

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

FREDERICK ROGERS,

Plaintiff,

ORDER

v.

03-C-0230-C

JENNIFER HELLENBRANDT
and JEAN THIEME,

Defendants.

Plaintiff's third motion for appointment of counsel is presently before the court. It has been filed in response to objections defendants have made to a flurry of filings plaintiff submitted in late December 2003 and in January 2004. Specifically, defendants have asked the court to disregard plaintiff's surreplies to defendants' second motion for summary judgment.

In repeating his request for appointed counsel, plaintiff points to his procedural blunders as proof that he is ignorant about the law and does not have the capacity to understand this court's summary judgment procedures.

There is no question that plaintiff has shown a lack of sophistication in developing

his claim on defendants' motions for summary judgment. However, I continue to believe that plaintiff gained enough experience from his previous lawsuit and sufficient instruction in this case to have been able to figure out how to submit relevant and admissible materials on a motion for summary judgment. Moreover, I do not believe that the outcome of defendants' motions for summary judgment would change if I granted plaintiff's third motion for appointment of counsel.

The question before this court on defendant's first motion for summary judgment is whether plaintiff's case should be dismissed because plaintiff failed to properly name an expert who can prove that he was caused psychological harm by being forced to attend a holiday program at the prison that had some religious content. My tentative view is that defendants' motion will fail. Even if plaintiff cannot prove his entitlement to compensatory damages, he may be able to recover nominal damages and declaratory and injunctive relief if he can prove that defendants violated his First Amendment establishment clause rights and his rights under the Religious Land Use and Institutionalized Persons Act.

With respect to defendants' second motion for summary judgment, my tentative view is that plaintiff's procedural errors will not affect the outcome of the motion. As defendants point out, none of plaintiff's documentary evidence is authenticated. However, the documents are nothing more than copies of plaintiff's inmate complaints about the holiday program and a psychological report. As noted above, the admissibility of plaintiff's

psychological state following the holiday program might relate to plaintiff's alleged damages, but it is immaterial to proving his underlying claims. Moreover, the parties in this case do not dispute that plaintiff exhausted his administrative remedies. Plaintiff cannot use his inmate complaints to prove that a holiday program was held or that there was a religious component to the program, because the matter discussed in plaintiff's inmate complaints are inadmissible hearsay to the extent that it is being offered for its truth. But this does not matter, because the parties do not dispute the crucial facts: some participants of the program performed material with a religious component; plaintiff's attendance at the program was mandatory; and participant selections were reviewed and approved by the prison school's planning committee. Thus, plaintiff's failure to conform his documentary material to the rules of evidence is not critical error. Although I will deny plaintiff's motion for appointment of counsel at this time, I will entertain a renewed request if the case survives summary judgment.

With respect to defendants' objections to plaintiff's surreplies, it is necessary to sort out what is an impermissible surreply and what documents were submitted properly in response to defendants' second motion for summary judgment.

Defendants filed their second motion for summary judgment on November 13, 2003, the date the magistrate judge set as the deadline for filing dispositive motions in the case (Dkt. #24). Defendants' motion was supported by a brief (Dkt. #25), proposed findings

of fact/conclusions of law (Dkt. #26) and four affidavits (Dkt. ##27-30). On November 19, 2003, plaintiff filed a response brief (Dkt. #31), a response to defendants' proposed findings of fact and conclusions of law (Dkt. #32), his own proposed findings of fact (Dkt. #33) and an affidavit (Dkt. #34). The next day, on November 20, 2003, plaintiff filed another document titled "Plaintiff's Response to Defendants' Proposed Findings of Fact and Conclusions of Law" (Dkt. #35), together with his own motion for summary judgment (Dkt. #38), a brief in support of his motion (Dkt. #39), and two other motions (Dkt. ## 36 and 37). From a close review of Dkt. #35, it appears that this document is a surreply to defendants' reply on its first motion for summary judgment. Noting that plaintiff's motion for summary judgment was untimely, defendants moved to strike plaintiff's motion for summary judgment on November 26, 2003 (Dkt. #43). On that same day, defendants filed a reply to plaintiff's November 19 materials opposing their second motion for summary judgment (Dkt. #41).

In an order dated December 2, 2003, I granted defendants' motion to strike plaintiff's motion for summary judgment (Dkt. #45). However, because plaintiff's November 19 submissions made several references to plaintiff's motion for summary judgment and supporting papers, I included in the order a modification of the schedule for briefing defendants' second motion that allowed plaintiff until December 23, 2003 in which to serve and file a revised response. I gave defendants until January 5, 2004 in which to serve and

file a reply.

Plaintiff took advantage of the opportunity to refile documents in opposition to defendants' second motion. On December 23, 2003, he filed a document dated November 15, 2003, titled "Conclusion of Law" (Dkt. #48). Subsequently, on December 29, 2003, he filed a document dated December 22, 2003, titled "Plaintiff's Response to Defendant Summary Judgment/Roger's Psychological Records Filed Under Seal Showing Injuries/Merit"(Dkt. #49), and a document titled "Plaintiff's Response to Defendants' Proposed Findings of Fact and Conclusions of Law/Brief in Support for Summary Judgment for the Plaintiff" (Dkt. #50). On January 12, 2004, defendants filed their reply to plaintiff's response (Dkt. #52), together with two more affidavits intended to clarify matters raised by plaintiff in his response (Dkt. ## 53 and 54). That is where the submissions should have ended. They didn't.

On January 15, 2004, plaintiff filed his own affidavit dated December 16, 2003 (Dkt. #55), which is a duplicate of an affidavit he filed in support of his rejected motion for summary judgment. Unlike the original affidavit, however, Dkt. #55 is signed and notarized. Defendants do not object to this submission as untimely. Instead, in a letter from defense counsel dated January 23, 2004, construed as a motion to strike (Dkt. #56), counsel acknowledges that plaintiff served this affidavit on defendants at the time he served them with his revised responsive materials in December. Therefore, the court will not strike

this affidavit as untimely.

Defendants' motion to strike is concerned with the following documents: 1) a document titled "Plaintiff's Response to Defendants' Reply Brief in Support of Motion for Summary Judgment (Second) (Dkt. #57); 2) a document dated January 14, 2004, titled "Plaintiff's Response to Reply of Defendants' Proposed Findings of Fact in Support of Second Motion for Summary Judgment" (Dkt. #58); 3) a document titled "Plaintiff's Reply to Defendants' Hellenbrand and Thieme Aff'd January 8, 2004" (Dkt. #59); and 4) "Plaintiff's Reply to Defendant Jean M. Thieme (Dated 1-20-04) signed 1-8-04" (Dkt. #60). None of these documents is appropriate under the court's summary judgment procedures. Plaintiff already has had two opportunities to put defendants' proposed facts into dispute and submit evidence and proposed facts in support of his position. There is no justifiable reason to offer him a third such opportunity.

ORDER

IT IS ORDERED that

1. Plaintiff's third motion for appointment of counsel is DENIED without prejudice to plaintiff's renewing the motion if his case survives defendants' motions for summary judgment;
2. Plaintiff's surreply to defendants' first motion for summary judgment (Dkt. #35)

is stricken on the court's own motion; and

3. Defendants' motion to strike plaintiff's surreply materials docketed as nos. 57, 58, 59 and 60 is GRANTED. These materials will not be considered in deciding defendants' second motion for summary judgment.

Entered this 6th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge