

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

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KURT W. MEYER,

Plaintiff,

ORDER

v.

05-C-269-C

MARK TESLIK,

Defendant.  
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In this civil action for declaratory and monetary relief, plaintiff Kurt Meyer, an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin, contends that defendant Mark Teslik deprived him of his right to freely exercise his religious beliefs between June 26, 2004 and October 1, 2004, in violation of the First Amendment and 42 U.S.C. § 2000cc-1, the Religious Land Use and Institutionalized Persons Act (RLUIPA). Trial is scheduled for April 10, 2006. This order will describe how the court generally conducts a trial and explain to the parties what written materials they are to submit before trial.

## TRIAL PREPARATION

### A. Jury Selection - Voir Dire Questions

The trial in this case will begin with jury selection. The judge will ask all the potential jurors standard “voir dire” questions, which they must answer under oath. (“Voir dire” means roughly “to speak the truth.”) This is the parties’ chance to observe the potential jurors while they are being questioned so that they can decide which prospective jurors to strike from the panel when the time comes to exercise their strikes.

The standard questions appear in the attachment to the magistrate judge’s preliminary pretrial conference order entered on July 28, 2005. The parties may add to the standard questions by submitting their proposed questions to the court and the opposing party no later than seven days before trial.

A total of thirteen possible jurors will be called forward. When the court has finished questioning the thirteen, each side will be allowed to strike the names of three potential jurors. The plaintiff will strike one name, the defendants one name, the plaintiff one name, the defendants one name, etc., leaving seven persons who will make up the jury panel.

### B. Opening Statements

After the parties select the jury, plaintiff will give an opening statement describing his claim. An opening statement should give the jury an idea of what the case is about and what

the jurors will see and hear from the witnesses and from the exhibits that plaintiff will offer into evidence. The opening statement is not a time for plaintiff to give testimony. What is said during opening statements is not evidence. Therefore, if plaintiff begins to make comments in the nature of testimony, and if defense counsel objects, the court will interrupt plaintiff and instruct the jury not to consider the testimony-like statements.

Following plaintiff's opening statement, defense counsel is allowed to make a statement about defendants' case. If counsel wishes, he may choose to delay the statement until the beginning of defendants' case.

#### C. Avoiding Dismissal of the Case

After opening statements, the evidentiary stage of the trial begins. Plaintiff must put in his evidence first, because he has the burden of proving his claims by a preponderance of the evidence. He must prove each element of each of his claims. (These elements are set forth below in section D, below.) If plaintiff does not put in enough evidence to prove his claims, defendant may move the court for judgment as a matter of law against plaintiff, and the judge may dismiss the case before defendant is called upon to produce any opposing evidence.

#### D. Elements of Plaintiff's Claims

In order to survive a motion for judgment as a matter of law, plaintiff must present enough evidence to allow a reasonable jury to find that each legal element of each of his claims has been proven by a preponderance of the evidence. As discussed above, with respect to plaintiff's claim that defendant deprived him of his First Amendment right to exercise his religious belief, plaintiff must show that:

(1) he has a sincerely held belief in Native American spirituality;

(2) pipe and drum ceremonies are central to the practice of Native American spirituality; and

(3) defendant Teslik intentionally deprived plaintiff of the opportunity to attend pipe and drum ceremonies.

Plaintiff may establish the elements of his claim through his own testimony; however, if he intends to assert that pipe and drum ceremonies are central expressions of Native American spirituality, he will first need to establish the foundation of his knowledge of Native American spiritual practices (for example, a lifelong adherence to and participation in the Native American religion may qualify plaintiff to testify regarding the practices central to the religion).

With respect to plaintiff's claim that defendant Teslik deprived plaintiff of his right to freely exercise his religious beliefs under RLUIPA, plaintiff must show that:

(1) he has a sincerely held belief in Native American spirituality;

(2) pipe and drum ceremonies are Native American religious practices; and

(3) defendant substantially and intentionally burdened plaintiff's ability to attend pipe and drum ceremonies by failing to authorize plaintiff's attendance at these ceremonies.

#### E. Evidence

All factual evidence offered 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 as an exhibit 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. For example, plaintiff may wish to introduce as evidence the forms he submitted to defendant in the summer of 2004 requesting to attend Native American religious services. If so, he should mark a copy of each request as an exhibit, identify each individually during his testimony (plaintiff should have personal knowledge that the copy of the request is a true and correct copy of the complaint he wrote) and ask the court and opposing counsel to allow the complaint to be accepted into evidence.

Plaintiff should be aware that a party may not rely on affidavits at trial because they are hearsay. The only exception to this rule is that a party may use a witness's affidavit to show that the witness made an earlier statement that is inconsistent with the witness's trial testimony.

The Federal Rules of Evidence limit the testimony of witnesses. Witnesses may give testimony on any relevant matter about which they have personal knowledge. However, witnesses generally cannot give hearsay testimony, that is, a witness cannot testify about what someone else said out of court, since the accuracy of a hearsay statement cannot be tested by the opposing party.

#### F. Preparing for Trial

In the magistrate judge's preliminary pretrial conference order, the parties were given a deadline to disclose to each other the names and addresses of their trial witnesses. A copy of this court's written Procedures for Calling Witnesses to Trial was attached to the order. Those procedures require that any party who wishes to call an incarcerated witness to testify must serve and file a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial, to make sure the incarcerated witness attends trial.

Plaintiff has not filed a witness list or made any motion seeking the attendance of any incarcerated individual. Nevertheless, I presume that plaintiff will testify on his own behalf. 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 defendant to be present at trial. If he wishes to call defendant as a witness at trial, he will have to subpoena him unless defendant's

counsel agrees to make defendant available to be called by plaintiff as a witness at trial.

## ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff, inmate Kurt Meyer (Fox Lake Correctional Institution) at trial beginning Monday, April 10, 2006.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN SEVEN CALENDAR DAYS BEFORE TRIAL, the parties are to file and serve (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; and (c) proposed jury instructions. The parties should not submit the standard voir dire questions and jury instructions attached to the magistrate judge's preliminary pretrial conference order. The court will consider any objections to the voir dire questions by either party in a conference to be held before jury selection begins.

2. The court retains the discretion to refuse to entertain special verdict forms or jury instructions not submitted on time, unless the subject of the request is one arising in the course of trial that could not reasonably have been anticipated prior to trial.

3. If either party wants to submit a trial brief in advance of trial, it must serve a copy of the brief on the opposing party. The party may file the brief with the court at any time before jury selection.

Entered this 10th day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge