

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

EUGENE CHERRY,

Plaintiff,

v.

MATTHEW FRANK, GERALD BERGE,
PETER HUIBREGTSE, GARY BOUGHTON,
BRAD HOMPE, JOAN GERL,
SGT. C. HANEY, THOMAS BELZ and
HENRY BRAY,¹

Defendants.

ORDER

03-C-129-C

Plaintiff Eugene Cherry has been allowed to proceed in this action on his claims that (1) defendants Belz and Bray are retaliating against him for filing lawsuits and complaining about prison conditions by placing sewing needles and staples in his food; (2) defendants Matthew Frank, Gerald Berge, Peter Huibregtse, Brad Hompe and Gary Boughton knew about Belz's and Bray's actions but did not intervene to help plaintiff; (3) defendant Hompe

¹In his complaint, plaintiff identified defendant Belz as "Tim Belz." However, it has come to the court's attention that Correctional Officer Belz's first name is Thomas. Therefore, I have corrected defendant Belz's name in the caption of this order. The parties are requested to make the same adjustment to the caption of their future filings in this case.

issued conduct reports to plaintiff, knowing that they were false and in retaliation for plaintiff's lawsuits and complaints about Belz's and Bray's misconduct; and (4) defendant Haney sexually assaulted him and defendant Joan Gerl refused to intervene to help him. At the time he filed his complaint, plaintiff also filed a motion for a preliminary injunction and a motion for appointment of counsel. In an order dated April 25, 2003, I denied plaintiff's motion for appointment of counsel. However, I gave defendants until May 26, 2003, in which to file a response to plaintiff's motion for a preliminary injunction, which is limited to the question whether plaintiff should be given emergency relief from defendants' alleged attempts to harm him by placing needles in his food. I advised the parties that once defendants filed their response to the motion, I would be able to determine at that time whether an evidentiary hearing is necessary.

Now plaintiff has filed a second motion for appointment of counsel, a motion for in camera inspection and a second motion for preliminary injunctive relief, this time titled "Motion for Temporary Restraining Order."

Motion for Appointment of Counsel

In his second request for appointed counsel, plaintiff argues that without counsel he will be unable to prove his claim that defendants Belz and Bray engaged in serious misconduct against him. He states that he has been told that he will not be able to read any

reports made from the internal investigation of his charges against Belz and Bray because the investigative process is regulated by state law and collective bargaining agreements that protect the privacy of staff.

I agree with plaintiff that the findings relating to an internal investigation into plaintiff's charges against defendants Belz and Bray will be highly relevant to the decision whether plaintiff is entitled to emergency injunctive relief. However, it may be that defendants intend to submit those findings to the court for in camera inspection when they file their response to the motion for preliminary injunction. If the reports of the investigation are submitted for in camera inspection, it will not be necessary to appoint counsel to review their content. However, in the event defendants' response is insufficient to resolve the matter, I will consider then whether to appoint counsel to represent plaintiff on this claim.

Motion for In Camera Inspection

In his motion for in camera inspection of documents, plaintiff asks the court to review "exculpatory evidence pertaining to the evidence sought" on his motion for preliminary injunction. Plaintiff then describes this "exculpatory evidence" as

any inmate complaints, incident reports, conduct reports, administrative disciplinary reports against defendants or any documentary evidence against defendants pertaining to issues involving Wisconsin Secure Program Facility

inmates that can show application of food tampering, use or excessive use of force, staff assistance strip searches all taking place on Alpha Unit in 2000, 2001, 2002 and 2003, any letters or correspondences written to defendant Franks that identify these same issues.

It is clear from plaintiff's request that he wants the court to gather evidence to prove his claims. This is not a proper role for the court to play. Plaintiff is responsible for conducting his own discovery and proving his claims. As I have indicated above, if plaintiff is refused access to evidence relevant to his claim against defendants Belz and Bray, it may be necessary to appoint counsel to represent him. Otherwise, however, I am not persuaded that plaintiff is incapable of conducting his own discovery to prove his claims. Plaintiff's motion for in camera inspection will be denied.

Motion for Temporary Restraining Order

In his motion for temporary restraining order, plaintiff requests an order directing defendants Berge and Frank to order defendants Hompe, Belz, Bray and Haney to stay away from plaintiff while this action is pending. Plaintiff complains that ever since he filed this action, defendants Belz, Bray and Haney laugh at him and tell him to file another lawsuit if he complains about dirt or hair being in his food, or their "tampering with his meds." Plaintiff suggests that if the defendants are allowed to remain around him, "his food, meds, etc., [he] will be subjected to constant harassment, more contraband involved, and more

motions to this court begging for help.”

To the extent that plaintiff is requesting emergency relief against serious or criminal misconduct intended to harm him physically, this court is already allowing the matter to be developed on plaintiff’s motion for a preliminary injunction. To the extent that plaintiff is alleging that some of the defendants are now retaliating against him in other ways for having filed this lawsuit, he will have to raise such a claim in a lawsuit separate from this one. I do not intend to allow plaintiff’s complaint in this case to become a moving target, expanding weekly to include a description of every rude, unprofessional or disrespectful comment made to him.

ORDER

IT IS ORDERED that

- 1) a ruling on plaintiff’s second motion for appointment of counsel is RESERVED until after defendants have responded to plaintiff’s motion for a preliminary injunction; and
- 2) plaintiff’s motions for in camera inspection of discovery and for a temporary

restraining order are DENIED.

Entered this 15th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge