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

DARRIN A. GRUENBERG,

Plaintiff,

v.

DUSTIN KINGSLAND and
STEVEN MUELLER,

Defendants.

ORDER

11-cv-574-slc

Plaintiff Darrin Gruenberg is proceeding to trial on his claim that defendants used excessive force against him in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment. This case is scheduled for trial on January 22, 2013 on the claims that survived summary judgment. Plaintiff is representing himself at trial. This order will describe how the court conducts a trial and explain to the parties what written materials they are to submit before trial.

READ THIS ORDER NOW

Both sides must review the order very carefully because it contains important instructions and it probably will answer many of your questions about the trial.

A. Proving Plaintiff's Claim

At the trial, it will be the plaintiff's responsibility to prove his claims against defendants. Because plaintiff has the burden of proof, he puts in his evidence first. In order to avoid having his case dismissed before defendants put in their 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.

Elements of plaintiff's claim may include the following:

(1) defendants used force on plaintiff;

(2) defendants intentionally used extreme or excessive cruelty toward plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline; and

(3) defendants' conduct caused harm to plaintiff.

During the period of pretrial discovery, plaintiff should have been collecting the evidence necessary to prove his claim. In determining what evidence to present to the jury at trial, plaintiff should keep in mind these things:

♦ **The jurors know nothing about this case.**

The jurors have never heard of this lawsuit before coming in for jury duty. They have not reviewed the complaint, the evidence or any of this court's orders in the case. They will not know the law about plaintiff's claim. This means that it is plaintiff's job to provide the jury with enough evidence and explanation to persuade the jury to enter a verdict in his favor. All the jury will know is what the parties present during the trial. This means that even if a piece of evidence was filed with a party's summary judgment materials or other court filings, the jury will not know about it unless somebody introduces it as evidence during the trial.

♦ **All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence.**

Every trial has different evidence problems and objections, but the problems and objections that happen most often involve **relevance** (Rules 401 and 402), **unfair prejudice** (Rule 403), **character evidence** (Rules 404 and 608), **prior statements of witnesses** (Rule 613) and **hearsay** (Rules 801-807). If one party asks a question or offers an exhibit that violates

these rules or that violate some other Federal Rule of Evidence, then the other party may object and get a ruling from the court.

- **The Federal Rules of Evidence limit the testimony of witnesses.**

Witnesses may give testimony on any relevant matter when they have personal knowledge of that matter. In general, witnesses cannot testify about what someone else said outside the courtroom, because the accuracy of that statement cannot be tested by the opposing party. Such statements are called hearsay. There are a number of exceptions to this general rule against hearsay that are set out in Rules 803 and 804.

- **Documentary evidence will not be admissible unless the document is "authenticated."**

Under Federal Rule of Evidence 901, a party who wishes to rely on a piece of evidence at trial must show that the evidence is what that party claims it to be. For example, if you want to introduce a particular document, you may satisfy Rule 901 by calling a witness who has personal knowledge that your document is an accurate copy of the original. This is the most common method of satisfying Rule 901, but other methods are listed in the rule. Alternatively, the parties may stipulate, or agree to the authenticity of a piece of evidence. *The court strongly encourages the parties to stipulate to the authenticity of documents before trial*.

- **A party may not introduce affidavits into evidence or read from them at trial.**

Affidavits are a form of hearsay. Unless the affidavit fits some exception to the hearsay rule, then it cannot be used as evidence at trial. The person who swore to an affidavit may appear as a witness at trial to testify in person about what he or she said in the affidavit if this is relevant to the trial. Also, if at trial a witness testifies to facts that are inconsistent with

previous statements the witness made in an affidavit or some other document, then a party may use the witness's earlier statements to challenge the credibility of the witness.

- **Orders or opinions from this court, the court of appeals or the Supreme Court are not evidence.**

This court's orders and other case law might be useful guides to a party about how to prepare for trial, but a party may not submit orders or opinions as exhibits and a party may not discuss them in front of the jury because they are not trial evidence.

B. Witnesses

In the January 19, 2012 preliminary pretrial conference order, the court gave the parties a deadline of December 14, 2012 for disclosing the names and addresses of their trial witnesses. A copy of the procedures for calling witnesses to trial was sent to the parties with the preliminary pretrial conference order. Another copy is enclosed with this order.

- **Calling incarcerated witnesses to testify at trial**

The parties are reminded that if they wish to call an incarcerated witness to testify, they must serve and file a petition for the issuance of writs of habeas corpus ad testificandum. **The deadline for filing a petition is December 21, 2012 (four weeks before trial).** With the motion, they must file supporting affidavits with the following information:

- a showing that the witness is willing to appear voluntarily;
- a description of the testimony the witness will give; and
- an explanation how the witness has personal knowledge of information relevant to a claim or defense.

The parties should make all efforts to submit any petition 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.

Plaintiff has filed a petition for the issuance of writs of habeas corpus ad testificandum for Rodney Redmond, who is incarcerated at the Columbia Correctional Institution. Because it appears that inmate Redmond may have relevant testimony to offer at trial, even if only as a rebuttal or impeachment witness, I will grant plaintiff's request for a writ for him. However, I want to make it clear that the court's issuance of the subpoena does not mean that Redmond automatically will be allowed to testify at trial. That determination will depend on a variety of factors that will become clearer at trial and the determination will be governed by the Federal Rules of Evidence.

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.

- **Calling defendants to testify at trial**

Plaintiff cannot expect that the defendants will be present during the trial. This means that if plaintiff wishes to call any of the defendants as witnesses at trial, then he should ask defendants' counsel whether the defendants will agree to be called as witnesses by plaintiff without a subpoena. If defendants do not agree, then plaintiff will have to follow the procedures for calling unincarcerated witnesses if he wishes to obtain testimony from them.

C. Trial Materials and Motions

The parties must follow the deadlines for the submission of pretrial materials as set forth in the order issued on January 19, 2012. The order provided the following deadlines:

- **Motions in limine: December 14, 2012**
- **Response to motions in limine: January 7, 2013**

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 because most evidentiary objections about individual documents can be made during trial. But sometime there are disputes about evidence that could have a big impact on the course of trial, and the parties probably will want to get a ruling from the judge about this evidence before the trial begins.

- **Voir dire, proposed jury instructions and verdict forms: December 14, 2012**
- **Exhibit list and a set of all of exhibits to be used at trial: December 14, 2012**

Although plaintiff has received a copy of this court's "Procedures for Trial Exhibits in the Western District of Wisconsin," another copy of the procedures is attached to this order.

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 ensure that each party considers carefully what documents he will need to prove the elements of the claims for which he carries the burden of proof at trial and then try 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.

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.

D. Trial Overview

1. 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. This is the parties' chance to observe the potential jurors while they are being questioned so that the parties can decide who to strike from the panel when the questioning is done.

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.

Thirteen possible jurors will be called forward. When the court has finished questioning these people, each side will be allowed to strike the names of three potential jurors. Plaintiff will strike one name, then defendants will strike one name, back and forth three times until six people are removed, leaving the seven people who will be the jury.

2. 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 to give testimony. What is said during opening statements is not evidence. Therefore, if one party begins to make comments that are more like testimony and the other party objects, then the court will instruct the jury not to consider the statements that are like testimony.

Following plaintiff's opening statement, defense counsel is allowed to make a statement about defendants' case. Defense counsel is allowed to delay this opening statement until the beginning of defendants' case.

3. Presentation of evidence

After the parties have given their opening statements, plaintiff will present his case by submitting evidence. This is called plaintiff's "case in chief." Plaintiff may provide his own testimony, call other witnesses and submit properly authenticated documents.

After plaintiff has presented his case, defendants may move to dismiss plaintiff's case on the ground that plaintiff has failed to present enough evidence to allow a jury to find that each element of his claims has been proven by a preponderance of the evidence. *See* Fed. R. Civ. P. 50. If defendants' motion is denied, then defendants will present their evidence.

After defendants are finished, plaintiff may present additional evidence to rebut defendants' case. Any testimony or other evidence presented during this phase of the trial is limited to responding to evidence introduced by defendants. Plaintiff may not introduce new evidence simply because he failed to address a matter in his case in chief.

4. Closing arguments

After both sides are done presenting evidence to the jury, plaintiff will give a closing argument explaining why the evidence supports a verdict in his favor. The closing argument is not a time to offer new testimony. Plaintiff should focus on the evidence presented during the trial and explain to the jury why this evidence proves his claim against defendants. In a closing argument, a party may explain why he believes his witnesses are more credible, why his evidence should be given more weight and what inferences may be drawn from the evidence presented. This explanation cannot be in the form of a personal opinion. For instance, it would be proper to argue to the jury "you should not believe the defendants because their stories are all different and they don't make sense." It would not be proper to say "I think the defendants are lying."

E. Damages

If the jury returns a verdict finding that the defendants violated plaintiff's constitutional rights, then the jury may award "compensatory damages" in a dollar amount that reasonably compensates plaintiff for the injuries or damages he suffered as a result of defendants' acts. It will be plaintiff's burden at trial to prove that he has losses that should be compensated. *Memphis v. Community School District v. Stachura*, 477 U.S. 299 (1986). If plaintiff proves his claim but he cannot prove compensable harm, then he will be entitled to "nominal damages" of one dollar. If plaintiff presents evidence that he suffered a physical injury, then he may present evidence of mental or emotional injuries that he also suffered as a result of defendant's action.

To recover "punitive damages," plaintiff will have to prove that defendants acted with "evil motive or intent" or with "reckless or callous indifference" to his constitutional rights. *Smith v. Wade*, 461 U.S. 30 (1983). If plaintiff satisfies the legal standard for punitive damages, the jury may, but is not required to, award these damages as a deterrent to defendants.

ORDER

IT IS ORDERED that

(1) The Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff Darrin A. Gruenberg at trial beginning on January 22, 2013. Plaintiff should arrive at the courthouse no later than 8:00 a.m.

(2) Plaintiff's request for a writ of habeas corpus ad testificandum for inmate Rodney Redmond, dkt. 57, is GRANTED. The Clerk of Court is directed to issue a writ of habeas corpus ad testificandum for the attendance of Redmond at trial beginning on January 22, 2013. He should arrive at the courthouse no later than 8:00 a.m.

(3) NOT LATER THAN December 14, 2012, the parties are to file and serve any motions in limine they wish to bring. Responses to those motions are due January 7, 2013.

(4) NOT LATER THAN December 14, 2012, the parties are to file and serve:

(a) any proposed questions for voir dire examination (optional);

(b) a proposed form of special verdict (optional);

(c) any proposed jury instructions (optional); and

(d) a copy of all exhibits and an exhibit list (required).

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.

(5) The court will not consider 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.

(6) NOT LATER THAN December 21, 2012, 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.

Entered this 19th day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge