

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

WILLIAM S. HARRINGTON,

Plaintiff,

ORDER
99-C-652-C

v.

TIMOTHY DOUMA, Asst. Warden, Security and
CAPTAIN LINDA J. SCHWANDT,
Administrative Captain,

Defendants.

Plaintiff is proceeding in forma pauperis against defendants Timothy Douma and Linda Schwandt on his claim that defendants violated his Eighth Amendment rights by failing to protect him from an assault from his cellmate while plaintiff was confined at the Columbia Correctional Institution in Portage, Wisconsin. This case has been scheduled for a jury trial on September 11, 2000. The purpose of this order is to clarify the issues for trial and explain pretrial procedures.

Avoiding Dismissal of the Case

At the trial, it will be the plaintiff's job to prove his claim by a preponderance of the

evidence. He must establish proof of the existence of each element of his claim. If he does not put in enough evidence to support his claim, the defendants may move the court for a judgment as a matter of law against plaintiff, and the case may be dismissed before the defendants are called upon to produce any opposing evidence.

Constitutional Claims

My tentative view of plaintiff's case is that in order to survive a motion for a judgment as a matter of law, plaintiff must prove

- 1) he faced a substantial risk of serious harm;
- 2) he informed defendants about the specific threat to his safety;
- 3) defendants knew that there was substantial likelihood that plaintiff would be assaulted;
- 4) defendants failed to take reasonable protective measures to prevent the assault; and
- 5) plaintiff suffered actual physical injury as a result of an assault by his cellmate.

Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award as compensatory damages an amount that will reasonably compensate plaintiff for the injuries or

damages sustained as a proximate result of defendants' acts. In order to recover compensatory damages, plaintiff must introduce evidence of physical harm suffered as a result of defendants' actions. If plaintiff presents evidence of physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendants' actions. If the court permits it, the jury may award punitive damages as a deterrence to defendants.

Evidence

All proof of facts submitted at trial must meet the requirements of the Federal Rules of Evidence. For example, if a party wishes to introduce evidence about the content of a document, he should get a copy of the document, submit it at the time of trial and produce a witness who can testify from his or her own knowledge that the document is what it appears to be. Or, a party can ask the opposing party to agree that the document is what it appears to be and is accurate. If the opposing party agrees, the first party still must produce the document, but he does not need to call a witness to testify about the document.

Both parties submitted and relied on the following documents at the summary judgment stage. Unless the other side objects to authenticity or accuracy, plaintiff or defendants may rely on these documents at trial without producing a witness who can testify that the document is what it appears to be and is accurate.

1. Letter dated June 25, 1999 from plaintiff to defendant Schwandt
2. Letter dated June 27, 1999 from plaintiff to defendant Schwandt
3. Memorandum dated July 1, 1999 from defendant Douma to plaintiff
4. Plaintiff's inmate complaint dated July 5, 1999 (CCI-1999-50097)
5. Conduct report #1028341 in which plaintiff was charged with lying and disruptive conduct as a result of the July 31, 1999 incident and document titled, "Disciplinary Hearing: Reasons for Decision and Evidence Relied On"
6. Conduct report in which Calvin Banks was charged with disruptive conduct as a result of the July 31, 1999 incident (#940371)
7. Handwritten statement of Tim Higbee dated August 29, 1999, regarding conduct report #1028341
8. Handwritten statement of Paul Persson dated August 19, 1999, regarding conduct report #1028341
9. Conduct report #752030 in which Calvin Banks was charged with battery of an inmate as a result of an incident on June 6, 1996

Defendants submitted and relied on the following documents at the summary judgment stage; as a result, I will assume that defendants will not object to their authenticity or accuracy if plaintiff chooses to introduce them at trial.

1. Letter dated June 23, 1999 from Calvin Banks to defendant Schwandt
2. Letter dated June 24, 1999 from plaintiff to defendant Schwandt
3. Letter dated June 29, 1999 from plaintiff to defendant Douma

4. Plaintiff's written statement in support of his plea of not guilty to the charges in conduct report #1028341
5. Banks's written statement dated August 29, 1999 regarding conduct report #940371 and document titled, "Disciplinary Hearing: Reasons for Decision and Evidence Relied On"
6. Plaintiff's inmate complaint dated August 11, 1999 (CCI-1999-54347) and his request for review by a complaint examiner
7. Typed statement of Tim Higbee dated August 1, 1999
8. List of questions for Paul Persson from plaintiff
9. Defendants submitted the following documents under seal:
 - Conduct report #972574 in which Calvin Banks was charged with attempted battery and disruptive conduct as a result of an incident on May 11, 1999
 - Conduct report #919784 in which Calvin Banks was charged with battery of an inmate as a result of an incident on April 16, 1998
 - Conduct report #769361 in which Calvin Banks was charged with battery of a correctional officer as a result of an incident on September 18, 1996
 - Conduct report #511558 in which Calvin Banks was charged with battery of a correctional officer as a result of an incident on June 29, 1996

The Federal Rules of Evidence also limit the testimony of witnesses. For example, a witness generally cannot give hearsay testimony, that is, the witness cannot testify about someone else's out of court statement, since the accuracy of a hearsay statement cannot be tested by the opposing party.

The Federal Rules also allow only relevant evidence. Any evidence that is offered must pertain to the claim in this lawsuit.

Preparing for Trial

In an effort to insure that plaintiff is prepared for trial, he must submit a letter to the court and to defendant's counsel that lists the names of any witnesses he intends to call at trial, together with a short description of the testimony he expects each witness will give, and a description of the other forms of evidence he plans to introduce. (As he prepares this letter, plaintiff should consider carefully how each witness and each piece of evidence relates to each part of his claim.) Because the trial date is so close, it will be necessary to know promptly whether plaintiff intends to request the issuance of any writs of habeas corpus ad testificandum for incarcerated witnesses. Therefore, when plaintiff lists the names of his witnesses and describes the testimony he believes each witness will give, he must state the current whereabouts of each incarcerated witness he wishes to call at trial, if any, and state whether that witness has agreed to attend trial voluntarily to testify on plaintiff's behalf.

I presume that plaintiff intends to take the stand himself at trial to testify about each of the five elements of his claim. Therefore, I will direct the Clerk of Court to issue a writ of habeas corpus ad testificandum for his attendance at trial. Plaintiff should note that he cannot

expect the defendants to be present at trial. If he wishes to call them as witnesses at trial, he must subpoena them unless defendants' counsel agrees to make defendants available to be called by plaintiff as witnesses at trial.

In addition, defendants will be required to submit to the court and to plaintiff a list of witnesses and exhibits defendants intend to introduce at trial.

Failure to submit these lists may result in sanctions, such as dismissal of the case or denial of the opportunity to call witnesses or to submit evidence.

Information on special procedures for calling witnesses is provided in the enclosed memorandum. The lists of witnesses that the parties are to submit do not take the place of the special procedures outlined in the memorandum.

ORDER

IT IS ORDERED that plaintiff may have until August 31, 2000, in which to serve and file a letter or memorandum in which he

1) lists the names of witnesses he intends to call at trial and describes the general nature of the testimony each witness will give (if plaintiff intends to take the stand himself, he should be listed as a witness, and describe the general nature of his own testimony); and

2) describes the documentary evidence he intends to introduce at trial.

IT IS FURTHER ORDERED that defendants may have until August 31, 2000, in which to submit their lists of witnesses and describe the documentary evidence they intend to introduce at trial.

The Clerk of Court is directed to issue a writ of habeas corpus ad testificandum for

plaintiff's attendance at trial, beginning on September 11, 2000.

Entered this 16th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge