

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

EUGENE L. CHERRY,

Plaintiff,

v.

THOMAS BELZ, and
HENRY BRAY,

Defendants.

ORDER

03-C-129-C

Plaintiff Eugene Cherry filed motions for *in camera* inspection (dkt. 92) and to compel discovery (dkt. 115). In October I reserved ruling on portions of these motions and allowed defendants an opportunity to provide a more substantive response (dkt. 130). In November defendants filed their response (dkt. 26). Yesterday, December 4, 2003, the court granted summary judgment to all the defendants except for Thomas Belz and Henry Bray, allowing plaintiff to proceed on his claim that these two violated his right to be free from cruel and unusual punishment by placing needles and staples in his food. (Dkt 140). This ruling narrows the issues raised in plaintiff's motions but does not eliminate them. For the reasons stated below, I am granting the motions in part and denying them in part.

In my previous order I set out plaintiff's discovery requests verbatim. In light of the court's summary judgment ruling, the first step in this order is to edit the requests to eliminate the portions that no longer are relevant. This is the result:

Interrogatory No. 1: Defendants, please identify and describe each administrative grievance and each lawsuit filed by prisoners pursuant to retaliation and cruel and unusual punishment by surrounding prisoners in Unit Alpha WSPF, from November 1999, through August, 2003.

Interrogatory No. 5: Defendants, please identify and describe each administrative grievance and each lawsuit filed by prisoners pursuant to tampering with food and harassment by defendant Bray and Belz by surrounding prisoners in Unit Alpha WSPF, July, 2000 through August, 2003.

Request for Admission No. 4: Defendants Belz and Bray have had numerous inmate complaints filed against them, as well as lawsuits by other prisoners who were housed on Alpha Unit, pertaining to food tampering, harassment, retaliation and excessive use of force.

Defendants object to providing the requested information on several grounds. First, they argue that complaints filed with the ICRS by prisoners other than the plaintiff are confidential under Wis. Admin. Code § DOC 310.16.¹ In response to the court's inquiry, defendants argue that the "response to litigation" exception to the regulation only applies to a prisoner litigant's own complaints: "If the rule were otherwise, an inmate could simply bring a suit and then demand records of other inmates' Offender Complaints in order to obtain access to the contents of them. This would make a mockery of the confidentiality of the ICRS in short order." Response, dkt. 134, at 4.

¹Which provides:

[T]he department shall ensure that complaints filed with the inmate complaint review system are confidential. Persons working in the ICRS may reveal the identity of complainants and the nature of the complaint only to the extent necessary to investigate the complaint, implement the remedy, or in response to litigation.

I agree with defendants that the exception does not allow direct disclosure to plaintiff of the information he seeks in his discovery requests. Therefore, if plaintiff is entitled to any disclosures, the court will act as the gatekeeper and determine the manner in which any of this information should be disclosed to and used by plaintiff.

Defendants also argue that the requested information is not relevant, since the time frame set by plaintiff exceeds that of the issues raised in his lawsuit, and because the existence of inmate *complaints* against staff without a finding of liability means nothing: they are merely unsubstantiated and unproven allegations filed by men with obvious incentives to lie about and harass prison employees. The second point is well taken, the first is not. Accusations are easy to level, harder to prove. Defendants will deny every third-party accusation plaintiff might attempt to use against them at trial in the instant case, which would require time-consuming *in limine* battles over issues with little or no evidentiary value. Therefore, plaintiff is not entitled to any disclosure of inmate complaints or lawsuits.

Findings of liability are another matter. If Belz or Bray ever have been found liable in any administrative proceeding or civil lawsuit of food tampering, retaliation, harassment, excessive force, or any other intentional mistreatment of a prisoner, then plaintiff is entitled know this. To prevail at trial plaintiff must prove that the defendants acted with deliberate indifference to his health and safety; one way to establish such mens rea is by proving similar conduct in the past (assuming that plaintiff can establish a sufficient foundation for

admissibility under the rules of evidence). Similarly, such evidence of prior bad acts might be admissible impeachment evidence during cross-examination of defendants at trial.

Additionally, the potential relevance of such evidence transcends the geographic and temporal limits of plaintiff's discovery requests. Therefore, defendants must disclose *ex parte* and *in camera* any and all such adverse determinations against Belz and Bray, regardless of their date or location.

Approaching the discovery requests from this angle eliminates the legitimate institutional claim of undue burden involved in reviewing over 4000 ICRS records and 258 lawsuit files. The relevant information—if any exists—should be known to Belz and Bray personally, and a review of their personnel files by the assistant attorney general defending them will sufficiently ensure that no relevant information goes undisclosed. Plaintiff should not assume that any disclosures are forthcoming; it may be that Belz and Bray are squeaky clean, with nothing to report. But if there is anything out there, then they must forthwith disclose all the specifics to the court for a determination whether disclosure to plaintiff is appropriate.

ORDER

Accordingly, IT IS ORDERED:

1 Plaintiff's motion to compel discovery and motion for in camera review is GRANTED IN PART and DENIED IN PART in the manner set forth above.

2. Defendants shall have until December 19, 2003, within which to submit to the court for *in camera, ex parte* review any information responsive to this order. If there is no such information, defendants' attorney must submit an affidavit to this effect within the deadline.

Entered this 5th day of December, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge