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

EDWIN C. WEST,

Plaintiff,

v.

STEVE HAMILTON,
AMY WYTTENBACH,
DENNIS SNYDER and
DARLENE HEIMERMANN-RAMSEY,

Defendants.

ORDER

04-C-211-C

Before the court are plaintiff's two motions to compel discovery (dkts. 45 and 47). Plaintiff is demanding better responses to his requests for admission (RFAs) 6, 8, 9 and 1 and requests for production (RFPs) 23, 24, 25 and 7. Defendants resist further disclosure. *See* briefs in response (dkts. 46 & 49) and the November 23, 2004 second affidavit of Dr. David Thornton, Treatment Director at Sand Ridge Secure Treatment Center (SRSTC) (dkt. 50). Having carefully reviewed all relevant submissions, I am granting in part and denying in part plaintiff's first motion and denying his second motion.

Although defendants are denying the disputed RFAs on the basis of relatively minor discrepancies, they have not violated any rule by doing so. For reasons outlined in the various submissions, defendants are suspicious of plaintiff's motives and tactics in the instant lawsuit and have chosen not to concede an inch. Therefore, it was not improper for defendants to deny RFA 6 because plaintiff labeled it wrong, RFA 8 for the same reason in addition to the lack of

an "attached document", RFA 9 because it was an "ITO" rather than an "ITP," and RFA 1 because it was missing at least one page.

Plaintiff's disputed RFPs 23-25 are a different matter. As plaintiff points out, *defendants* are the ones who claim plaintiff communicates "hidden subliminal messages" to female staff; therefore, it is disingenuous for defendants to claim plaintiff's request is "very subjective" and "inherent[ly] ambig[uous]" when it was defendants' staff who raised the issue during plaintiff's treatment. In his amended complaint at paragraph 60 (dkt. 30 at 10), plaintiff alleges that

> One of the reasons for the [Individual Treatment Opportunity], as stated in the ITO is, 'he often speaks in hidden subliminal messages to female staff, but that those that are familiar with him can easily decode the message.'

Defendants admit this allegation at paragraph 60 of their answer, dkt. 33 at 8.[1] This is sufficient to shift the burden of production to defendants.

Nowhere do defendants claim that this information is irrelevant, sensitive, privileged, or otherwise protectable. Defendants' claim of burden is not well taken in the absence of a claim of irrelevance: apparently plaintiff's ITO is relevant to his equal protection claim; therefore the reasons for the ITO are relevant and discoverable; therefore disclosure of information relevant to the "subliminal messages" claim are relevant and discoverable as well.

I am aware of and sensitive to defendants' claim that staff and patients at the Sand Ridge Secure Treatment Center are extraordinarily wary of plaintiff, his actions and his motivations. They see him as manipulative, aggressive and litigation-minded. From the records before the

[1] By definition, subliminal messages *cannot* be easily decoded, so I surmise defendants are referring to innuendo and double entendres or something equally decipherable and inappropriate.

court, there appears to be a factual basis for these concerns. But in the absence of a supported motion for protection and so long as this case is proceeding toward summary judgment or trial, defendants cannot resist disclosure of the "hidden subliminal messages" information solely by claiming that plaintiff's requests are vague, ambiguous and require speculation. Defendants do not "have to guess at [plaintiff's] meaning in order to respond" because plaintiff merely is asking defendants to back up their own claims with documentation. It flows from this that if defendants' own employees are claiming to have decoded subliminal messages from plaintiff, plaintiff would be entitled to learn their qualifications to do so if they have any. Therefore, on this record, plaintiff is entitled to substantive responses to RFPs 23-25.

The calculus is different for plaintiff's request in his second motion (dkt. 47) for disclosure of the curriculum for the "Breaking the Patterns" Group for Phase 4 of the Corrective Thinking Program conducted during the year 2003. Here, defendants have established a valid basis to keep this information out of plaintiff's hands, and plaintiff has not provided an adequate reason for actually needing this material.

First, defendants have established a palpable need to keep the "Breaking the Patterns" curriculum out of the hands of patients, even those who have been assessed and placed on a corrective thinking program track. Disclosing the curriculum would create a nonconjectural risk that plaintiff would coach other patients and prisoners to fake responses to psychological tests in order to achieve an artificially low score on the Psychopathy Checklist-Revised (PCL-R). According to Dr. Thornton, The PCL-R, developed by Dr. Robert Hare, is the flagship measure of psychopathic traits that routinely is used by evaluators in risk assessments for sexually violent

persons (SVP) hearings and by treatment staff. To compromise the assessment process would jeopardize the ability of evaluators to provide accurate risk assessments to the courts regarding SVPs and would compromise the ability of treatment staff to provide appropriate treatment to the most difficult patients. *See* Nov. 23, 2004 Thornton Aff., dkt. 50, at 2-3.

Measured against the high costs of disclosure is plaintiff's claimed need for the "Breaking the Patterns" curriculum: he needs a hard copy of the curriculum to prove that on the first day he was in the program, he deduced that it was a rehash of the material used to score a patient's psychopathy, to which plaintiff objected from day one: "SRSTC was having group facilitators who were never trained in the Hare psychopathy check list teaching this material to a bunch of alleged psychopaths." Plaintiff's Second Motion To Compel, dkt. 47, at 2. Plaintiff's theory in the instant lawsuit is that his objection, perhaps accompanied by other things, marked him to defendants as a troublemaker; as a result, they began their efforts to set him up to remove him from his treatment group, thus violating plaintiff's constitutional right to equal protection. In essence, plaintiff wants disclosure of a confidential treatment curriculum to prove that he correctly recognized its overlap with the PCL-R and was punished for this observation. This isn't nearly enough of an evidentiary need to justify disclosure of the curriculum.

Further, as the state points out, Dr. Thornton admits at ¶¶ 5-6 of his affidavit the points that plaintiff wishes to prove. Therefore, plaintiff has no genuine need for a hard copy of the curriculum. This set of circumstances is sufficient, without more, to doom plaintiff's second motion to compel.

That said, context and case law also would militate toward denying plaintiff's second motion to compel. Plaintiff is a serial litigant in this court. *See, e.g.,* cases 96-C-163-C, 97-C-756-C, 98-C-0548-C, 01-C-539-C.[2] Plaintiff did not prevail in any of his previous cases and has never taken a case all the way to trial. As he has in some of his previous lawsuits, plaintiff employed a cat-and-mouse tactic of requesting voluntary dismissal of this case without prejudice, but then promptly reopening it. *See* October 27, 2004 Order, dkt. 43. In short, plaintiff has done nothing to establish the *bona fides* of his litigation strategy.

To the same effect it is worth noting the shaky foundation on which this particular lawsuit rests. Plaintiff's "class of one" equal protection claim in this case is almost circular. The complaint is about 90 paragraphs long but it can be summarized tersely: plaintiff claims that the defendants who ran his SVP treatment program violated his constitutional right to equal protection by intentionally treating him differently from his other group members because they disapproved his behavior. But logic suggests that treatment professionals have at least some leeway to determine that behavior of which they disapprove by a group member will result in treatment different from other patients who did not engage in similar behavior. So at what point have treatment providers crossed the line from professional discretion into an equal protection violation of constitutional magnitude? The answer to this question must be situational; in this case, it is difficult to see how plaintiff will be able to prove that the line was crossed.

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[2] Wisconsin's computerized court record system also reveals eight civil cases and petitions for writs filed by plaintiff in Dane, Juneau, Milwaukee, Sheboygan and Winnebago Counties.

Plaintiff alleges that defendants "have knowingly and intentionally not been treating plaintiff in accordance with the [Corrective Thinking] Program," *see* Amended Complaint at ¶ 83, dkt. 30 at 13, which has slowed his treatment and will cost him another year in custody. According to plaintiff, the defendants undertook these improper acts and omissions "intentionally or with deliberate indifference and callous disregard of plaintiff's rights . . . under the Fourteenth Amendment" (*id.* at ¶ 87), and as a result,

> plaintiff . . . has suffered a deprivation of his equal protection rights to be treated fairly and similarly to those in his treatment groups by those treating him, so that he can achieve the purpose of his commitment.

Id. at ¶ 88.

These allegations miss the mark. Even to *state* a prima facie "class of one" equal protection claim, a plaintiff must allege not only that he has been intentionally treated differently from others similarly situated, but also that there was "*no* rational basis for the difference in treatment" or that the cause of the differential treatment was a "*totally* illegitimate animus" toward the plaintiff. *See McDonald v. Village of Winnetka*, 371 F.3d 992, 1001-02 (7th Cir. 2004) (emphasis added).[3]

In the instant case Plaintiff alleges in his complaint that his punishment was unfair because staff at SRSTC perceived him as a manipulative, rule-breaking trouble-maker who had "stalked" a female staff member (defendant Wyttenbach). *See, e.g.,* Amended Complaint at ¶¶ 18-24, 32-35 (the stalking allegations), 25-28 (plaintiff challenges the Phase 4 curriculum) 44-

[3] The Seventh Circuit is expressing doubts about the viability of the "no rational basis"option for the second element. *See id. at* 1002, n.3.

54 (more verbal sparring with Wyttenbach during a group session, followed by an argument in which plaintiff threatened to sue Wyttenbach). According to plaintiff, these perceptions were incorrect and led to unfair deviations from plaintiff's treatment program, including a secret conspiracy to cause plaintiff to fail Phase 4 of the CT Program.

But rightly or wrongly, plaintiff appears to admit that these were–and are–the perceptions defendants and others at SRSTC had and have of plaintiff. For instance, Steven Watters, the Director of SRSTC averred in response to an earlier discovery dispute in this case that

> West is perceived as intimidating by other patients and staff at SRSTC, and he has admitted this to staff. He is experienced and knowledgeable about the court system, which is also intimidating to patients and staff.

Watters then documents two different sets of conduct by plaintiff in which the evidence established to SRSTC's satisfaction that plaintiff broke major rules and casually violated confidences. July 15, 2004 affidavit, dkt. 16 at 4-6.

Obviously the parties disagree over how to characterize plaintiff's behavior at SRSTC and how to characterize staff's response to it. That being so, there is reason to question how a mental health patient, even one involuntarily committed, can establish a class-of-one equal protection violation based on a disagreement with staff over how plaintiff is responding to treatment when the vindictiveness alleged by the patient consists mainly of the staff's perception that he is not responding well to treatment. Many of the incidents that plaintiff himself alleges in his amended complaint allow the inference that there was a"rational basis for the difference in treatment" and that the defendants were not motivated by a "totally illegitimate animus."

We are in the realm of subjective treatment decisions here, and plaintiff's personal disagreement with how the defendants responded, without more, will not be enough to prove up his claim.

Perhaps an expert qualified to treat sexually violent persons and who is familiar with the PCL-R, Dr. Hare and the "Breaking the Patterns" curriculum could offer an opinion supporting plaintiff's contentions. I do not know whether plaintiff disclosed an expert witness by his November 12, 2004 deadline, but I do know that he has not asked this court for an extension, as I invited him to do if certain conditions were met. *See* November 12, 2004 Order, dkt. 48. In the absence of a complete and persuasive expert report, I do not see how plaintiff can survive summary judgment, even if this court were to compel defendants to provide every shred of information responsive to his RFAs and RFPs.

But this court does not pre-judge cases, which is why I am ordering the defendants to provide the disputed "subliminal messages" evidence. On the other hand, given the vulnerability of the "Breaking the Patterns" curriculum, Dr. Thornton's concessions in his second affidavit, and the frailty of plaintiff's equal protection claim, plaintiff is not entitled to the discovery demanded in his second motion to compel. If a trustworthy, qualified expert witness were to ask to review the "Breaking the Patterns" curriculum, then the equation would be different. That hasn't happened, and this court is not about to provide a confidential treatment document to this plaintiff in this case when the record establishes that he has no genuine need for it.

ORDER

For the reasons and in the manner stated above, it is ORDERED that plaintiff's first motion to compel is GRANTED IN PART and DENIED IN PART and his second motion to compel is DENIED.

Entered this 8th day of December, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge