

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

PATRICK J. FITZGERALD,

Petitioner,

MEMORANDUM

v.

07-C-61-C

DEPARTMENT OF CORRECTIONS (WDOC);
MATHEW J. FRANK, Secretary of WDOC;
JAMES GREER, Health Services Administration WDOC;
HELEN NELSON, Health Services Administrator WDOC;
STEVE CASPERSON, Admin Div of Adult Institutions WDOC;
JUDY SMITH, Warden of Oshkosh Correctional Institution;
TOM EDWARDS, Oshkosh Correctional Health Services Administrator;
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;
JENNIFER DELVAUX, Inmate Complaint Examiner, WDOC/OSCI; and
DONNA LARSON, Registered Nurse, Oshkosh Correctional Institution,

Respondents.

On January 24, 2007, petitioner Patrick J. Fitzgerald, a prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, filed a civil complaint pursuant to 42 U.S.C. § 1983, alleging violations of his constitutional rights. His complaint is presently under advisement for screening as required by the 1996 Prison Litigation Reform Act.

Recently, however, petitioner has begun filing additional materials. In particular, he has filed documents titled “Plaintiff’s Request for Production of Documents,” “Plaintiff’s Interrogatories and Request for Production of Documents,” “Requests for Admissions,” “Motion for Appointment of Counsel,” “Affidavit in Support of Plaintiff’s Motion for the Appointment of Counsel,” “Memorandum of Law in Support of the Plaintiff’s Motion for the Appointment of Counsel,” “Affidavit in Support [of] Order to Show Cause and Temporary Restraining Order,” and “Order to Show Cause and Temporary Restraining Order.” In addition, on February 13, 2007, petitioner submitted a letter asking whether the court has received the materials listed above and for confirmation that all of the respondents have been served with his complaint. In this letter, he also points out that the court’s docket for this case incorrectly indicates that no jury demand was made. On February 15, 2007, petitioner submitted another letter to the court, this one dated February 9, 2007, in which he describes recent events and requests that the court conduct “a complete investigation.”

As petitioner will note from the newly printed docket sheet that is enclosed with this memorandum, the previously overlooked jury demand has been corrected on the docket. As for petitioner’s motions, I will consider his request for appointment of counsel and for emergency injunctive relief at the time I screen his complaint. However, no action will be taken with respect to his discovery demands.

It is a rule of federal civil procedure that a party to a lawsuit must serve the opposing

party with a copy of all papers he files with the court. Fed. R. Civ. P. 5. The court cannot tell whether the party has done that unless he shows clearly on the court's copy that he has. If it does not appear clear that the opposing party has been served with a party's submission, that submission cannot be considered. This is because fairness in judicial proceedings demands that both parties to a lawsuit be aware of what the other side is presenting to the court and what accusations are being made against them so that they can respond. In any event, it is too early for petitioner to be seeking discovery from the respondents.

When a prisoner files a lawsuit, he or she is bound by the provisions of the 1996 Prison Litigation Reform Act. Under the act, the court must screen the allegations in the prisoner's complaint and decide in a written opinion whether the complaint states a claim that can be heard in federal court or whether the complaint must be dismissed for lack of legal merit or because the prisoner has sued someone who is immune from suit.

As noted above, this court has not yet issued a screening order in this case. Until such an order is issued and petitioner is permitted to proceed against one or more of the respondents, no respondent can be served with petitioner's complaint. This means that petitioner's case is at a standstill for the time being. Unfortunately, at any one time, there are numerous pending motions and complaints requiring screening that compete for this court's attention. As much as the court would like to rule promptly on each of these matters, the sheer volume of litigation prevents it from doing so.

With respect to discovery, it is this court's practice to request that the parties refrain from engaging in discovery until a preliminary pretrial conference has been held. A preliminary pretrial conference is scheduled promptly after the respondents file an answer to petitioner's complaint. Moreover, discovery requests are to be filed directly with the respondents and are not to be submitted to the court unless they are the subject of a motion to compel discovery. Motions to compel discovery are proper only if the respondents fail to respond to requests for production of documents, interrogatories or requests for admissions within the time allowed under the Federal Rules of Civil Procedure. In sum, petitioner should refrain from filing additional documents in this case until the court has issued its screening order and the respondents against whom petitioner has been allowed to proceed, if any, have been served with petitioner's complaint. After petitioner's complaint has been served on the respondents, an assistant attorney general for the state of Wisconsin will serve and file a notice that he or she will be representing the respondents. At that time, petitioner will know the name of the lawyer representing the respondents so that he can serve the lawyer with his discovery requests at the appropriate time.

With respect to petitioner's letter of February 9, 2007, no action will be taken in response to it. Federal courts are not investigative agencies. They are impartial forums within which the parties to legal disputes submit evidence that they gather in support of their version of the facts. If petitioner believes respondents have evidence in their possession

that will help him prove his claims, he is free to use the discovery mechanisms available to him in the Federal Rules of Civil Procedure and serve those requests on respondents' lawyer at the appropriate time. In the meantime, I am requesting that petitioner cease his filings in this case until a screening order has been issued.

Entered this 20th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge