

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

ORDER

v.

02-C-459-C

JEFFREY FRIDAY, Officer 2 at Waupun
Correctional Institution; STEVEN HOUSER,
captain at Waupun Correctional Institution;
WILLIAM SCHULTZ, Financial Specialist 2
at Waupun Correctional Institution.

Defendants.

This case is scheduled for trial on March 1, 2004. The issues to be resolved at trial are whether defendants retaliated against plaintiff on account of his protected speech when they issued him a conduct report and found him guilty of a battery attempt as charged in conduct report no. 1199246-1603. Presently before the court is plaintiff's request for five subpoenas for trial witnesses and an order requiring the federal government to pay the applicable subpoena fees, and his request for issuance of a writ of habeas corpus ad testificandum for inmate Thomas Seeley. The request for subpoenas and for issuance of a writ of habeas corpus ad testificandum will be granted, but the request for an order requiring the government to pay the cost of subpoenaing his witnesses will be denied.

Before discussing plaintiff's motions, I must advise the parties that because of congestion on the court's calendar for the week preceding the trial of this case, it is possible that one of the trials scheduled for the earlier week will spill over into the week of March 1. If this happens, this case may have to be pushed forward a day or possibly two. Therefore, any subpoenas or writs of habeas corpus ad testificandum issued for the trial of this case should state that the person's attendance is sought for March 1, 2004, "and each day thereafter until the trial of this case concludes or the individual named in the subpoena or writ has been excused."

As to plaintiff's request for subpoenas, pursuant to Fed. R. Civ. P. 45(a)(3), the clerk of court shall issue signed but blank subpoenas to a party requesting it, who is responsible for completing the subpoenas before service. Pursuant to Rule 45(b)(1), service of such a subpoena shall be made by delivering a copy thereto to such person and, if the person is to be a witness, by giving that person the fees for one day's attendance and the mileage allowed by law. This requirement applies to plaintiff even though he is indigent. McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987), 28 U.S.C. § 1915(d) (witnesses shall attend as in other cases . . ."). Although the Constitution guarantees every person the right of access to the courts, it does not require the government to pay witness fees or allow the courts to waive the fees for witnesses so that an indigent plaintiff can present his case fully to the court. McNeil, 831 F.3d at 1373. Therefore, I cannot grant plaintiff's request for an order requiring the federal government to pay the costs of subpoenaing his adverse witnesses.

Plaintiff should be aware that any potential witness who receives a subpoena from plaintiff that does not come with the witness fee and transportation costs may move to quash the subpoena for that failure. The court would be bound to grant such a motion. Having noted these things, I am directing the clerk of court to send the requested subpoena forms to plaintiff Lindell for use according to the dictates of the statutes and rules.

In support of the request for issuance of a writ of habeas corpus ad testificandum for inmate Thomas Seeley, plaintiff has submitted a sworn statement, in which he avers that inmate Seeley was confined to a cell near plaintiff's cell at the time plaintiff was involved in a fight with his cell mate. Plaintiff avers also that Seeley heard the verbal exchange between defendant Friday and plaintiff when Friday came to plaintiff's cell to extract him following the fight. Seeley would testify "that he heard Lindell complaining about being set-up and forced into danger by staff" and also heard defendant Friday "ma[k]e threatening replies" to Lindell. According to plaintiff, this testimony would confirm defendant Friday's "retaliatory state of mind." Because inmate Seeley appears to be competent to testify as a witness to what speech plaintiff engaged in that he claims is protected speech and what defendant Friday said that might allow a reasonable jury to infer a retaliatory motive for Friday's issuance of conduct report no. 1199246-1603, I will grant plaintiff's request for a writ of habeas corpus ad testificandum for inmate Seeley.

ORDER

IT IS ORDERED that

1. Plaintiff's request for five subpoena forms is GRANTED. The clerk of court is directed to send plaintiff the subpoena forms forthwith.

2. Plaintiff's request for an order requiring the federal government to pay the costs of subpoenaing his adverse witnesses is DENIED.

3. Plaintiff's request for issuance of a writ of habeas corpus ad testificandum for inmate Thomas Seeley is GRANTED. The clerk of court is directed to issue a writ of habeas corpus ad testificandum for inmate Seeley from March 1, 2004, until such time as the trial concludes or the witness has been excused. Inmate Seeley is at the following address:

Waupun Correctional Institution
200 S. Madison St.
Waupun, Wisconsin

Entered this 2nd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge