

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

CAPTAIN MONICA HORNER and
THOMAS CRAVENS,¹

Defendants.

ORDER

3:06-cv-608-bbc

In this civil action, plaintiff Nathaniel Allen Lindell is proceeding to trial on his claim that defendants Captain Monica Horner and Thomas Cravens violated plaintiff's First Amendment rights by delaying his entry into the High Risk Offender Program in retaliation for filing lawsuits and grievances. Trial is scheduled for February 25, 2008. 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.

READ THIS ORDER NOW. Both parties must review the order very carefully; it

¹In an order entered January 7, 2008, the court granted defendants' motion for summary judgment on several claims. Following this order, only two defendants remain. I have amended the caption accordingly.

contains important instructions and may answer many questions about the trial.

A. Witnesses

In the magistrate judge's amended scheduling order entered on May 3, 2007, the parties were given a deadline of January 28, 2008 for disclosing the names and addresses of their trial witnesses. In addition, the parties are reminded that if they wish to call an incarcerated witness to testify, they must serve and file a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial (that is, by January 28, 2008). With the motion, they must file supporting affidavits showing that the witness is willing to appear voluntarily, describing the testimony the witness will give and explaining how the witness has personal knowledge of information relevant to a claim or defense. (A copy of the procedures for calling witnesses to trial was sent to the parties with the preliminary pretrial conference order entered February 22, 2007. Another copy is enclosed with this order.) The parties should make all efforts to submit any motion as soon as possible so that the court will be able to issue any writs in time to insure the witness's presence at trial.

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 either defendant to be present at trial. If he wishes to call defendants as witnesses at trial, he should ask defendants' counsel whether

defendants will agree to be called as witnesses by plaintiff without a subpoena. If defendants do not agree, plaintiff will have to follow the attached procedures for calling unincarcerated witnesses if he wishes to obtain testimony from them.

B. Other Documents Submitted before Trial

The parties are reminded that they have until February 18, 2008 to file and serve any (1) proposed voir dire questions, (2) proposed jury instructions, (3) proposed verdict forms and (4) motions in limine. By the same date, the parties are to submit to the court for the judge's use an exhibit list and a complete set of all of the exhibits they intend to introduce at trial. Also, the parties are to serve each other with copies of the same documents they file with the judge, no later than February 18, 2008.

Note well: The parties should keep the original copies of their exhibits in their possession so that they have them at the time of trial. To avoid any confusion, even if the exhibits they plan to use were submitted to the court or the other party previously, the parties must submit new copies of their exhibits with the exhibit list by February 18, 2008.

Attached to the magistrate judge's preliminary pretrial conference order in this case is a copy of this court's "Procedures for Trial Exhibits in Cases Assigned to Judge Crabb." Another copy of the procedures is attached to this order. Please note: In addition to following the exhibit procedures, the parties should exchange copies of their trial exhibits in

advance of trial for two reasons. First, it will insure that each party considers carefully what documentary evidence they will need to prove the elements of the claims for which they carry the burden of proof at trial and to obtain authentication of the documents before coming to trial, if necessary. Second, it will promote the efficient conduct of the trial by allowing each party to examine the opposing parties' exhibits in advance of trial so that objections to the admissibility of the documents may be taken up at the final pretrial conference outside the presence of the jury. The parties should be prepared to explain at the final pretrial conference their grounds for objecting to a particular exhibit. Additional information about exhibits is discussed below in Section E. A party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. Motions in limine are not intended to resolve disputes regarding all pieces of evidence; most evidentiary objections about individual documents can be made during trial. However, in some cases in which there are disputes regarding evidence having a potentially significant impact on the course of trial, it may be appropriate to seek a ruling in advance.

Voir dire questions are discussed below in Section C.

C. Jury Selection - Voir Dire Questions

The trial 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 "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. 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 defendant one name, the plaintiff one name, the defendant one name, etc., leaving seven persons who will make up the jury panel.

D. 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 one party begins to make comments in the nature of testimony, and the other party objects, the court will interrupt

the party speaking 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 defendant's case. If counsel wishes, he or she may choose to delay the statement until the beginning of defendant's case.

E. Evidence

Determining what evidence to offer at trial and how one should offer it is one of the most difficult questions facing a party preparing for trial. In making this decision, the parties should remember that the jurors will know **nothing** about the case when they enter the court room. Jurors will not review the complaint, the parties' proposed findings of fact and briefs or even this court's opinions related to the case. It is each party's job to provide the jury with all the evidence it needs to render a verdict in that party's favor. If a particular fact or piece of evidence is not introduced during trial, the jury may not consider that evidence in making a decision, even if the evidence was included in a party's summary judgment materials or other court filings.

All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence, which the parties should study carefully before trial. Although it is impossible to predict which rules may be important in a given trial, the most commonly cited rules are those relating to hearsay (Rules 801-807), relevance (Rules 401 and 402), unfair prejudice

(Rule 403), character evidence (Rules 404 and 608), use of criminal convictions to impeach (Rule 609) and prior statements of witnesses (Rule 613). If one party asks questions or offers an exhibit that does not comply with these rules or any other Federal Rule of Evidence, the other party may raise an objection with the court.

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 outside the courtroom, since the accuracy of such a statement cannot be tested by the opposing party. There are a number of exceptions to this general rule that are set out in Rules 803 and 804.

Documentary evidence will not be admissible unless the document is “authenticated” as required by Rule 901 (that is, shown to be an accurate copy by a witness who has personal knowledge of the document) or its authenticity has been stipulated to by the opposing party. The court strongly encourages the parties to stipulate to the authenticity of documents before trial. If the parties cannot agree in advance of trial on the admissibility of a proposed document or other piece of evidence, the party wishing to introduce the evidence must produce a copy of the document and a witness who can testify from his or her own knowledge that the document is what it appears to be.

Plaintiff should be aware that a party may not introduce affidavits into evidence or

read from them at trial because they are hearsay statements, made outside the courtroom. Similarly, statements that plaintiff made in a complaint or grievance are not evidence of the truth of that statement. However, a person who has completed an affidavit may appear in person to testify as a witness if he or she can offer testimony that is relevant to the lawsuit. Also, if at trial a witness testifies to facts that are inconsistent with statements the witness made in an earlier affidavit, a party may use statements in the witness's affidavit to show that the witness's testimony is inconsistent with the witness's earlier sworn statements.

Finally, plaintiff should be aware that orders or opinions from this court, the court of appeals or the Supreme Court are not evidence that may be used to support his claim. Plaintiff may refer to this court's orders and other case law in deciding how to prove his case, but he may not submit them as exhibits.

F. Proving the Claim

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. In order to avoid having his case dismissed before the defendant puts in his defense, plaintiff must present enough evidence to allow a reasonable jury to find that each legal element of his claim has been proven by a preponderance of the evidence.

To prevail on his First Amendment retaliation claim, plaintiff must prove that his

protected activity of filing lawsuits and grievances was one of the reasons defendants recommended that plaintiff be placed in Long Term Administrative Confinement instead of the High Risk Offender Program. If plaintiff does not put in enough evidence to prove his claim, defendants may move the court for judgment against plaintiff, and the judge may dismiss the case before defendants are called upon to produce any opposing evidence. If plaintiff satisfies his burden of proof, the burden shifts to defendants to show that they would have taken the same actions even if plaintiff had not filed lawsuits and grievances.

G. Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award compensatory damages in an amount that reasonably compensates plaintiff for the injuries or damages he suffered as a result of defendants' acts. Because plaintiff did not suffer a physical injury as a result of defendants' conduct, plaintiff may not receive damages for emotional harm. 42 U.S.C. § 1997e(e).

If plaintiff satisfies the legal standard for punitive damages set out in the court's standard instructions, the jury may, but is not required to, award these damages as a deterrence to defendants, in addition to nominal damages.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff Nathaniel Allen Lindell (Wisconsin Secure Program Facility) at trial beginning on February 25, 2008.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN January 28, 2008, the parties are to file and serve any motions for the issuance of subpoenas or writs of habeas corpus ad testificandum, together with supporting affidavits revealing the witness's willingness to appear voluntarily.

2. NOT LATER THAN February 18, 2008, 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; (d) a copy of all exhibits and an exhibit list; and (e) any motions in limine. The parties should not submit copies of 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.

3. 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 the party could not reasonably have anticipated before trial.

4. If any party wants to submit a trial brief before trial, he 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 9th day of January, 2008.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge