

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Michael J. Powers,	:	
	:	
Plaintiff	:	Civil Action 2:09-cv-00501
	:	
v.	:	Judge Holschuh
	:	
Terry Collins, Director, Ohio Department of Rehabilitation & Correction, <i>et al.</i> ,	:	Magistrate Judge Abel
	:	
Defendants		

Order

This matter is before the Magistrate Judge on plaintiff Michael J. Powers' July 21, 2010 motion for reimbursement of costs for service of process via certified mail (doc. 30).

When plaintiff filed his complaint in this Court, he submitted ten copies of his complaint and summonses for each defendant. On January 6, 2010, the Court issued an Order denying plaintiff's motion to compel service because he was not proceeding *in forma pauperis*. On January 7, 2010, Mr. Powers requested that the Clerk of Court return his copies of the complaint that he sent to the Court. On January 14, 2010, plaintiff mailed ten requests for waiver of service forms and one copy of the complaint to the Ohio Attorney General. At that time, plaintiff had not yet received his copies of the complaint back from the Clerk of Court. The Attorney General never responded to

plaintiff's requests for waiver of service. Plaintiff wrote to the Attorney General on two occasions to inquire as to the status of his request for waiver of service, but he never received a reply to his inquiries. On April 8, 2010 the Court ordered the Clerk of Court to return Mr. Powers' copies of the complaint that he had submitted to the Court. Plaintiff perfected service on defendants by certified mail.

In response to plaintiff's motion for reimbursement of costs for service, defendants argue that Powers failed to comply with the requisites of Rule 4(d) thereby failing to properly request that defendants waive service. Plaintiff maintains that defendants failed to act in good faith and must reimburse for the costs incurred in serving them.

Discussion. Although Mr. Powers is proceeding pro se, he is required to comply with the applicable Federal Rules of Civil Procedure just like any other litigant. Rule 4(d), which deals with waiver of service, specifically provides that in order to take advantage of the waiver process, the notice and request must:

- be in writing and be addressed to the individual defendant;
- name the court where the complaint was filed;
- be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;
- inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;
- state the date when the request is sent;

- give the defendant a reasonable time of at least 30 days after the request was sent to return the waiver.

Fed. R. Civ. P. 4(d)(1)(A)-(F). Here, Mr. Powers failed to attach the appropriate number of copies of his complaint and two copies of the required form for each defendant. He also failed to provide any prepaid means for returning the forms or provide the date the request was sent. Because Mr. Powers concedes that he did not follow this Rule, he is not entitled to recover any costs of service. The imposition of such costs may only be made upon a defendant who “fails to comply with a request for a waiver” under Rule 4(d)(2).

Furthermore, it is also not clear that defendants, who are sued solely in their official capacity, are subject to Rule 4(d)(2). Rule 4(d)(1) is only applicable to an individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h). A suit against an official in his official capacity “is not a suit against the official personally, for the real party in interest is the entity.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Arguably, service on a defendant sued in his official capacity must be made under Rule 4(j), because suing a state official in his official capacity is ultimately a suit against the state. The 1993 Advisory Committee Note to Rule 4(d) states:

The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental

entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail.

As a result, it is reasonable to conclude that Rule 4(d) shields state officers who are sued in their official capacity from the mandatory waiver provisions in the same manner as federal officers are under Rule(i)(2). *See, e.g., Moore v. Hosemann*, 591 F.3d 741, 746 -747 (5th Cir. 2009). *But see Marcello v. Maine*, 238 F.R.D. 113, 115 (D. Me. 2006)(holding that service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals).

For the reasons stated above, plaintiff Michael J. Powers' July 21, 2010 motion for reimbursement of costs for service of process via certified mail (doc. 30) is DENIED.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/ Mark R. Abel
United States Magistrate Judge