

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

LARRY GEORGE,

Plaintiff,

v.

JUDY SMITH, RUTH TRITT,
MARTY SCHROEDER, OFFICER VILSKI,
TIM PIERCE and NURSE CARIVOU,

Defendants.

ORDER

05-C-403-C

On August 2, 2005, after plaintiff paid the full fee for filing this lawsuit, I screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A and allowed him to proceed on his claim that defendants had violated his First Amendment rights by denying him certain publications that were deemed to contain gang-related content. In addition, I allowed plaintiff to proceed on claims that his Eighth Amendment rights were violated when 1) defendant Carivou failed to give him asthma medication for several days and gave him medication that was not to be taken for asthma; 2) a yet to be identified defendant failed to allow plaintiff to see a doctor to obtain a prescription for sunglasses that plaintiff needs for a medical condition that causes him severe sensitivity to light; and 3) defendant Judy

Smith endorsed a policy that allowed plaintiff to be exposed to second hand smoke. Now plaintiff has written to ask that the United States Marshal serve his complaint on the defendants because none has returned the waiver of service of summons form plaintiff attempted to send to each of them. Plaintiff's request will be denied.

As I noted above, plaintiff paid the fee for filing this case. He is not proceeding in forma pauperis under 28 U.S.C. § 1915. Therefore, if he has been unsuccessful in obtaining a signed waiver of service form from the defendants, it is his responsibility to hire a private process server to serve the defendants personally. Under Fed. R. Civ. P. 4(d)(2)(G), he can recoup the costs of such service unless the defendant shows good cause for his or her failure to comply with a properly served request for waiver of service of a summons.

In this case, plaintiff has not made a showing that he complied with the requirements for obtaining a waiver form from any of the defendants, which were set out in a memorandum attached to this court's August 2 order titled "Procedure for Serving a Complaint on Individuals in a Federal Lawsuit." This document set out explicit directions for requesting waiver of service of a summons from a defendant. In particular, the instructions require a plaintiff to send to each defendant a copy of his complaint, the necessary waiver forms and a self-addressed, stamped envelope for his or her use in returning the waiver form. This packet of materials is to be inserted in a large envelope and mailed to each defendant "through first-class mail or other reliable means." Fed. R. Civ. P. 4(d)(2)(B).

Plaintiff states that he sent each defendant except defendant Schroeder the waiver forms through the prison mail and gave the defendants 30 days to return the form to him “in the envelope [he] provided.” Plaintiff has made no showing that the internal mail system he used to send his packets to the defendants is reliable or that he supplied the defendants with postage pre-paid envelopes for returning the waiver forms as required by Rule 4(d)(2)(G). Until he makes such a showing, he cannot prevail on an argument that defendants failed in their duty to allow plaintiff to avoid the costs of personal service of a summons and his complaint.

As for defendant Schroeder, plaintiff states that because Schroeder is now retired, he gave the service packet to Lawrence Stahowiak, another prison official, and asked him to put Schroeder’s address on it and mail the documents to Schroeder at plaintiff’s expense. Stahowiak advised plaintiff that he was not allowed under prison rules to obtain or possess such information about other staff members. Nothing in Rule 4 allows a plaintiff to delegate responsibility for obtaining a defendant’s address to a defendant’s former co-worker.

If plaintiff is unable to secure defendant Schroeder’s present address or obtain waiver forms from the remaining defendants after complying strictly with the rules governing waiver of service, he must choose one of two options. If he is not indigent, he will have to hire a private process server to locate Schroeder and serve him and the other defendants personally with his complaint. If plaintiff is indigent, he can ask the court for leave to proceed in forma

pauperis in this action for the purpose of serving his complaint on the defendants. If plaintiff chooses this option, he will have to support his request with a certified copy of his trust fund account statement for the past six months so that a determination can be made whether he qualifies for pauper status. If he does, then the court will grant plaintiff leave to proceed with respect to the cost of service and will ask the Attorney General to accept informal service of process as to all of the defendants except defendant Schroeder. In addition, the court will ask the United States Marshal to make an effort to obtain defendant Schroeder's address from the Department of Corrections and, upon receiving the address, serve Schroeder with plaintiff's complaint.

ORDER

IT IS ORDERED that plaintiff's request for an order requiring the United States Marshal to serve the defendants in this case is DENIED as premature.

Entered this 24th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge