

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

AUSTIN C. SZYMANKIEWICZ,

Plaintiff,

v.

DENICE DOYING,

Defendant.

ORDER

04-C-186-C

This case is presently scheduled for trial during the week of May 2, 2005, on plaintiff's claim that defendant Doying retaliated against plaintiff for exercising his constitutional right to file an inmate complaint when she searched his cell on July 18, 2003. Now plaintiff has written to request four blank subpoena forms, an exhibit list and exhibit stickers. In addition, plaintiff has filed a document titled "Motion for Clarification and or Correction of Issues to be Tried."

In his motion for clarification, plaintiff notes that in this court's order of April 5, 2005, the court described as follows the elements of his retaliation claim that he would be required to prove at trial:

- 1) He complained about defendant Doying requiring him to mow lawns; and
- 2) That complaint was one of the reasons that defendant Doying removed

from plaintiff's cell legal documents belonging to inmates Walls and Rollins on July 18, 2003.

Plaintiff notes, correctly, that when he filed his complaint in this court, he alleged that his own legal documents had been confiscated along with the legal documents belonging to inmates Walls and Rollins. Plaintiff wants to introduce evidence of the taking of his own belongings because, in his view, a retaliatory motive is more believable if he can show that defendant took papers important to his own personal litigation efforts at the time. Although I express no opinion whether plaintiff is correct that the jury is more likely to believe his claim of retaliation if he can prove that defendant took his legal papers as well as the legal papers of others, I did not intend by my order of April 5, 2005, to limit plaintiff's ability to put in evidence of everything that defendant Doying removed from his cell during her search on July 18, 2003.

With respect to plaintiff's request for subpoenas, the request will be denied. According to the magistrate judge's preliminary pretrial conference order dated July 7, 2004, plaintiff was to disclose his trial witnesses no later than March 28, 2005. On March 19, 2005, plaintiff disclosed that he would be calling as witnesses inmates Michael Hills and Lonnie Gatlin, who had agreed to testify voluntarily. Writs of habeas corpus ad testificandum have already been issued for these witnesses. In a document dated April 1, 2005, after the deadline for witness disclosure had passed, plaintiff submitted a

“supplemental” disclosure, in which he reiterated that he would be calling inmates Hills and Gatlin. In addition, he stated, “. . . plaintiff reserves the right to call any witness listed by the defendant.”

Defendant has listed only three witnesses in her disclosure: herself, plaintiff and Haley Herman, an inmate complaint examiner. If plaintiff thought that defendant’s testimony or the testimony of the inmate complaint investigator was essential to proving his case, it was his responsibility to disclose these individuals as potential witnesses on his list before the disclosure deadline expired and then to learn promptly whether each would testify voluntarily or appear only by subpoena. In any event, the United States Marshal will not serve a trial subpoena on any potential witness unless the subpoena is accompanied by a check or money order made payable to the witness in the amount of the daily witness fee of \$43, plus the sum of the witness’s mileage to and from court at the rate of 40.5 cents per mile. At the time he filed this lawsuit just over a year ago, plaintiff had a zero balance in his regular prison account, seventy-seven cents in his release account and he owed court-ordered restitution in the amount of \$13,000. Assuming his financial circumstances have not changed in any significant way, it is questionable whether plaintiff could have successfully subpoenaed the defendant and Haley Herman, even if he had included them on his disclosure statement before the deadline expired.

An exhibit list and exhibit stickers are enclosed to plaintiff with this order. Before the

trial begins, plaintiff may give the trial clerk for the judge's use his original exhibit list and a copy of each exhibit that he intends to offer at trial. He should retain a copy of the list and the original exhibits in his own possession.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for clarification is GRANTED. He is free to introduce evidence that defendant Doying took legal papers belonging to him when she searched his cell on July 18, 2003.

2. Plaintiff's request for the issuance of four subpoena forms is DENIED.

Entered this 18th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge