

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

DERRICK HOWARD,

Plaintiff,

v.

PATRICK HOOPER,

Defendant.

ORDER

11-cv-629-bbc

Plaintiff Derrick Howard is proceeding in this case on his claim that defendant Hooper used excessive force against him in violation of his Eighth Amendment rights. Now plaintiff has moved to compel the production of Secured Internal Management Procedure SIMP 25 and Division and Adult Institution (DAI) Policy and Procedure 306.07. *See* *dk.* 33. In addition, plaintiff has filed a motion for an order allowing jailhouse lawyer Rufus West a/k/a Muslim Mansa Lutalo Iyapo, to be present during any phone calls and in-person hearings before the court where plaintiff's presence is required. *See* *dk.* 34. Both of these motions are denied.

On January 30, 2012, defendant responded to plaintiff's interrogatory No. 4, which asked defendant to "Identify all policies related to using force at CCI, and in general." Defendant responded in part that "Use of Force is outlined in Wisconsin Administrative Code 306, Secured Internal Management Procedure SIMP 25, Division and Adult Institution (DAI) Policy and Procedure 306.07.01. SIMP 25 and DAI P&P are confidential for security reasons and releasing this information would breach the security of the institution and place the staff, inmate or other inmates at risk of harm." Instead of following up with an appropriately directed request for defendant to produce these two documents, plaintiff complained in his March 7, 2012 motion requesting appointment of counsel, that defendant had refused to provide plaintiff with SIMP 25 and DAI Policy 306.07.01. Plaintiff failed to seek this information using the appropriate discovery procedures. Only after using the discovery mechanisms set out in the

Federal Rules of Civil Procedure, in particular, Fed. R. Civ. P. 33 and 34, and waiting at least 30 days to obtain a response to such requests, can plaintiff complain that defendant is not responding appropriately. Plaintiff cannot ask for discovery using informal methods and expect a timely response or court intervention. Furthermore, plaintiff has access through the institution law library to Wisconsin Administrative Code 306 which outlines the security standards and practices at state correctional institutions, including use of force as specifically discussed in Wisconsin Administrative Code section 307.07.

For what it's worth, it is no secret that correctional officers are taught and allowed to gain and maintain control of a prisoner by vertically restraining him against a wall or by horizontally restraining him on the floor, but they are not allowed to use—and they know they are not allowed to use—excessive force when restraining an inmate in this fashion. This dovetails with what the court advised plaintiff in its October 7, 2011 order (dkt. 9) granting him leave to proceed on his claim: plaintiff has to show that defendant applied these restraints maliciously, for the purpose of causing harm, rather than in a good faith effort to keep control of the actual situation. So what usually ends up being important in a lawsuit like this one is for the fact-finder to determine what was happening at the time that made defendant decide to restrain plaintiff and what defendant really did when restraining plaintiff. As the court noted in its October 7 order, the important factors include why force was needed, how much force was used, the extent of the injuries inflicted, whether the defendant perceived a threat to the safety of staff or prisoners, and whether defendant made any effort to temper the severity of the force he used when. In its order, the court allowed plaintiff to proceed with his excessive force claim because it interpreted plaintiff to be claiming that defendant slammed plaintiff's face against the wall and floor causing

injuries even though plaintiff was restrained and did nothing to threaten the safety of defendant or any other person. Dkt. 9 at 3. It is unlikely that anything in SIMP 25 or DAI Policy 306.07.01 will be sufficiently relevant to plaintiff's claim to outweigh defendant's oft-expressed need to keep these policies confidential.

If plaintiff files an appropriate request for production of these documents and the State declines to produce them, then plaintiff should be prepared to make a specific showing as to how and why his need for these files in this lawsuit outweighs the institution's security concerns regarding this information. At that point, the court might direct the State to submit these documents *in camera* (to the court alone, not to plaintiff) for the court to review. So as not to mislead plaintiff, I note that in previous lawsuits by other prisoners claiming excess force by correctional officers, inmates requesting these documents or similar documents have not persuaded the court that the need for production has outweighed the State's interest in maintaining their confidentiality. Plaintiff, however, remains free to make his best case for disclosure, first to the state in his specific request for production, then, if necessary, to this court in a motion to compel.

Turning next to plaintiff's motion to allow jailhouse lawyer Rufus West a/k/a Muslim Mansa Lutalo Iyapo, to be present during any phone calls and in-person hearings with the court. I am denying this motion because Rufus West a/k/a Muslim Mansa Lutalo Iyapo is not an attorney. Although plaintiff may represent himself in this court, this court cannot allow any party to be represented in any court proceeding by a non-lawyer. (Another common example of this situation is when a small business owner incorporates his business: the corporation is considered a separate "person," so that if somebody sues the business, the owner cannot

represent his own business, even if he is the only person involved with it). In this case, it is absolutely fine for plaintiff to receive assistance outside of court from any source, including other inmates, but this court cannot allow plaintiff to be represented on the record by a non-lawyer, and it cannot allow plaintiff to receive assistance from a non-lawyer during an on-the-record proceeding.

Because the court does not plan to hold any more telephonic conferences in this case before trial, we don't need to explore the distinction between another prisoner simply *listening* to a telephonic conference and *participating* in it, but I note that the court would not order the institution to allow this if it violated CCI's security policies. Although any trial in this case will be open to the public, this court does not require the state to bring other prisoners to watch them.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Derrick Howard's motion to compel production of documents or in camera inspection, dkt. 33, is DENIED.
- (2) Plaintiff's motion for an order allowing assistance of a jailhouse lawyer, dkt. 34, is DENIED.

Entered this 27th day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge