

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,

Defendants.

ORDER

03-C-129-C

In an order dated April 25, 2003, I granted plaintiff Eugene Cherry leave to proceed in forma pauperis on several claims, including one in which plaintiff alleged that defendants Thomas Belz and Henry Bray attempted to harm him by placing needles and staples in his food and that defendants Matthew Frank, Gerald Berge, Peter Huibregste, Brad Hompe and Gary Boughton knew about Belz's and Bray's actions but refused to intervene to help him. Along with his proposed complaint, plaintiff filed a motion for a preliminary injunction on this claim, seeking immediate transfer from the Wisconsin Secure Program Facility. I stayed a decision on this motion in the April 25 order and directed defendants to file a brief and

proposed findings of fact in response to plaintiff's motion. In particular, I asked defendants to answer the "haunting question" of how plaintiff was able to obtain needles and staples (which plaintiff sent to the court), given the stringent security measures at the Secure Program Facility.

Defendants have filed their response. They have advanced several theories for how plaintiff may have obtained needles: prison staff may have accidentally dropped them into his clothes while they were being laundered, plaintiff may have obtained them at another institution (even though plaintiff has been incarcerated at the Secure Program Facility for several years) and then hid them (even though inmates and their property are thoroughly searched when they enter the prison), or he may have received them through the mail (even though all of plaintiff's mail is inspected before being given to him). Although defendants are rich in theories, they admit that they have a paucity of facts to support them. To put it simply, defendants do not know how dangerous objects found their way into plaintiff's cell.

Nonetheless, defendants ask that the court deny plaintiff's motion for a preliminary injunction because, they contend, there is no credible evidence to support his claim. At this point, I cannot agree with defendants. Plaintiff alleges that he found needles and staples in his food on multiple occasions after it was delivered by defendants Belz and Bray and that when they returned to retrieve his tray they would ask him, "How was your meal?" while laughing. If these allegations are true, they would support an inference that defendants Belz

and Bray purposefully tried to harm him. (I agree that these allegations, without more, would not support an inference that defendants Frank, Berge, Huibregtse, Hompe and Bougton knew about Belz's and Bray's behavior and were covering up for them.)

Defendants ask the court to find plaintiff's allegations incredible because they have already conducted an internal investigation and concluded that plaintiff was lying. According to their proposed findings of fact, plaintiff should not be believed because he made several contradictory statements and claimed not to recall several facts during the investigation, did not report the discovery of the needles right away and had made threats to defendants Belz and Bray before making his allegations. If true, these facts do undermine plaintiff's claim. However, although I remain deeply skeptical of plaintiff's allegations, I cannot determine on the basis of paper submissions whether plaintiff's credibility is so questionable that there is no likelihood that he will succeed on the merits. Therefore, I will direct the clerk of court to schedule an evidentiary hearing at which the parties may call witnesses with personal knowledge of relevant facts and present documentary evidence supporting their version of events. Because plaintiff's testimony is necessary, the clerk is directed to issue a writ of habeas corpus ad testificandum for plaintiff's attendance at the hearing.

At the hearing, plaintiff will have the burden of convincing the court that he has some chance of success on the merits of his claim. Specifically, plaintiff should be prepared to

address defendants' assertions that his statements during the internal investigation were contradictory, that he failed to report the alleged misconduct right away and that he fabricated the allegations because he does not like defendants Belz and Bray.

Both parties are entitled to call witnesses and present documentary evidence at the hearing. However, incarcerated witnesses other than plaintiff will not be approved unless their testimony is both relevant and based on personal knowledge. Before this court will issue a writ of habeas corpus ad testificandum for an incarcerated witness other than plaintiff, plaintiff will have to submit his own affidavit or the affidavit of the proposed witness averring that the witness is willing to testify without being subpoenaed and describing precisely the testimony the party will give. Whether the affidavit is made by the plaintiff or the prospective witness, it must be specific about what incident the witness observed, when and where it occurred, who was present, and how the witness happened to be in a position to see or to hear what occurred at the time it occurred. If a witness, either incarcerated or non-incarcerated, is unwilling to testify voluntarily, the witness will have to be subpoenaed under Fed. R. Civ. P. 45. Although plaintiff is not required to pay the daily witness fee, subsistence allowance or travel cost of a subpoenaed incarcerated witness, see 28 U.S.C. § 1821(f), I will direct the clerk of court to decline to issue a subpoena for an incarcerated witness unless plaintiff first satisfies me by affidavit that the witness is unwilling to testify voluntarily and that the witness's testimony is relevant and based on personal

knowledge. Documentary evidence that the parties intend to rely on should be provided to the other side before the hearing.

Two other matters are before the court. First, defendants have moved for an in camera inspection of the affidavit of defendant Hompe, to which the investigation report of plaintiff's allegations is attached. Defendants argue that under prison policy, inmates are not permitted to know the "results" of investigations of staff misconduct. I presume that defendants are more concerned with information gathered in the process of the investigation than the ultimate conclusion; presumably, plaintiff already knows that the "results" of the investigation were that defendants found his allegations to be unsubstantiated. Because I invited defendants to submit the investigation report for an in camera inspection in an order dated May 15, 2003, this motion will be granted.

Also, plaintiff has submitted a letter in which he states that prison staff searched his cell on May 25, 2003, and confiscated the May 15 order from this case and a letter from this court dated March 17, 2003, in case no. 02-C-394-C. He requests that the court send him additional copies of these papers. I have included a copy of those two orders with this opinion.

I anticipate that plaintiff may request appointed counsel to represent him at the hearing, but any such motion will be denied. Plaintiff does not need counsel to offer testimony regarding what he observed. Further, although plaintiff does not have access to

the internal investigation report, defendants have provided in their proposed findings of fact a sufficient synopsis of the report's conclusions for plaintiff to respond.

ORDER

IT IS ORDERED that

1. Defendants' motion for an in camera inspection of the affidavit of Brad Hompe is GRANTED. This document shall remain sealed until otherwise directed by this court.

2. The parties may have until June 27, 2003, in which to identify their witnesses and submit relevant affidavits or request for subpoenas.

3. An evidentiary hearing will be held on July 17, 2003, at 9:00 a.m. The clerk shall issue a writ of habeas corpus ad testificandum for plaintiff's attendance at the hearing.

Entered this 3rd day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge

