IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MUSTAFA-EL K.A. AJALA
formerly known as Dennis E. Jones-El,

ORDER

Plaintiff,

13-cv-638-bbc

v.

WILLIAM SWIEKATOWSKI,

Defendant.

- -

Pro se plaintiff Mustafa-El K.A. Ajala is proceeding on a claim that defendant William Swiekatowski gave him a conduct report in February 2007 because of plainitff's race and religion. Trial is scheduled for August 24, 2015. 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 sides must review the order very carefully; it contains important instructions and may answer many questions about the trial. All trials are complicated, so it is important to be prepared. By reading this order and following the instructions in it, the parties will increase their chances of having a smooth trial and presenting their evidence without interruptions for failing to follow trial procedures.

TABLE OF CONTENTS

A. Courtroom Behavior

The court expects that the parties will behave in a respectful manner throughout the course of trial. This means that the parties should not raise their voices, interrupt each other (or the judge) or argue with a witness.

If this is your first lawsuit, it is understandable that you will mistakes. If that happens, try not to get frustrated. Instead, listen carefully to the instructions the judge gives you and try again.

B. Proving Plaintiff's Claim

At the trial, it will be plaintiff's job to prove his claim against defendants. Because plaintiff has the burden of proof, he puts in his evidence first. 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. In particular, plaintiff will have to prove that defendant discriminated against him because of his race or religion.

If plaintiff does not present sufficient evidence to prove the elements of his claim, defendant may move to dismiss the case under Federal Rule of Civil Procedure 50(a) before he puts in any evidence.

During the period of pretrial discovery, plaintiff should have been collecting evidence to support his claim. When deciding what evidence to present to the jury at trial, plaintiff should remember:

- **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. 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, along with the instructions provided by the court. 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 one of the parties introduces it as evidence during the trial.

Remember that the jurors have probably never seen a prison and do not know anything about how one operates. If you don't tell them, it will be very hard for them to understand what your claim is about.

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

Although it is impossible to predict which rules may be important in a particular trial, the most commonly cited rules are those relating to **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 some other Federal Rule of Evidence, then the other party may object and get a ruling from the court. The parties should review all of the Federal Rules of Evidence before trial so that they know how to present evidence properly and raise

objections to evidence that does not comply with the rules.

- **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 if the statement is being offered for the truth of the matter, because the accuracy of that statement cannot be tested by the opposing party. Those 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, so that they won't have to argue about this in front of the jury.

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

Affidavits and other written statements such as grievances cannot be moved into evidence to prove that what is said in them is true. Instead, the party must call the witness who wrote the document to testify at trial.

Affidavits and other written statements may be used *against* a witness in certain circumstances. If at trial a witness testifies to facts that are different from the facts the witness swore to in an affidavit or some other document, the party questioning that witness may use the witness's earlier statements to challenge the credibility (the believability) of the witness.

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

The parties may refer to this court's orders and other case law in deciding how to prove their case, but they may not submit them as exhibits or discuss them in front of the jury because they are not evidence. If a party believes that a particular statement of the law is relevant and important to his case, he may include it as part of his proposed jury instructions.

C. 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**, in other words, a motion requiring the person named in the petition to come to court to give testimony). The deadline for filing a petition is July 27, 2015 (four weeks before trial). With the motion, a party 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. ("Relevant to" means that the information relates to and explains some part of a claim or defense.)

In addition, if the party is calling more than one prisoner to testify about the same events, the party should explain why he needs each prisoner's testimony.

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. More details about calling incarcerated witnesses are contained in the witness procedures attached to this order.

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

If a party wishes to call a nonprisoner witness, he may ask the witness to testify voluntarily. If the witness will not agree, the party must subpoena the witness and pay the required witness fees. The court does not have the authority to waive those fees, even if the party is proceeding in forma pauperis. More details about calling nonprisoner witnesses are contained in the procedures for calling witnesses that are attached to this order.

- **Calling defendant to testify at trial**

Defendant is not required to be present at trial in the absence of a subpoena. This means that if plaintiff wishes to call defendant as a witness at trial, then he should ask defense counsel whether defendant will agree to be called as a witness by plaintiff without a subpoena. If defendant does not agree, then plaintiff will have to follow the attached procedures for calling unincarcerated witnesses if he wants defendant to testify.

D. Trial Materials and Motions

The parties should adhere to the following deadlines for the submission of pretrial materials:

- **Motions in limine** — July 29, 2015
- **Response to motions in limine** — August 12, 2015

Parties file what are called "motions in limine" to get rulings from the court before

trial about evidence that they believe should be admitted or excluded. For example, a party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. ("in limine" means at the threshold; in this instance, at the threshold of trial.) 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 if there are disputes about evidence that could have a big impact on the course of trial, the parties may want to get a ruling from the court about this evidence before the trial begins.

- **Proposed voir dire questions, jury instructions and verdict forms** — July 29, 2015
- **Objections to the opposing side's voir dire, instructions and verdict forms —** August 12, 2015
- **Exhibit list and complete set of all of exhibits to be used at trial** — July 29, 2015

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 insure 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.

E. 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. ("Voir dire" means "to speak the truth.") This is the parties' chance to watch and listen to the potential jurors while they are being questioned so that the parties can decide whom 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 questions to the standard questions by submitting their proposed questions to the court and the opposing party by the deadline above.

Fourteen possible jurors will be called forward. When the court has finished questioning these people, the judge will ask the parties whether they wish to ask any more questions and whether they believe that any of the potential jurors cannot be fair and impartial. After that, each side will be allowed to strike the names of three potential jurors. Plaintiff will strike one name, then defendant will strike one name, back and forth three times until six people are removed, leaving the eight 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 defendant's case. Defense counsel is allowed to delay this opening statement until the beginning of defendant's 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 that comply with the Federal Rules of Evidence.

a. Questioning witnesses

If a party calls a witness to testify, the party must ask the witness questions that are relevant to the claim or claims being tried. This is called "direct examination." The party may not give his own testimony during direct examination and he may not argue with the witness if he believes that the witness has given incorrect or improper testimony. If the party believes that the witness has not answered the question, the party may repeat the question or ask the question a different way.

The parties are reminded that witnesses other than experts are limited to testimony about their own observations. Therefore, the person questioning a witness should ask questions at the beginning about how the witness came to know the facts he is testifying about: Where was the witness at the time? Was the witness close enough to hear and see what was going on? What reason did the witness have to pay attention to what was going on?

When the party is finished asking the witness questions, it is the other side's turn to

ask the witness questions. This is called cross examination.

If plaintiff calls himself as a witness, he does not have to ask himself questions. Instead, he may take the witness stand and talk about the relevant facts of the case. Again, plaintiff will be limited to testifying about his own observations and experience.

If a party believes that a witness is giving testimony that does not comply with the Federal Rules of Evidence, the party may raise an objection with the judge and tell the judge the reason for the objection. If the judge agrees with the objection, the objection will be "sustained" and the witness will not be allowed to answer the question. (If the witness has already answered the question, the court will tell the jury to disregard the witness's answer.) If the judge does not agree with the objection, the objection will be "overruled," or denied.

b. Submitting exhibits

If a party wishes to offer a document as evidence, he must include the document in his exhibit list. Before the document can be shown to the jury, the party must ask a witness who has personal knowledge of the document to explain what the document is. There is an exception to that rule if the other side agrees that the document is admissible.

c. Defendants' case and rebuttal evidence

After plaintiff has presented his case, defendant 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 the claim has been proven by a preponderance of the evidence. This is called a motion for judgment as a matter of law. Fed. R. Civ. P. 50. If defendant asks the court to dismiss the case, plaintiff will be given an opportunity to explain why he believes there is enough evidence to allow the case to continue. If the court denies defendant's motion or defendant does not move to dismiss the case, defendant will present his evidence.

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

4. Closing arguments

After the parties are finished presenting evidence to the jury, both sides will have an opportunity to give closing arguments. This is not a time to offer new testimony. The parties should focus on the evidence presented during the trial and explain to the jury why they believe the evidence supports their position. 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.

F. Damages

If the jury returns a verdict finding that defendant violated plaintiff's constitutional rights, 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 defendant's 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 proves that he suffered a physical injury, he may recover damages for mental or emotional injuries. 42 U.S.C. § 1997e(e).

To recover "punitive damages," plaintiff will have to prove that defendant 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 defendant.

ORDER

IT IS ORDERED that

1. The Clerk of Court is directed to issue a writ of habeas corpus ad testificandum for the attendance of plaintiff Mustafa-El K.A. Ajala (formerly known as Dennis Jones-El)

at trial beginning on August 24, 2015. Plaintiff should arrive at the courthouse no later than 8:00 a.m.

2. NOT LATER THAN July 27, 2015, the parties are to file and serve any additional 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.

3. NOT LATER THAN July 29, 2015, the parties are to file and serve any motions in limine they wish to bring. Responses to those motions are due August 12, 2015.

4. NOT LATER THAN July 29, 2015, the parties are to file and serve (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; (c) proposed jury instructions; and (d) a copy of all exhibits and an exhibit list. 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. Responses are due on August 12, 2015.

5. 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.

Entered this16th day of June, 2015.

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

PROCEDURES FOR CALLING WITNESSES TO TRIAL

At trial, plaintiff will have to be ready to prove facts supporting his claims against the defendants. One way to offer proof is through the testimony of witnesses who have personal knowledge about the matter being tried. If a party wants witnesses to be present and available to testify on the day of trial, the party must follow the procedures explained below. ("Party" means either a plaintiff or a defendant.) These procedures must be followed whether the witness is:

1) A defendant to be called to testify by a plaintiff; or

2) A plaintiff to be called to testify by a defendant; or

3) A person not a party to the lawsuit to be called to testify by either a plaintiff or a defendant.

I. PROCEDURES FOR OBTAINING ATTENDANCE OF INCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

An incarcerated witness who tells a party that he is willing to attend trial to give testimony cannot come to court unless the court orders his custodian to let him come. The Court must issue an order known as a writ of habeas corpus ad testificandum. This court will not issue such a writ unless the party can establish to the court's satisfaction that

1) The witness has agreed to attend voluntarily; and

2) The witness has actual knowledge of facts directly related to the issue to be tried.

A witness's willingness to come to court as a witness can be shown in one of two ways.

a. The party can serve and file an affidavit declaring under penalty of perjury that the witness told the party that he or she is willing to testify voluntarily, that is, without being subpoenaed. The party must say in the affidavit when and where the witness informed the party of this willingness;

OR

b. The party can serve and file an affidavit in which *the witness* declares under penalty of perjury that he or she is willing to testify without being subpoenaed.

The witness's actual knowledge of relevant facts may be shown in one of two ways.

a. The party can declare under penalty of perjury that the witness has relevant information about the party's claim. However, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. For example, if the trial is about an incident that happened in or around a plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and witnessed the incident, the plaintiff may tell the court in an affidavit what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred;

OR

b. The party can serve and file an affidavit in which *the witness* tells the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred.

Not later than four weeks before trial, a party planning to use the testimony of an incarcerated witness who has agreed to come to trial must serve and file a written motion for a court order requiring the witness to be brought to court at the time of trial. The motion must

1) State the name and address of the witness; and

2) Come with an affidavit described above to show that the witness is willing to testify and that the witness has first-hand knowledge of facts directly related to the issue to be tried.

When the court rules on the motion, it will say who must be brought to court and will direct the clerk of court to prepare the necessary writ of habeas corpus ad testificandum.

II. PROCEDURE FOR OBTAINING THE ATTENDANCE OF INCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If an incarcerated witness refuses to attend trial, TWO separate procedures are required. The court will have to issue a writ of habeas corpus ad testificandum telling the warden to bring the witness to trial and the party must serve the witness with a subpoena.

Not later than four weeks before trial, the party seeking the testimony of an incarcerated witness who refuses to testify voluntarily must file a motion asking the court to issue a writ of habeas corpus ad testificandum and asking the court to provide the party with a subpoena form. (All requests from subpoenas from pro se litigants will be sent to the judge for review before the clerk will issue them.)

The motion for a writ of habeas corpus ad testificandum will not be granted unless the party submits an affidavit

1) Giving the name and address of the witness; and

2) Declaring under penalty of perjury that the witness has relevant information about the party's claim. As noted above, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. In the affidavit, the party must tell the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or to hear what occurred.

The request for a subpoena form will not be granted unless the party satisfies the court in his affidavit that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court.

If the court grants the party's request for a subpoena for an incarcerated witness, it will be the

party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the Marshal. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

III. UNINCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

It is the responsibility of the party who has asked an unincarcerated witness to come to court to tell the witness of the time and date of trial. No action need be sought or obtained from the court.

IV. UNINCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, no later than four weeks before trial, the party must serve and file a request for a subpoena form. All parties who want to subpoena an unincarcerated witness, even parties proceeding in forma pauperis, must be prepared to tender an appropriate sum of money to the witness at the time the subpoena is served. The appropriate sum of money is a daily witness fee and the witness's mileage costs. In addition, if the witness's attendance is required for more than one trial day, an allowance for a room and meals must be paid. The current rates for daily witness fees, mileage costs and room and meals may be obtained either by writing the clerk of court at P.O. Box 432, Madison, Wisconsin, 53703, or calling the office of the clerk at (608) 264-5156.

Before the court will grant a request for a subpoena form for an unincarcerated witness, the party must satisfy the court by affidavit declared to be true under penalty of perjury that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a

party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court; and

4) The party is prepared to tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the witness's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay.

If the court grants the party's request for a subpoena for an unincarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the marshal, together with the necessary check or money order. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

V. SUMMARY

The chart below may assist in referring you to the section of this paper which sets forth the appropriate procedure for securing the testimony of witnesses in your case.

WITNESSES

INCARCERATED		UNINCARCERATED	
VOLUNTARY	INVOLUNTARY	VOLUNTARY	INVOLUNTARY
A court order that the witness be brought to court is required. Papers are due 4 weeks before trial.	A court order that the witness be brought to court and a subpoena are required. A motion must be served & filed 4 weeks before trial. Subpoena forms must be completed 2 weeks before trial.	Nothing need be sought or obtained from the court.	Pro se parties must obtain an order granting issuance of a subpoena. Papers are due 4 weeks before trial. Completed forms and fees are due 2 weeks before trial.

CURRENT SUBPOENA RATES
(as of June 2015)

Daily Witness Fee - $40
Milage - $0.575
Room and Meals (Per Diem) - $153

PROCEDURES FOR TRIAL EXHIBITS
IN CASES ASSIGNED TO JUDGE CRABB

Before trial, the parties are to label all exhibits that may be offered at trial. Before the start of trial, the parties are to provide the deputy clerk with a list of all exhibits. Exhibits for use at trial are not subject to the electronic filing procedures, but are to be filed conventionally. Counsel are to retain the original exhibits following trial.

1. Each party is to label all exhibits.

2. If more than one defendant will be offering exhibits, that defendant should add an initial identifying the particular defendant to the label.

3. Each party is to submit a list of their exhibits. The party should state to whom the exhibits belong, the number of each exhibit and a brief description.

4. Each party is to provide the court with the original exhibit list and a copy of each exhibit that may be offered for the judge's use.

5. As a general rule, the plaintiff should use exhibit numbers 1-500 and the defendant should use exhibit numbers 501 and up.

6. Each party is to maintain custody of his or her own exhibits throughout the trial.

7. At the end of trial, each party is to retain all exhibits that become a part of the record. It is each party's responsibility to maintain his or her exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.

8. Each party should be aware that once reference is made to an exhibit at trial, the exhibit becomes part of the record, even though the exhibit might not be formally offered or might not be received.

Any questions concerning these instructions may be directed to the clerk's office at (608) 264-5156.

Entered this 19th day of May, 2006.

BY THE COURT:

BARBARA B. CRABB
District Judge