberate indifference to plaintiff's serious medical needs and because his own factual allegations fall short of showing that any prison official is subjecting him to constitutionally inadequate medical care, plaintiff cannot show that he has even "some" likelihood of success on the merits of his claim. For this reason, his motion for a preliminary injunction must be denied.

C. Motion for Court Appointed Medical Expert

Plaintiff asks for appointment of a medical expert witness to help him prove his case. Although plaintiff was found eligible for pauper status in the state circuit court before his case was transferred to this court, the federal statute, 28 U.S.C. § 1915, governs his case now. That statute contains no provision that would permit appointment of an expert witnesses at government expense for plaintiff. In United States Marshals Service v. Means, 741 F.2d 1053, 1057 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit held that "the plain language, statutory context and legislative history of 28 U.S.C. §1915 convince [us] that the statute neither expressly nor implicitly authorizes the payment of . . . witness fees." However, the court recognized that Rules 706 and 614 of the Federal Rules of Evidence give district courts discretion to appoint an impartial expert witness in a civil case,

to assist the court in evaluating complex scientific evidence. For example, in McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit suggested that the district court might appoint an impartial expert to help the court evaluate the scientific evidence bearing on the plaintiff's claim that his Eighth Amendment rights were violated as a result of his exposure to secondary cigarette smoke. In McKinney, the court interpreted Federal Rule of Evidence 706(h) as giving district courts the discretion to apportion costs to one side, id. at 1511, and the Court of Appeals for the Seventh Circuit adopted this view in Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997). However, recognizing the gravity of a decision to require one or both parties to pay the high cost of an expert witness when the expert's testimony would substantially aid the court, the Eighth Circuit cautioned that the power is to be exercised only under compelling circumstances. Means, 741 F.2d at 1059.

In this case, plaintiff is not asking for the appointment of an impartial expert to help the court evaluate his evidence and that of defendants. He is asking for payment of the cost of a witness who would testify on his behalf. As helpful as such a witness might be to plaintiff's prosecution of his claim, the funds to pay for such a witness do not exist under 28 U.S.C. § 1915 and are not compelled under Fed. R. Evid. 614 or 706(b). Therefore, plaintiff's motion for appointment of an expert witness at government expense will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion to Compel Discovery and Extend Time to Serve Defendant Bartels" is DENIED as unnecessary.

2. The United States Marshals Service may have until February 7, 2003, in which to submit additional information to the court about its efforts to locate defendant Pamela Bartels to serve her with plaintiff's complaint. If those efforts did not include an Internet search of public records for Bartels's current address or contact with her former employer, the Marshal is to pursue these avenues and advise the court in the remarks section of the process receipt and return form if those efforts are unsuccessful.

3. Plaintiff's motion for a preliminary injunction is DENIED for plaintiff's failure to support the motion with evidence to show some likelihood of success on the merits of his claim.

4. Plaintiff's motion for a court-appointed medical expert is DENIED.

Entered this 29th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge