

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

PATRICK J. FITZGERALD,

Plaintiff,

v.

ORDER

07-C-61-C

JAMES GREER, Health Services Administration WDOC;
HELEN NELSON, Health Services Administrator WDOC;
STEVE CASPERSON, Admin Div of Adult Institutions WDOC;
TIMOTHY CORRELL, MD, Dodge Correctional Institution;
DEB LEMKE, MD, Oshkosh Correctional Institution;
ROMAN Y KAPLAN, Health Services Unit, WDOC/OSCI;
NANCY BOWENS, Nurse Practitioner WDOC/OSCI; and
JENNIFER DELVAUX, Inmate Complaint Examiner, WDOC/OSCI,

Defendants.

Plaintiff Patrick J. Fitzgerald has filed two documents. One is titled “Affidavit in Support for Order to Show Cause/Preliminary Injunction.” The other is titled “Declaration in Support of Plaintiff’s Motion for Preliminary Injunction.” Both documents contain statements made by plaintiff concerning the nature of his medical care and his chronic pain that are sworn or declared to be true under penalty of perjury. One of the documents includes five attachments marked as “exhibits.” The other includes an attachment that appears to be a proposed order for a preliminary injunction. I construe all of these

documents together as plaintiff's second motion for preliminary injunction. (Plaintiff's first motion for a preliminary injunction was filed at the time plaintiff filed his complaint.)

In his second motion, plaintiff asks for an order requiring defendants to "immediately provide pain medications that were once prescribed by personal physicians . . ." and permit him to be "examined by a qualified orthopedic specialist at plaintiff's expense"

As I told plaintiff in this court's order of March 26, 2007, when I denied his earlier motion, this court requires a party seeking emergency injunctive relief to follow specific procedures that are described in a document titled Procedure To Be Followed On Motions For Injunctive Relief, a copy of which was included with the March 26 order. Plaintiff has not followed those procedures. In particular, he has not submitted individually numbered proposed findings of fact, each of which is followed by a citation to the location of admissible evidence in the record that supports the factual proposition. Indeed, plaintiff has not filed any proposed findings of fact at all, and other than statements made in his affidavits that are within his personal knowledge, his evidence is inadmissible.

Plaintiff's "exhibits are not admissible as evidence because they have not been authenticated as Fed. R. Evid. 901(a) requires. To authenticate a document, plaintiff must submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." Ordinarily, documents are authenticated by attaching them to an affidavit of an individual who swears that the documents are true and correct copies of the

originals. However, the individual who authenticates the documents must have personal knowledge of their authenticity. Fed. R. Evid. 901(b)(1). Thus, for example, if plaintiff wants the court to consider as evidence documents obtained from his medical file (which is what the exhibits appear to be), he will have to ask the keeper of his medical records to swear in an affidavit that the documents are from plaintiff's medical file and are true and correct copies of the originals in that file.

In addition, as I told plaintiff in the March 26 order, he will not be able to succeed on a motion for preliminary injunction if he cannot show a likelihood of success on the merits of his claim that he is being denied effective treatment for his pain. In Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996), the court of appeals held that the decision how to manage an inmate's pain "is for doctors to decide free from judicial interference, except in the most extreme situations." This means that plaintiff will not be able to prove a likelihood of success on the merits of his claim, a necessary showing to obtain preliminary injunctive relief, if all he does is submit evidence that he has received narcotic pain medication at various points in the past. He will have to show that defendants' decision to change his pain medication from narcotics to Ibuprofen is "so blatantly inappropriate as to evidence intentional mistreatment." Id. It may be that the only way plaintiff can make such a showing is to obtain the opinion of at least one doctor who currently believes that plaintiff's pain treatment is so totally without medical or penological justification that it

results in the gratuitous infliction of suffering. At the present time, plaintiff's submissions do not support such a conclusion.

With respect to plaintiff's request for an order requiring defendants to let him be examined by an orthopedic specialist at his own expense, I told plaintiff in the March 26 order that at the least he would have to submit evidence showing that defendants are not letting him arrange for himself to be examined by such a specialist. Plaintiff's current motion is similarly devoid of such evidence.

Because plaintiff has neither followed the procedures for preliminary injunctive relief nor made the necessary showing of entitlement to such relief, his motion will be denied without prejudice.

ORDER

IT IS ORDERED that plaintiff's second motion for a preliminary injunction is DENIED without prejudice.

Entered this 16th day of April, 2007.

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