

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DALE W. BIRCH,)
)
 Plaintiff,)
)
 v.) Case No. 19-2156-JAR
)
 THE CITY OF ATCHISON, KANSAS, et al.,)
)
 Defendants.)

ORDER

The plaintiff, who is incarcerated and proceeding pro se in this matter, has filed a motion requesting various relief (ECF No. 12). For the reasons set out below, the motion is granted in part and denied in part.

1. Discovery Requests

Plaintiff’s motion begins by “moving” defendants (not the court) to respond to eleven numbered discovery requests. As discussed by the court in its May 23, 2019 order (ECF No. 8), Federal Rules of Civil Procedure 30, 31, 33, 34, and 36 allow a party to serve discovery requests directly on another party. Thus, procedurally, plaintiff should have mailed his discovery requests directly to defense counsel (rather than filing them). For the sake of efficiency, and recognizing plaintiff is proceeding pro se, the court will **deem the filing of these discovery requests sufficient service** on defendants in this instance. Thus, defendants’ discovery response deadlines are triggered by the filing date, which is also the

date on which defense counsel received a Notice of Electronic Filing via the court's computerized filing system.

2. Protective Order

Plaintiff's second request is that the court mail him a copy of the court's form protective order, which is available on the court's public website, because the jail at which he is incarcerated does not give him access to the internet. This request is granted, and **the clerk is directed to mail plaintiff a copy of the form protective order.**

3. Subpoenas

Next, plaintiff states he "would like to subpoena" several people "as witnesses" under Fed. R. Civ. P. 45. Rule 45(a)(3) states, "The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service." Thus, plaintiff is entitled to have the clerk issue subpoenas to him for service. There are three types of subpoenas plaintiff may request: (1) a subpoena to testify at a deposition, (2) a subpoena to testify at a hearing or trial, and (3) a subpoena to produce documents. It is unclear from plaintiff's motion which type or types of subpoena he is requesting (and the number of each type requested). Therefore, this portion of plaintiff's motion is **denied, but he may refile** a more specific request for the issuance of subpoenas. Before filing any subsequent request, plaintiff is directed to carefully review the mandates set out in Rule 45 regarding completing and serving subpoenas. Any subsequent request should contain a discussion of how, as a practical matter, plaintiff intends to move forward with the subpoenas. For example, plaintiff should explain how he intends to pay the

witness fees required¹ and, should he seek to subpoena a witness to testify at a deposition, how he intends to conduct such a deposition while incarcerated.

4. Request to Amend Complaint

Plaintiff's fourth request is to add seven new plaintiffs (and possibly new allegations) to the lawsuit, which the court construes as a motion for leave to file an amended complaint. Fed. R. Civ. P. 15 and D. Kan. Rule 15.1 govern motions to amend pleadings. D. Kan. Rule 15.1 requires that the party seeking leave to amend his pleading "attach the proposed pleading" to his motion. Plaintiff did not attach a copy of his proposed amended complaint to his motion, thereby violating D. Kan. Rule 15.1. Plaintiff's motion therefore is **denied** with respect to this request.

5. Appointment of Counsel

Finally, plaintiff again asks the court to appoint counsel to represent him in this case.² The court addressed plaintiff's request for counsel—and the legal standards applicable to appointment of counsel in civil cases—in its May 23, 2019 order. The court analyzed, and ultimately denied, plaintiff's request, but granted plaintiff permission to refile the request "if plaintiff's complaint either survives a dispositive motion filed by

¹ See *Hooper v. Tulsa Cty. Sheriff Dep't*, 113 F.3d 1246 (table), 1997 WL 295424, at *2 (10th Cir. June 4, 1997) ("Every circuit considering this issue has held that § 1915(a)'s waiver of prepayment of 'fees or costs' does not authorize the federal courts to waive or order payment of witness fees for a civil litigant proceeding in forma pauperis.").

² Plaintiff frames this request as a motion "to reconsider the appointment of counsel." ECF No. 12 at 9. But because a motion to reconsider the court's previous order denying appointment of counsel would be untimely under D. Kan. Rule 7.3(b), the court construes the request as a new motion for appointment of counsel.

defendants or the deadline for filing such a motion has passed with no such motion being filed.”³ No dispositive motion has been filed, nor has the deadline for filing dispositive motions passed, thereby making plaintiff’s refiled request premature. In any event, although the court is sympathetic to plaintiff’s lack of access to internet legal research and the specific challenges all incarcerated parties face in investigating and presenting their claims, the court remains convinced plaintiff can adequately present his case (in which the legal and factual issues are not complex) and that justice does not require the appointment of counsel at this time. Plaintiff’s motion is **denied** with respect to this request.

IT IS SO ORDERED.

Dated June 26, 2019, at Kansas City, Kansas.

s/ James P. O’Hara
James P. O’Hara
U.S. Magistrate Judge

³ ECF No. 8 at 3. A dispositive motion is one that seeks to dispose of some or all of plaintiff’s claims—such as a motion to dismiss or a motion for summary judgment.