

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

JOSEPH D. KOUTNIK,

Plaintiff,

v.

GERALD BERGE, JON E. LITSCHER,
MATTHEW FRANK, KURT LINJER
and GARY BLACKBOURN,

Defendants.

ORDER

03-C-345-C

In an opinion and order entered on July 19, 2004, I concluded that defendants had violated plaintiff's right to free speech when they censored a letter he wrote and later disciplined him because he signed the letter with the name "Kujo." Trial is scheduled for September 13, 2004, on the issue of damages.

Presently before the court are a "motion to pursue damages for mental/emotional harm" and a motion for appointment of counsel. (Plaintiff has filed several other motions that I will address in a later order.) Both of these motions will be denied.

With respect to plaintiff's first motion, I instructed plaintiff in the August 11, 2004

memorandum that because he was not injured physically, he may not recover for mental or emotional harm. See 42 U.S.C. § 1997e(e). Plaintiff cites Calhoun v. Detella, 319 F.3d 936 (7th Cir. 2003) for the proposition that “§ 1997e(e) does not bar recovery of punitive or nominal damages . . . for emotional and mental harm caused to inmates in violation of the Constitution.” Plt.’s Mot., dkt. #56, at 1-2. However, plaintiff overstates the breadth of the holding in Calhoun. The court considered only whether “§ 1997e(e) precludes [a] suit altogether” when a prisoner “does not claim to have suffered a physical injury.” Id. at 940. The court concluded that it did not. However, it agreed with the defendants that “absent a showing of physical injury, § 1997e(e) would bar a prisoner’s recovery of compensatory damages for mental and emotional injury.” Id.

It is true that § 1997e(e) does not bar plaintiff from recovering nominal or punitive damages. But nominal and punitive damages are not awarded on the basis of a plaintiff’s emotional harm. Rather, nominal damages are a recognition that the constitutional injury, in and of itself, caused the plaintiff an injury. See Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) (“A deprivation of First Amendment rights standing alone is a cognizable injury.”). Punitive damages are awarded not because the defendant caused emotional harm, but because the defendant acted with evil intent or in reckless disregard for the plaintiff’s federally protected rights. Marshall ex rel. Gossens v. Teske, 284 F.3d 765, 772 (7th Cir. 2002). Allowing a prisoner to recover for mental and emotional injuries in the guise of

punitive or nominal damages would make the limitation of § 1997e(e) meaningless. Accordingly, I conclude that petitioner is not entitled to present evidence or argument of any mental or emotional injuries that he may have suffered.

With respect to plaintiff's motion for appointment of counsel, he argues that he is unable to afford counsel, that this case involves a complex question whether he may recover for mental and emotional harm, that he is in segregation and has limited access to the law library and limited ability to obtain documentary evidence and that he has "limited knowledge of the law." I disagree with plaintiff that the question whether he may recover for emotional distress is a complex one. As noted above, that answer to this question under § 1997e(e) is clear: he may not. Further, plaintiff has not explained why limited access to the law library necessitates counsel in this case. The questions remaining for trial are factual ones: to what extent plaintiff was injured by defendants' violation of his constitutional rights and whether defendants acted with an evil motive or intent. Finally, plaintiff does not say how he is being prevented from obtaining documentary evidence or even what documentary evidence he is seeking.

In any event, even if I concluded that a lawyer might be beneficial, plaintiff's request must be denied because it is not timely. Because plaintiff has not identified any good cause for his failure to submit his motion sooner, it will be denied.

ORDER

IT IS ORDERED that plaintiff Joseph Koutnik's motions to present evidence at trial of emotional harm and for appointment of counsel are DENIED.

Entered this 30th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge