COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2171 **Cir. Ct. No. 2004CV1289**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TITUS HENDERSON,

PLAINTIFF-APPELLANT,

V.

MATTHEW FRANK, GERALD BERGE, BRAD HOMPE, DR. THOMAS BOSTON, RUSSELL BAUSCH, ROBERT SHANNON, AND STEVE CASPERSON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Titus Henderson appeals from an order dismissing his complaint against several Department of Corrections employees. We affirm.

¶2 Henderson's complaint concerned denial of dental care and other matters, and alleged state and federal legal theories. Henderson's first argument on appeal relates to the circuit court's conclusion that, as to most or all of the state law claims, Henderson failed to file a notice of claim as required by WIS. STAT. §§ 801.02(7)(bm) and 893.82 (2003-04).[1] Henderson's argument on this point is difficult to understand. It appears he may be arguing that there are uncertainties in the law about the effect of failing to allege in the complaint compliance with the notice of claim requirement. He may also be arguing that the court should have allowed him a chance to amend the complaint to allege compliance. These arguments are not responsive to the court's conclusion, because the court did not rely on any failure of the allegations in the complaint, but relied instead on Henderson's failure to provide evidence, on summary judgment, that he did in fact file a notice of claim.

¶3 Henderson may also be arguing that if the defendants had been required to provide more discovery, he would have been able to prove compliance. However, Henderson would not need any discovery at all to aver in an affidavit of his own that he filed a notice of claim. He has not directed us to anywhere in the record where he presented such an affidavit, or any other evidence that he filed a notice of claim. Therefore, he has not established that the court erred in this conclusion.

¶4 Henderson's next arguments concern discovery and WIS. STAT. § 804.015(4), which provides in part: "If a prisoner commences an action or

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

special proceeding, the court shall limit the number of requests for interrogatories, production of documents or admissions to fifteen, unless good cause is shown for any additional requests." In the defendants' response to Henderson's first set of discovery requests, they relied on the above statute to decline to respond to the sixteenth interrogatory, and to all of the requests for production of documents or admissions. Henderson's first motion to compel discovery was denied for failure to comply with a local rule, and in his second motion to compel, he addressed only interrogatories, including number sixteen. The circuit court denied the motion on that interrogatory on the ground that good cause had not been shown to exceed the number provided by statute.

¶5 Henderson's next arguments concern the constitutionality and interpretation of WIS. STAT. § 804.015(4). It appears that Henderson is raising these issues with respect to interrogatory number sixteen, as well as to the requests for production of documents and admissions. However, it does not appear that he ever moved to compel discovery on those requests, and therefore there is no circuit court ruling on them for us to review. The only reviewable issue is interrogatory number sixteen, which asked the defendants to describe the cell search by two defendants on a certain date when Henderson's books were destroyed. Even if we were to reverse the court's decision on this interrogatory, Henderson has not explained how a reversal of that decision would lead to reversal of the court's summary judgment decision. It is not clear to us how any answer the defendants might have given to that interrogatory would lead to a different result on the other issues we are addressing in this appeal. Therefore, we decline to discuss these arguments further.

¶6 Henderson next argues that the circuit judge should have recused himself because he "represented a party in the past." Henderson is apparently

referring to the fact that the circuit judge was formerly secretary of the Department of Corrections. That is not the same as "representing a party," and is not, by itself, grounds for disqualification. To the extent Henderson is arguing that the judge should have disqualified himself under WIS. STAT. § 757.19, he does not argue that there was any specific situation related to this judge that is described in that statute. It appears his argument relies on para. (2)(g), which provides that a judge is disqualified "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Case law establishes that this is a determination that can be made only by the circuit judge, and the judge's decision is reviewable by this court only to establish whether the judge made a determination requiring recusal and failed to heed his or her own finding. ***State v. Carviou***, 154 Wis. 2d 641, 645-46, 454 N.W.2d 562 (Ct. App. 1990). In this case, the judge determined that disqualification was not required. Therefore, we affirm that decision.

¶7 Henderson also asserts that several of the judge's unfavorable rulings in this case demonstrate an appearance of partiality. Henderson cites no authority, and we are not aware of any, for the proposition that unfavorable rulings, by themselves, demonstrate partiality.

¶8 Henderson also argues that he should have been informed of his right to judicial substitution. However, the opinion he relies on does not apply to his case. In that opinion, *see* ***State v. Kywanda F.***, 200 Wis. 2d 26, 546 N.W.2d 440 (1996), the court was discussing a statutory requirement in WIS. STAT. ch. 48 that requires a child to be informed of the substitution right. Henderson's case is not one under ch. 48, and there is no similar statute requiring the court to inform parties in general civil cases of the right of substitution.

¶9 Finally, Henderson addresses the merits of one of his claims. He appears to argue that it was a violation of due process for the defendants not to provide him with a hearing when they imposed on him a demotion in the institution's five-level security classification system. The argument is that he is entitled to due process because the demotion results in an indefinite period of segregation and denial of parole, and that these results satisfy the test for whether a liberty interest exists. For a liberty interest to exist, the hardship imposed must cause an atypical and significant hardship in relation to the ordinary incidents of prison life. ***Sandin v. Conner***, 515 U.S. 472, 484 (1995).

¶10 Henderson's argument fails because he does not explain what basis there is to believe that the demotion has the effects he claims of indefinite segregation and denial of parole. He cites no legal authority that gives the demotion these effects, and refers to nothing in the record to dispute the defendants' evidentiary submissions asserting that it did not have these effects.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.