

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

LARRY GEORGE,

Plaintiff,

v.

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

Defendants.

ORDER

05-C-403-C

Plaintiff Larry George has filed a document titled "Motion for Order," in which he asks the court to make a copy of the affidavits of Brandon Calvetti, Luigi Aiello, Paul Nigl, Charles Botcher and David Kalk (plaintiff's exhibits 123, 124, 125, 126 and 128) and send them on to defense counsel. To cover the photocopying costs, plaintiff also has submitted payment in the amount of \$10.

Although I am sending the requested copies to Jody Schmelzer as plaintiff asks, I do not intend to consider the affidavits of inmates Calvetti, Aiello, Nigl, Botcher or Kalk in deciding the pending motion for summary judgment. Plaintiff admits in the affidavit he filed

on October 5, 2006 (Dkt. #50) that he did not send defendants a copy of the affidavits because of his “understanding that it would be a rule violation for [him] to have possession of these or to copy these.” Despite plaintiff’s keen awareness that failure to serve the affidavits on opposing counsel is a violation of Fed. R. Civ. P. 5, plaintiff nevertheless cited to the affidavits to support certain of his responses to defendants’ proposed findings of fact in support of their motion for summary judgment. Briefing is now complete on defendants’ motion. Defendants’ receipt of the affidavits at this late date does not negate the fact that they were not privy to the contents of the affidavits when they were preparing their reply to plaintiff’s response to the summary judgment motion. I have no intention at this late date to reopen briefing so that defendants can file a revised reply. If plaintiff had wanted the affidavits at issue to be considered by the court, he should have moved the court for an order directing prison officials to relax the rule preventing his possession and copying of the documents so that he could serve them as Fed. R. Civ. P. 5 requires. In addition, he should have supplied the court with a copy of the rule preventing his compliance with Rule 5. Even now, he does not identify the rule to which he refers. He cannot expect the court to disregard his non-compliance with Rule 5 on an assertion without proof that it is against prison rules for an inmate prosecuting a civil lawsuit to have in his possession affidavits obtained from other inmates relating to the issues raised in the lawsuit. Indeed, it is perplexing how plaintiff can make such an assertion. This court’s records are replete with

lawsuits containing affidavits supplied by inmates supporting claims raised by other inmates.

In his “motion for order,” plaintiff also seeks sanctions against defendants “for the lies contained in some of the defendants’ affidavits.” That request will be denied. If defendants proposed facts supported by statements in affidavits with which plaintiff disagreed, plaintiff was free to dispute the proposed facts and provide evidence contradicting the statements. If a material fact turns on the credibility of competing witnesses, the motion for summary judgment must be denied and the matter decided by a jury.

ORDER

IT IS ORDERED that plaintiff’s “motion for order” is GRANTED insofar as plaintiff has asked the court to send copies of the affidavits of Brandon Calvetti, Luigi Aiello, Paul Nigl, Charles Botcher and David Kalk to defense counsel.

Further, IT IS ORDERED that plaintiff’s “motion for order” is DENIED with respect to plaintiff’s request for sanctions against defendants.

Entered this 26th day of October, 2006.

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