

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

BERRELL FREEMAN,

Plaintiff,

ORDER

v.

03-C-0021-C

GERALD BERGE and
JON E. LITSCHER,

Defendants.

Presently before the court are the following motions:

1. Plaintiff's July 31, 2003 "Motion for Reconsideration" of the magistrate judge's July 30, 2003 decision on plaintiff's motion to compel discovery (Dkt. #45);
2. Plaintiff's "Objection to Court Order of July 30 and Motion to Reconsider," dated August 3, 2003 (Dkt. #47);
3. Plaintiff's "Motion for Court Order that Witnesses be Brought to Court at Time of Trial," dated August 3, 2003 (Dkt. #49);
4. Plaintiff's second "Motion for Order to Stop/Cease and Desist Retaliation" dated August 10, 2003 (Dkt. # 91);

4. Plaintiff's "Motion for Filing and Information," dated August 11, 2003 (Dkt. #53);
5. Plaintiff's "Notice/Clarification to Court," dated August 12, 2003 (Dkt. #68);
6. Plaintiff's "Notice to Court with Proof of Obstruction by Defendants," dated August 15, 2003 (Dkt. #85); and
7. Plaintiff's "Motion for Appointment of Counsel," dated August 15, 2003 (Dkt. #86).

In addition, plaintiff has filed several discovery motions and a motion for summary judgment, together with supporting documents and two separate mailings of affidavits in support. The first group of affidavits (Dkt. ## 58-67) accompanied plaintiff's motion for summary judgment and were filed on August 14, 2003. The second packet of affidavits (Dkt. ## 71-84) were filed on August 21, 2003. I have scanned plaintiff's proposed findings of fact in support of his motion for summary judgment to determine whether plaintiff cites to these latter affidavits to support proposed findings of fact and find that he does. Therefore, they will be considered in connection with plaintiff's motion for summary judgment.

There are only two claims remaining to be resolved in this lawsuit: 1) whether, before March 28, 2002 (the date the settlement agreement was reached in Jones El' v. Litscher, 00-C-421-C) plaintiff was subjected to cell temperatures at the Wisconsin Secure Program

Facility that violated the Eighth Amendment; and 2) whether plaintiff has been and is being deprived of food in violation of the Eighth Amendment.

Filings Related to Plaintiff's Motion for Summary Judgment

As noted above, plaintiff filed a motion for summary judgment on August 14, 2003. At that time, he admitted he had not served it on defendants. Instead, he filed a "Motion for Filing and Information" (Dkt. #53), in which he complained that he had asked twice for copies at the prison and that his requests had been denied. He asked the court to advise him how much the court would charge for two copies of the motion, brief and supporting documents.

The next day, on August 15, 2003, plaintiff filed a "Notice of Clarification to Court" (Dkt. #68). In that document, plaintiff stated that he had served defense counsel with a copy of all of his hand-written documents and that the only documents he failed to serve are the affidavits of other prisoners and "typewritten documents" attached to his brief. He asked again to be allowed to purchase copies of these papers from the court.

On August 21, 2003, plaintiff submitted a check for \$35 and again requested two copies of his motion for summary judgment. This time, he specified that he wanted copies of all supporting documents, including "briefs, affidavits, etc." Also on August 21, 2003, plaintiff filed a document titled "Notice to Court," in which he stated that he had served

defendants with the second batch of affidavits.

Not surprisingly, defense counsel has written a letter dated August 18, 2003, requesting guidance about how he should proceed with respect to plaintiff's motion for summary judgment since he does not have all the supporting documents.

Plaintiff's motion for summary judgment consists of a one-page motion, 43 pages of proposed findings of fact, a six-page brief, an 11-page personal affidavit, and 108 pages of exhibits and affidavits from other inmates. Counsel for defendants has received some but not all of these documents. Because plaintiff has paid for them, I have made two copies of the motion and all of the supporting papers, including the brief and proposed findings of fact. On this one occasion, I am sending one copy of the complete motion and supporting documents to defense counsel directly and sending the other copy to plaintiff. Below, I will set a schedule for briefing the motion.

Plaintiff should be aware that this court does not have sufficient personnel or financial resources to make copies for the parties in a lawsuit on a regular basis. With one exception, plaintiff has not provided this court with a copy of the requests he made to prison officials for photocopies and a copy of their responses to his requests showing that they were unwilling to copy his documents. The one document he did submit is attached to his "Notice to Court with Proof of Obstruction by Defendants" (Dkt. #85), and shows only that the prison refused to copy "court orders" as "not approved on legal loan extension."

It is unnecessary for plaintiff to send this court copies of its own orders or the orders of other courts that have not been published. Thus, plaintiff's "proof of obstruction" is not proof of obstruction at all. In this regard, I note that plaintiff has not limited his submissions to those he needs to prove his claims. A great many of the affidavits he has solicited from other inmates fail to shed light on the temperatures *plaintiff* was subjected to before March 28, 2002, or on what dates and for how long plaintiff was deprived of food. Instead, the majority of the affidavits are made on the personal knowledge of the affiants about what happened to them and not to plaintiff.

I note as well that plaintiff has jumped the gun in filing his motion for summary judgment. According to the magistrate judge's preliminary pretrial conference order, dispositive motions are not due until September 25, 2003. Perhaps if plaintiff had waited to file his motion until closer to the deadline, he would have accumulated funds with which to pay for copies of his submissions instead of relying on legal loan extensions or the court.

Plaintiff's Objections to the Magistrate Judge's July 30, 2003 Order

Plaintiff has filed two motions objecting to the magistrate judge's July 30, 2003 order granting in part and denying in part his motion to compel discovery (Dkt. ## 45 and 47). I construe these submissions as motions for reconsideration of the July 30 order pursuant to 28 U.S.C. §636(b)(1)(A).

In deciding whether to reconsider any pretrial matter determined by a magistrate judge, the court must find that the magistrate judge's order is clearly erroneous or contrary to law. I have reviewed the rulings plaintiff challenges and conclude that with one minor exception, the magistrate judge's disposition of plaintiff's motion to compel was entirely correct and well within the magistrate judge's discretion. The exception is the magistrate judge's decision that defendants need not produce for inspection the documents identified in plaintiff's document request No. 16 as "all documents labeled 'Wisconsin Department of Corrections Mission Statement' and related documents." Plaintiff points out that the magistrate judge's decision to deny his motion to compel defendants to produce documents in response to this request was grounded on the magistrate judge's assumption that the request related strictly to the totality of conditions of confinement claim that was dismissed from this lawsuit. Plaintiff contends that this document relates directly to his two remaining claims. Although the document has dubious value to plaintiff in ultimately proving his entitlement to relief on the remaining claims, I conclude that it was error for the magistrate judge to hold that the documents are relevant only to plaintiff's dismissed claims.

Plaintiff's Motion for Witnesses at Trial

Plaintiff has moved for an order that witnesses be brought to court at the time of trial (Dkt. #49). This motion will be denied as premature. If the case goes to trial, plaintiff can

refile his request as a motion for writs of habeas corpus ad testificandum in accordance with this court's Procedures for Calling Witnesses to Trial, a copy of which is attached to this order.

Plaintiff's Second Motion to Cease Retaliation

Plaintiff's second "Motion to Stop/Cease and Desist Retaliation" (Dkt. #91) will be denied as well. In this motion, plaintiff asserts that a Captain Biggar retaliated against him by confiscating a piece of his outgoing mail on August 5, 2003 and issuing him a conduct report. Plaintiff states that the letter was addressed to Diane Block, whom he "may" call to testify in this case and contained a request that Ms. Block call someone at the law office of Cannon and Dunphy. He contends that confiscation of the letter is an attempt to damage his case.

In his first "Motion to Stop/Cease and Desist Retaliation," plaintiff alleged that Captain Julie Biggar had confiscated letters that he wanted to send to Diane Block and Alicia Miller and issued him a conduct report because he placed letters to different people in one envelope. At that time, plaintiff asked for an order enjoining retaliation against him. In an order dated August 12, 2003, I denied the motion because plaintiff had not shown that Captain Biggar took adverse action against him *because* he was exercising a constitutional right, such as his right to gain access to the courts and, more important, because I was

unwilling to entertain a claim of retaliation in the context of this lawsuit short of a showing that prison officials were physically preventing plaintiff from prosecuting this action. Nothing in plaintiff's second motion convinces me that Biggar's confiscation of plaintiff's August 5 letter is preventing him from proceeding in this case. Indeed, he has filed close to two hundred pages of documents in this action in the past month. If plaintiff believes that Biggar is retaliating against him for exercising a constitutional right, he will have to file a separate lawsuit on this issue.

Plaintiff's Motion for Appointment of Counsel

Finally, plaintiff has moved for appointment of counsel to represent him in this action. In an order dated June 3, 2003, I gave thorough consideration to plaintiff's earlier motion for appointment of counsel. For the reasons stated in that order, plaintiff's newest motion for appointment of counsel will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion for Filing and Information" (Dkt. #53) is GRANTED.

Enclosed to plaintiff and defendants is a copy of plaintiff's motion for summary judgment, together with all of the supporting papers, including the brief and proposed findings of fact.

2. The parties are to observe the following schedule for briefing plaintiff's motion for summary judgment:

Defendants may have until September 15, 2003, in which to respond to the motion.

Plaintiff may have until September 25, 2003, in which to serve and file a reply.

3. Plaintiff's motions pursuant to 28 U.S.C. §636(b)(1)(A) for reconsideration of the magistrate judge's July 30, 2003 order (Dkt. ## 45 and 47) are GRANTED with respect to plaintiff's document request No. 16. Defendants are to make the Department of Correction's mission statement and "related documents" available to plaintiff for inspection. In all other respects, plaintiff's motions for reconsideration are DENIED.

4. Plaintiff's "Motion for Court Order that Witnesses be Brought to Court at Time of Trial" (Dkt. #49) is DENIED as premature;

5. Plaintiff's second "Motion to Stop/Cease and Desist Retaliation" (Dkt. #91) is

DENIED; and

6. Plaintiff's motion for appointment of counsel (Dkt. #86) is DENIED.

Entered this 26th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge