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

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

RICHARD SCHNEITER, *et al.*,

Defendants.

ORDER

06-C-608-C

Before the court are plaintiff's motions to compel discovery, appoint counsel and adjust the schedule, *see* dkts.21, 23, 27 and 29 with supporting documents (dkts. 24, 25, 28 and 30), all of which defendants oppose, *see* dkts. 22, 26 and 31. For the reasons stated below, I am granting in part and denying in part plaintiff's motions, with each side bearing its own costs.

Plaintiff has been granted leave to proceed against nine of 27 defendants on three of six claims. What's left are claims of unconstitutional conduct based on limiting sunlight, providing outdoor vests, hats and gloves contaminated with other prisoners' body fluids, and retaliating against plaintiff for filing lawsuits and grievances. *See* November 13, 2006 order, dkt. 2, at 27-28. The court has denied reconsideration of its screening order, *see* dkt. 6, clarified its denial of his due process claim, *see* dkt. 10, denied his motion for appointment of counsel and to compel a legal loan, *see* dkt. 14, denied his second request for counsel but extended the calendar in the case to give plaintiff more prep time, *see* dkt. 16 and denied his third request for appointment fo counsel, *see* dkt. 20. The calendar, already extended once at plaintiff's request, required plaintiff to disclose expert witnesses by August 10, defendants to disclose experts by September 7, summary judgment motions to be filed by September 21, discovery to end by January 25, 2008, and trial to begin on February 25, 2007.

Plaintiff's First Motion To Compel (dkt. 21)

Plaintiff first seeks to compel better answers to all of his interrogatories and to his requests for admission (RFAs) 7(f) - 7(j) and 9(b). In his seventh RFA, which relates to his contaminated clothing claim, plaintiff asks defendants to admit that some prisoners have communicable diseases, some have bee found guilty of throwing bodily fluids on other people, some prisoners wipe their noses on their sleeves or gloves during outdoor rec, sometimes prisoners spit on each other or throw bodily fluids at each other during outdoor rec, prisoners face the same risk of picking up diseases by wearing unwashed outdoor rec clothing as they do from being put in a cell or given unwashed bedding or clothing at shower time. Defendants objected that these requests were vague, ambiguous and required speculation because he didn't specify which defendants were to answer them, or which group of prisoners he was talking about (prisoners in general or "some WSPF prisoners"). Plaintiff suggests that defendants are being intentionally coy and that they easily could answer these RFAs with a bit of investigation.

Defendants Schneiter, Ray, Huibregtse, Hautamaki and Raemisch must supplement their responses to RFAs 7(f), 7(g), 7(h) and 7(I), limiting their response to that group of prisoners at WSPF who have access to the gloves, hats and vests used in the exercise yard (which may be no limitation at all). Each defendant may limit his response to his personal knowledge, but as Rule 36 requires, they must make reasonable inquiry into these issues before claiming lack of knowledge. These are not profound facts and they are not difficult to admit or deny. It is an issue for a different day whether plaintiff can establish deliberate indifference to a serious health hazard from the facts that some prisoners wipe their noses on some gloves and some prisoners have communicable diseases (particularly when defendants claim to wash these items regularly, which plaintiff labels a lie, *see below*).

As for 7(j), this RFA requires medical knowledge that defies an accurate answer from these defendants in the RFA format, so they do not need to answer it.

No defendant needs to answer RFA 9(b). It requires comparisons and opinions that defy a simple admission or denial by a defendant.

Defendants need not supplement their answer to plaintiff's Interrogatory 1. The answer squarely addresses the question and they stand by their answer notwithstanding plaintiff's claim that they are lying.

So too with Interrogatory 2: plaintiff asks if defendants "feel" as if they are exposing prisoners to risks; none of the defendants share any feelings, but they provide relevant information about the exchange of viruses in closed environments, then gratuitously explain their clothes-washing policy to account for this. Plaintiff doesn't like this answer, labeling it a lie; this however, is not a basis for this court to order defendants to amplify their answer. Plaintiff got the information to which he was entitled.

Plaintiff skips to Interrogatory 4, in which he asks defendants Horner, Cravens, Boughton and Huibregtse of which complaints and lawsuits by plaintiff they were aware when they signed the "RAIG" at issue in this case. Defendants objected, claiming that it was irrelevant. So too, with Interrogatory 5 (a) in which plaintiff asked if they knew that the warden had testified in one of plaintiff's earlier lawsuits. Defendants also deemed 5(c) irrelevant because it asked "what would have happened" if they had decided the RAIG differently.

Because this court has granted plaintiff leave to proceed on his retaliation claim, plaintiff is entitled to attempt to show a cause →effect relationship between the decision makers' knowledge of plaintiff's incessant litigation and their adverse decision. Therefore, plaintiff is entitled to substantive answers to Interrogatories 4 and 5(a). To the same effect, plaintiff is

entitled to attempt to prove that the action taken by these decision makers actually was adverse; therefore, if they can provide a nonspeculative answer to 5(c), they must do so.

Plaintiff labels defendants' resistence to his discovery demands frivolous and seeks sanctions and reimbursement of his motion costs. Defendants may have been incorrect but they did not interpose frivolous objections. Rule 37(a) is a make-whole provision rather than a punishment. Plaintiff won part of his motion but not all of it; rather than have each side pay its opponents expenses, each side will bear its own costs.

Plaintiff's Second Motion To Compel (dkt. 23)

Plaintiff seeks to compel responses to more RFAs, interrogatories and some requests for production of documents (RFPs). In RFA 2(h), (I), (l), (n), (o) and (p), plaintiff asked certain defendants for their personal beliefs and feelings about whether certain diseases can be spread via unwashed clothing, and asked them if they would analogize these risks to unsanitary barbering or unwashed pants and underwear. Plaintiff claims that defendants feelings and beliefs are relevant to proving their deliberate indifference to serious health hazards. But, as defendants point out, they only can be liable for deliberate indifference to facts demonstrating (or from which they actually inferred) an excessive risk to inmate health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). None of these RFAs are relevant to establishing this point. Therefore, defendants need not supplement their answers.

RFA 2(k) asks defendants to admit that pursuant to Wis. Stats. § 940.20, it is a felony for an inmate to spit or throw bodily fluids on staff or other inmates. Defendants objected that this called for a legal conclusion. As they point out, the statute criminalizes intentionally causing

bodily harm to another person in the institution. Since intent is an element of the cited statute, it is impossible for defendants to answer RFA 2(k) with a simple yes or no.

RFAs 3(a) - 3(e) ask defendants to admit to certain facts about an inmate named Jason Tyrrell. Defendants ultimately objected on the ground that not only was this information irrelevant, inmate records are confidential for security and safety reasons. Plaintiff replied that he already has access to Tyrell's records, and that comparing himself to Tyrell helps prove retaliation because although Tyrell was a nastier inmate than plaintiff, he does not litigate, and therefore, defendants approved Tyrell for the program they denied to plaintiff. While such a comparison could be relevant to proving defendants' animus against plaintiff, plaintiff is not entitled to admissions from defendants on this point if such admissions would violate defendants' confidentiality policies regarding other inmates. Plaintiff will have to prove up this point through other evidence.

RFAs 4 (b), (d), (f), (h), (j), (l), (n) and (p) ask defendants to admit to the truth and accuracy of the scientific and medical assertions in a series of attached articles addressing sunlight and health. Defendants were willing to admit that the articles were accurate photocopies but declined to speculate as to the truth and accuracy of the assertions therein. This was the only honest and accurate course available to them. Pursuant to F.R. Ev. 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), only a properly qualified scientific expert could provide a usable answer to these RFAs.

Plaintiff also has moved for more complete answers to Interrogatories 1 and 2(a). The first interrogatory asked the named defendants to explain why they chose to believe the "negative facts" stated about him at the RAIG and asked who might have asked or ordered these

defendants to place him on LTAC . The defendants objected to the phrasing but averred that "the information on the RAIG prompted the decision to place plaintiff on LTAC, rather than having been 'ordered' to do so." Plaintiff deems this evasive; he apparently wants defendants to articulate their thought processes in a fashion that allows him to impeach them. To the extent that any inmate is entitled to a statement of findings leading to an adverse action, and to the extent that such an entitlement applies to the proceeding addressed in Interrogatory 1, the defendants must provide such findings. However, if there is no separate administrative requirement that this be done, then defendants are under no obligation to supplement this response. They essentially have asserted that the totality of circumstances informed their decision; it would be futile to attempt to break this anser apart in followup interrogatories.

Interrogatories 2(a) - (c) revisit the science of sunlight and asks for speculative opinions that the defendants are not qualified to provide. They need not supplement their answers.

Plaintiffs' RFPs 1(b), (c) and (g) ask for documents that reveal any of WSPF's strategies to prevent spread of any diseases; documents that reveal any outbreak of any diseases among WSPF prisoners; and an ingredient list for the soap used to launder recreation clothing and the amount used per load. Defendants objected to the first request as vague and overly broad, the second as invasive of inmate confidentiality, the third as irrelevant. Defendants did not need to not answer these RFPs as phrased. Even so, if WSPF or DOC has any written policies or protocols on how to prevent the spread of fluid-borne pathogens, any sections that have to do with inmate clothing must be disclosed to plaintiff. If WSPF or DOC is aware of any actual cases at WSPF of an inmate becoming infected by fluid-borne pathogens contained in clothing, the existence of these documents must be disclosed to plaintiff, with possible disclosure of

redacted versions to follow. If plaintiff has a qualified expert on the elimination of fluid-borne pathogens from clothing, then defendants must disclose to that expert any information it has about the laundry techniques used on the shared clothing used by prisoners during outdoor recreation at WSPF.

Plaintiff's RFPs 2(a)-(d) ask for: all foundational documents used to provide discovery answers (which defendants later provided); all documents defendants have seen regarding possible physical and psychological harms attendant to long-term confinement in an institution like WSPF; defendants' curricula vitae; and defendants' personnel records, less identifying information. None of these requests possible could lead to the discovery of admissible evidence with one exception: if any defendant actually has read or has been provided with any document addressing the issue of sunlight and prisoner health or the issue of the transmission of fluid-borne pathogens through shared clothing, then these documents must be disclosed to plaintiff.

As with his first motion, plaintiff has asked for sanctions on his second. He will not get them. Defendants' discovery responses were adequate and appropriate. Whatever additional disclosures I have ordered are a result of the court's refinement of plaintiff's over-broad or misdirected requests.

Plaintiff's Motion for Counsel, Extensions and a Protective Order (Dkt. 27)

Plaintiff again asks this court to appoint counsel, adjust the summary judgment deadline and issue a protective order. Plaintiff claims that his lawsuit is in jeopardy due to Wisconsin's legal loan procedure, which has starved him of the money he needs to fund this lawsuit, particularly because defendants have refused to provide him with free photocopies of materials.

It is impossible to sympathize with plaintiff's self-inflicted litigation wounds. Plaintiff is a serial litigant, having filed a dozen lawsuits in this court alone, against scores of defendants alleging innumerable violations of his constitutional rights.[1] As a result, plaintiff is always short of money, paper and postage; his demands that the state underwrite his addiction to litigation caused the Seventh Circuit to declare that prisoners have no constitutional entitlement to subsidy to prosecute a civil suit. *See Lindell v. McCallum*, 353 F.3d 1107, 1111 (7th Cir. 2003). "Like any other civil litigant, he must decide which of his legal actions is important enough to fund." *Id.*

Plaintiff filed the instant lawsuit in May 2006 in the Eastern District of Wisconsin, even though he was imprisoned in Boscobel, the DOC is headquartered in Madison, and he invoked the *Jones-el* settlement agreement entered by this court. Milwaukee transferred plaintiff's case to this court in October, 2006; by April he was seeking an order to compel the state to fund this lawsuit, or in the alternative, to stay proceedings so that he could marshal the resources necessary to litigate. Notwithstanding its familiarity with plaintiff's litigation tactics, this court nonetheless moved the trial date from November 26, 2007, to February 25, 2008 so that plaintiff could save up money to pursue this case.

So how did plaintiff go about marshaling his resources in response to the court's uncharacteristic scheduling accommodation? In January, 2007, he had filed another lawsuit in this court against twelve defendants but got booted from court in February because he would not pay the required $1.51 partial filing fee. *See Lindell v. Frank, et al.,* 07-C-09-C. Earlier this

[1] *See* Cases numbered 01-C-209-C, 01-C-521-C, 02-C-21-C, 02-C-79-C, 02-C-459-C, 02-C-473-C, 04-C-249-C (habeas petition), 05-C-03-C, 05-C-04-C, 07-C-09 and 07-C-484-C.

week, on August 29, 2007, plaintiff filed yet another lawsuit against 15 state defendants. *See Lindell v. Frank, et al.*, 07-C-484-C. This court already has enabled plaintiff once in the instant case, only to be sandbagged by plaintiff's diversion of his resources to a new lawsuit against another busload of defendants. Under the circumstances, plaintiff cannot seriously expect this court to accommodate him again. This motion is denied. All dates previously set remain in effect, and the court's repeated orders denying appointment of counsel stand.

Plaintiff's Third Motion To Compel (dkt. 29)

Here, plaintiff rehashes many of the same topical disputes via additional discovery requests to which defendants objected. Plaintiff first asks for better answers to his third set of RFAs 1(a) - (c), (e), (i) and (k) - (n). These are requests that defendants admit to the authenticity of records and documents related to his medical condition of dermatographism, as well as admit to the fact that plaintiff is liable to get a disease from wearing unwashed clothing (RFP 1(n)). As with plaintiff's similar demands discussed above, it is sufficient for defendants to admit that the documents are what they are, then to refuse to speculate as to the thoroughness and accuracy of their contents. Plaintiff is not entitled to compel defendants to admit to the specifics of medical conditions, risks and treatments about which they have no expertise. The documents and medical records say what they say; the significance of their contents is for an expert to explain.

To the same effect, defendants have responded to plaintiff's third set of RFAs 2(a)-(c) and (g) by admitting that the exhibits presented by plaintiff were true and accurate copies of documents plaintiff had retrieved from websites and dictionaries, but declining to vouch for the

accuracy or thoroughness of the information contained therein. This was entirely appropriate. If plaintiff wants to establish for summary judgment or trial purposes that lack of sunlight can cause or exacerbate depression, then he must present an admissible expert opinion from a qualified expert.

Next, plaintiff objects to defendants' refusal to provide documents in response to his fourth set of RFPs 1(b), 1(e), 2(a) and 2(b).

RFP 1(e) asks for other inmates' complaints about unwashed or soiled outdoor clothing. Defendants objected, claiming that these were confidential. This is a valid concern, but plaintiff is entitled to learn some generic information in an attempt to establish defendants state of mind: do any other such complaints exist? If so, how many are there, when were they filed, who reviewed them and what were the outcomes? Defendants must provide this information to plaintiff.

RFP 1(e) asked for a copy of a WSPF flier on flu vaccines and the like. Defendants say they don't have it, plaintiff says they're lying. This court will not order a party to produce documents they aver not to possess. If plaintiff previously got this flier from medical staff, then he can get another.

RFP 2(a) is a shotgun request for all documents from the *Jones-el* case that explain real or potential physical or psychological harms posed to prisoners housed at "supermax" prisons in general and WSPF in particular. Defendants objected that the request is vague; a better characterization would be too broad and burdensome to require an answer. The issues in this case are allegations of inadequate sunlight and unwashed clothing. Other harms possible from imprisonment at WSPF are irrelevant to this lawsuit.

RFP 2(b) ask defendants to reveal their criminal records. Defendants objected on relevance, but answered anyway. Plaintiff complains that the objection was frivolous. Plaintiff got his answer, so he is wasting time, paper and ink making a debater's point.

Last is plaintiff's fourth set of RFAs 1(a)-(f) and (h).

RFAs 1(a) and 1(b) ask defendants to admit that they have not put every inmate in LTAC who belonged to certain groups or performed certain acts. Defendants maintain that these requests would require a massive records check to answer. This may be true and this answer might stand, but to the extent that the defendants can recall any specific instance of conduct that fits within these RFAs, then this would be an example showing "not every." If defendants have ready access to a situation proving the exception, they must disclose it. Otherwise, their objection is well taken.

Skipping ahead, RFA 1(h) is a more generic flipside request, contending that other prisoners with worse records than plaintiff have been let into the HROP and not put in LTAC. Again, this court will not order a massive records review, but if defendants are aware of examples that fit within this RFA, then they must provide a substantive answer to it.

RFA 1(c)-(f) ask for admissions about an inmate named Ronald Dennis. Plaintiff wishes to use this inmate as a comparator in his retaliation claim, like Jason Tyrell, discussed above at 5. Consistent with the policy discussed above, defendants refused to answer these RFAs because other inmates' information is confidential for security and safety reasons. This is a valid objection to an RFA. If, as plaintiff asserts generally, Dennis is not secretive about his violent or criminal history, perhaps even boastful about it, then plaintiff will have to obtain this information from Dennis.

A caveat to defendants: as long as plaintiff's retaliation claim is extant, evidence tending to show that defendants treated him more harshly than other inmates who were genuinely similarly situated to plaintiff is relevant and presumptively discoverable. Defendants may enforce their policies and may invoke the punctilios of the rules on third party prisoners, but they cannot completely wall off plaintiff from receiving information of this nature, if it exists. The AGO should consult with DOC about how they wish to approach this. At this time, however, defendants are not obliged to provide additional information beyond that specified in this order.

ORDER

It is ORDERED that plaintiffs' motions docketed as 21, 23, 27 and 29 are GRANTED IN PART and DENIED IN PART in the manner and for the reasons set forth above. All parties will bear their own costs on these motions.

Entered this 31st day of August, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge