IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES E. HENNINGS,

Plaintiff,

ORDER

06-C-353-C

v.

DAVE DITTER,

Defendant.

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In an order dated July 17, 2007, I granted in part plaintiff's motion to exclude trial testimony of defendant's witness Peggy Doucette because defendant had not identified her as a potential witness until one month before trial. Defendant has filed a motion to reconsider that decision, which will be granted.

In his opposition to plaintiff's motion, defendant acknowledged that plaintiff had submitted an interrogatory in which he asked defendant to identify his potential witnesses. Defendant objected to this interrogatory on the ground that it was "vague, ambiguous and unintelligible," even though plaintiff used language identical to Fed. R. Civ. P. 26(a)(1), which requires parties in most cases to disclose without a discovery request "the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information." Although plaintiff twice filed

a motion to compel discovery in this case, he never objected specifically to defendant's response to that interrogatory.

In the July 17 order, I relied on Rule 26 in granting plaintiff's motion, but I overlooked the fact that the provision requiring initial disclosures does not apply in cases such as this one, in which the plaintiff is a prisoner unrepresented by counsel. Fed. R. Civ. P 26(a)(1)(E)(iv). Because this court never ordered defendant to provide plaintiff the names of potential witnesses during discovery, defendant was not required to do so until he filed his witness list on July 5.

To be clear, I do not mean to suggest that there is any merit to defendant's objection that plaintiff's interrogatory was "vague, ambiguous and unintelligible." There is not. To say that plaintiff's interrogatory could not be understood is to say the same about Fed. R. Civ. P. 26(a)(1), a rule with which parties have been complying in almost every federal civil case since 1993. In fact, defendant's response to the interrogatory was so objectively unreasonable that it suggests bad faith. Nevertheless, plaintiff never moved properly to compel defendant to respond to this interrogatory, meaning that I have no authority under Fed. R. Civ. P. 37 to sanction defendant by excluding the witness.

In any event, I anticipate that counsel for defendant will not make the same objection to similar requests in the future.

ORDER

IT IS ORDERED that defendant David Ditter's motion for reconsideration of the

July 17, 2007 order is GRANTED. Defendant may call Peggy Doucette as a fact witness at trial.

Entered this 30th day of July, 2007.

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