

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5088  
(Summary Calendar)

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JOHN RICHARDS,

Plaintiff-Appellant,

versus

HARRY E. KINKER, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
For the Eastern District of Texas

(6:91-CV-233)

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(September 27, 1993)

Before JOLLY, WIENER and EMILIO. M. GARZA, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant John Richards, a prisoner in the Texas Department of Criminal Justice, Institutional Division, filed suit under 42 U.S.C. § 1983, alleging violation of his civil rights by a prison guard. Richards here appeals the dismissal of his case,

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

arguing, inter alia, that he was erroneously denied appointment of counsel, discovery sanctions, motion to subpoena more witnesses prior to trial, and introduction of evidence of the character of the guard in question. Finding Richards' arguments to be without merit, we affirm.

## I

### FACTS AND PROCEEDINGS

Proceeding pro se and in forma pauperis (IFP), Richards filed the instant civil rights action alleging that defendant prison guard Betty M. Zorn ransacked his cell and filed disciplinary violations against him in retaliation for his activities as a writ writer and for his filing of numerous grievances. The case was transferred to a magistrate judge, who conducted two evidentiary hearings. The parties then consented to a bench trial before the magistrate judge, with any appeal from the resulting judgment to be directly to this court.

After hearing all of the evidence the magistrate judge issued a memorandum opinion and order dismissing the claims against the defendants with prejudice and denying any remaining motions filed by either party.

## II

### ANALYSIS

#### A. Appointment of Counsel

Richards first argues that the magistrate judge erroneously denied his motion for the appointment of counsel at trial. But as a civil rights complainant has no right to appointed counsel, the

court will not appoint counsel in such a case unless it presents "exceptional circumstances." Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). We evaluate several factors when reviewing whether a district court abused its discretion in denying an indigent civil rights complainant's motion seeking appointed counsel: (1) the type and complexity of the case; (2) whether the plaintiff is able to represent his own interests adequately; (3) the ability of the plaintiff to investigate the case himself; and (4) whether the case involves substantially conflicting testimony requiring the skills of an attorney practiced in cross-examination. Id. at 212-13. (citations omitted).

A review of the written materials filed by Richards, and of the oral examinations conducted by Richards at the evidentiary hearings and the trial, reveals that the magistrate judge did not abuse her discretion in denying Richards appointed counsel. First, the issues in the instant action were not complex. In addition, as an experienced writ writer, Richards is well-versed in the filing of inmate grievances and the conduct of civil rights litigation. Moreover, his pleadings and briefs in the instant case clearly demonstrate his familiarity with the legal system and ability to represent himself adequately in a civil rights action.

Richards contends that he was not able to seek out and interview witnesses, obtain written statements, or otherwise properly investigate the case himself. He does not, however, provide any details as to which witnesses he was unable to interview or which statements he could not obtain. Further, he was

able to provide seven witnesses at one of the allegedly retaliatory disciplinary hearings against him, was able to participate in the pre-trial discovery, and succeeded in having the court subpoena three inmates, one parolee, and three officers to testify at the evidentiary hearing, and two more inmates and three other officers to testify at the trial. Finally, a review of the records of the evidentiary hearings and the trial reveals that Richards was quite capable of conducting both direct and cross-examinations of the witnesses. The magistrate judge did not abuse her discretion when she denied Richards' motion for appointment of counsel.

B. Discovery Sanctions

Richards contends that the magistrate judge erroneously declined to sanction the defendants for their failure to comply with the court's discovery orders in timely fashion. "The district court has broad discretion in discovery matters and its rulings will be reversed only on an abuse of that discretion." Scott v. Monsanto Co., 868 F.2d 786, 793 (5th Cir. 1989). Richards sought either the entry of a default judgment against Zorn or a fine of \$500 per day plus court costs.

By the time Richards filed his motions for sanctions, however, the defendants had already moved the court for leave to file an out-of-time response to Richards' discovery requests, claiming that Richards' discovery requests had not been sent to the proper attorney of record, and that the defendants believed that discovery was not proper in a § 1983 action until issues of immunity had been addressed. The district court granted the motion, giving the

defendants until February 28, 1992, to comply. Richards concedes that the defendants responded "in late January 1992."

The only specific facts Richards supplies regarding the defendants' alleged non-compliance with his discovery requests relate to the testimony of Van Allen McDannell, an inmate who testified for Richards at the expanded evidentiary hearing held in December 1991. McDannell changed his testimony, testifying at the trial that his previous testimony had been untrue, and that he had lied on Richards' behalf.

Nearly six months before the trial, the defense supplied Richards with the sworn statement of McDannell. The affidavit detailed McDannell's perjury on Richards' behalf at the earlier evidentiary hearing, and his testimony at the trial was virtually identical to the statements in his affidavit. In his reply brief, Richards also contends that he did not receive a forty-page exhibit submitted by the defendants at trial, but he fails to detail where this exhibit is, what it contains, and how his alleged failure to receive it before trial caused him any prejudice. The district court did not abuse its discretion by denying Richards' motion for sanctions against the defendants.

C. Evidence of Retaliation

Richards argues next that the district court erroneously denied his motion to subpoena more witnesses prior to trial. In his motion Richards alleged that he wished to subpoena additional witnesses: (1) to present character evidence against Zorn; and (2) to present additional testimony regarding the alleged

retaliatory behavior of Zorn. He now argues, in particular, that the additional witnesses would have testified to Zorn's placement on disciplinary probation for three months for initiating a verbal altercation with another employee. Richards alleges that this incident was related to and a result of the alleged retaliation of Zorn against Richards on December 16, 1990.

A review of the record reveals that Richards was, in fact, allowed to make reference to Zorn's placement on disciplinary probation. The other witnesses Richards wished to subpoena would have provided testimony as to Richards' demeanor, Zorn's demeanor, and the alleged retaliatory incidents which formed the basis of the lawsuit. This evidence had already been introduced at the evidentiary hearings, and was introduced again at the trial. The subject evidence was thus cumulative in nature. The magistrate judge was well within her discretion in refusing Richards' request to subpoena additional witnesses whose testimony would only have been cumulative. Harvey v. Andrisc, 754 F.2d 569, 572 (5th Cir.), cert. denied, 471 U.S. 1126 (1985).

D. Character Evidence

Finally, Richards argues that he was not allowed to introduce evidence of Zorn's character when the defense was allowed to introduce evidence of his own criminal history. This "character evidence," however, is the same evidence of Zorn's placement on disciplinary probation discussed above. As previously noted, Richards was able to introduce testimony regarding Zorn's placement on disciplinary probation.

For the foregoing reasons, the judgment of the district court  
is  
AFFIRMED.