

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

DENNIS W. GONZALEZ,

Plaintiff,

v.

JON E. LITSCHER, GERALD BERGE
and TODD T. OVERBO,

Defendants.

ORDER

01-C-521-C

The only claims remaining in this suit are plaintiff's claims that he was denied access to a medicine bag, ceremonial drums, feathers and a smoking pipe in violation of the First Amendment's free exercise clause. Because defendants are qualifiedly immune to plaintiff's demand for money damages on these claims, plaintiff can obtain only injunctive and declaratory relief. Trial in this case was scheduled originally for October 7, 2002. However, I believe the original trial date does not give the parties enough time to prepare for trial. Therefore, trial of plaintiff's remaining claims will take place on October 21, 2002. Because this case will not be tried to a jury (as explained below), the final pretrial conference is cancelled. In this order I will explain pretrial procedures.

Constitutional Claims

My tentative view of plaintiff's case is as follows:

1) Plaintiff must first establish, through his own testimony or otherwise, that his sincerely held religious beliefs require him to have access to a medicine bag, ceremonial drums, feathers and a smoking pipe.

2) Defendants must then articulate a penological interest or interests underlying their refusal to allow plaintiff access to a medicine bag, ceremonial drums, feathers and a smoking pipe.

3) Plaintiff then bears the burden of demonstrating, by a preponderance of the evidence, that defendants' policy of denying him access to a medicine bag, ceremonial drums, feathers and a smoking pipe is not reasonably related to legitimate penological interests. If plaintiff does not put in enough evidence to support his claims, defendants may move the court for a judgment as a matter of law against plaintiff and the case will be dismissed before the defendants are called upon to produce any further evidence.

Bench Trial

Because plaintiff is entitled only to injunctive and declaratory relief if he succeeds at trial, this case will not be tried to a jury. See Marseilles Hydro Power v. Marseilles Land & Water Co., 299 F.3d 643, 648-49 (7th Cir. 2002) (When “the only relief sought is equitable, such as an injunction . . . neither the party seeking the relief nor the party opposing it is entitled to a jury trial” and “a plaintiff who is seeking equitable relief and not damages cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment”).

Opening Statements

Plaintiff will give an opening statement describing his claim. The opening statement is not to include any remarks about the facts of the case except that plaintiff may refer to statements that will be the subject of live testimony by witnesses or to the content of exhibits that will be offered into evidence. At this time, plaintiff is not to make any comments in the nature of testimony, such as his opinion about what happened.

Following plaintiff's opening statement, defense counsel will be given an opportunity to make a statement about defendant's case. If counsel wishes, he or she may choose to delay the statement until the beginning of defendants' case.

Preparing for Trial

In accordance with the preliminary pretrial conference order in this case, the parties should have already served on all other parties the materials specified in Fed. R. Civ. P. 26(a)(3)(A), (B) and (C). If they have not already done so, the parties may have until September 30, 2002, in which to do so. The parties may have until October 14, 2002, in which to submit to the court their witness lists and exhibit lists, and to file and serve all motions *in limine* (and any necessary briefs or documents in support) and any objections to an opponent's designations under Fed. R. Civ. P. 26(a)(3). With regard to witnesses, I expect that plaintiff will list himself as a witness, as he is in the best position to testify about his religious practices. Therefore I will direct the clerk of court to issue a writ of habeas corpus ad testificandum for plaintiff's appearance at trial. However, if, in addition, plaintiff intends to call other

witnesses, he must follow the procedures for calling witnesses described in the attached memorandum. Plaintiff should pay particular attention to that section of the memorandum explaining procedures for obtaining writs of habeas corpus ad testificandum for incarcerated witnesses. If plaintiff intends to request the attendance of any incarcerated witness, his request should be made to the court in accordance with the attached written procedures no later than October 7, 2002. (Plaintiff can therefore ignore the provision in the written procedures requiring such requests to be filed not later than five weeks before trial).

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.

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.

ORDER

IT IS ORDERED that

1. The October 7, 2002 trial date in this case is CANCELLED. Trial of the remaining claims in this case will take place on October 21, 2002. There will be no final pretrial conference;

2. Not later than October 14, 2002, each party shall submit to the court its witness list and exhibit list, and shall file and serve all motions *in limine* (and any necessary briefs or documents in support) and any objections to an opponent's designations under Fed. R. Civ. P. 26(a)(3); and

3. The Clerk of Court is directed to issue a writ of habeas corpus ad testificandum for plaintiff's appearance at trial.

Entered this 23rd day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge