

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ROBERT BRODIE,

Plaintiff,

v.

**9:95-CV-1537
(FJS/DEP)**

**LOUIS MANN, Superintendent of Shawangunk Correctional Facility;
JIM FREER, Senior Counselor of Shawangunk Correctional Facility;
and DONALD SELSKY, Director of Special Housing Units,**

Defendants.

JURY INSTRUCTIONS

I. INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I am now instructing you and apply that law to the facts as you find them. In doing so, you are not allowed to select some instructions and reject others, rather you are required to consider all the instructions together as stating the law. In that regard, you should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it.

In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards any party. The plaintiff and the defendants, as well as the general public, expect you to carefully and impartially consider all the evidence in this case, follow the law as stated by the Court, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion may be. It is not my function to determine the facts, that is your function.

II. ROLE OF ATTORNEYS

Our courts operate under an adversary system in which we hope that the truth will emerge through the competing presentations of adverse parties. The function of the attorneys is to call your attention to those facts that are most helpful to their side of the case. It is their role to press as hard as they can for their respective positions.

In that regard, one can easily become involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this is not a contest between attorneys. You are to decide this case solely on the basis of the evidence. Remember, the attorneys' statements and characterizations of the evidence are not evidence. Insofar as you find their opening and/or closing arguments helpful, take

advantage of them; but it is your memory and your evaluation of the evidence in the case that counts.

OBJECTIONS

In fulfilling their role, attorneys have the obligation to make objections to the introduction of evidence they feel is improper. The application of the rules of evidence is not always clear, and attorneys often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and are not to be considered as points scored for one side or the other.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against either the plaintiff or the defendants. In any event, any opinion I might have is irrelevant. You are the judges of the facts.

III. MULTIPLE DEFENDANTS

Although there are multiple defendants in this action, it does not follow from that fact alone that if one is liable the others are liable as well. Each defendant is entitled to a fair consideration of his own defense, and a defendant may not be prejudiced by the fact, if it should become a fact, that you find against another defendant.

IV. EVIDENCE

As I stated earlier, your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits marked in the record. Arguments and statements of lawyers, questions to witnesses, and material excluded by my rulings, are not evidence. In addition, during the trial, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may not consider any responses which I ordered stricken from the record.

A. Direct and Circumstantial Evidence

While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common experience. The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts. (SNOW EXAMPLE)

The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

B. Stipulated Facts

The parties also have presented some stipulated facts. A stipulated fact is simply one that all parties agree is true. You must accept any such stipulated facts as true.

V. EVALUATION OF EVIDENCE

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

In evaluating a witness' testimony, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party, as well as the interest the witness may have in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he or she testified, the accuracy of the witness' memory, his or her candor or lack of candor, the reasonableness and probability of the witness' testimony, the testimony's consistency or lack of consistency, and its corroboration or lack of corroboration with other credible testimony.

If you were to find that any witness willfully testified falsely as to any material fact, that is, as to an important matter, the law permits you to disregard completely the

entire testimony of that witness upon the theory that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may accept so much of the witness' testimony as you deem true and disregard what you believe is false. By these processes you, as the sole judge of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept, and what weight you will give it.

As stated in my preliminary instructions, the mere fact that a witness is a corrections official does not in and of itself create any greater or lesser credibility. The testimony of a corrections official has to be evaluated in the same light as that of all other witnesses.

Also, as stated earlier, the existence or non-existence of a fact is not determined by the number of witnesses called. Your concern is not with the quantity but the quality of the evidence.

In summary, what you must try to do in deciding credibility is to size up a witness in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

VI. BURDEN OF PROOF

When a party has the burden of proof on a particular issue that means that considering all the evidence in the case, that party's contention on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of it. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, its weight, and the effect that it has on your minds. The law requires that, in order for a party to prevail on an issue on which he has the burden of proof, the evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than the evidence opposed to his or her claim. (SCALE EXAMPLE) If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

In this case Plaintiff seeks to recover damages for an alleged violation of his due process rights provided by the United States Constitution. Plaintiff has the burden of proving by a fair preponderance of the evidence the elements of this claim which I will describe to you. For Plaintiff to prevail, you must find the evidence that supports his claim is the more likely version of what occurred. If, however, you find the evidence supporting a Defendant's case more persuasive, or if you are unable to find a

preponderance of evidence on either side, then you must resolve the question in favor of that Defendant. You may only find in favor of Plaintiff if the evidence supporting his claim outweighs the evidence opposing it.

VII. SUBSTANTIVE LAW

A. Constitutional Violations

Mr. Brodie has alleged a constitutional claim pursuant to 42 U.S.C. § 1983 which provides that:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

I will refer to this statute simply as "Section 1983."

Section 1983 does not create any substantive right in and of itself but rather serves as a means by which individuals can seek redress in this Court for alleged violations of their substantive rights under the United States Constitution.

Plaintiff alleges that the Defendants violated his right to due process under the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law.

As I have indicated, the State is not a Defendant in this case -- the Defendants in this case are prison employees and officials whom the Plaintiff has named in the lawsuit. They are being sued in their individual capacities. The Plaintiff has named the following Defendants:

JIM FREER -- Senior Counselor of Shawangunk Correctional Facility

LOUIS MANN -- Superintendent of Shawangunk Correctional Facility

DONALD SELSKY -- Director of Special Housing Units

Plaintiff claims that the Defendants deprived him of liberty without due process law in violation of the Fourteenth Amendment. Specifically Plaintiff asserts that during the course of a prison disciplinary hearing to determine whether Plaintiff violated certain Rules of Inmate Conduct that the following actions on the part of the Defendant Hearing Officer Freer violated his constitutional right to due process:

- (1) Defendant Freer denied Plaintiff the opportunity to give testimony in his own defense;
- (2) Defendant Freer denied Plaintiff the opportunity to call nine requested witnesses without a reason that was reasonable or logically related to correctional goals;

- (3) Defendant Freer did not provide Plaintiff with certain requested evidence that was relevant to Plaintiff's defense;
- (4) Defendant Freer failed to personally re-interview two witnesses after they indicated they would testify and then reportedly refused to testify at the hearing;
- (5) Defendant Freer sentenced Plaintiff based on insufficient evidence; and
- (6) Defendant Freer did not provide Plaintiff a fair and impartial hearing because his guilt was predetermined prior to the start of the hearing.

Plaintiff asserts his due process claim against Defendant Mann and Defendant Selsky based on their position as supervisory officials of Defendant Hearing Officer Freer. I will explain in more detail the standard for supervisory liability in a moment.

To prove a claim against each individual Defendant, Plaintiff must establish, by a preponderance of the evidence, each of three elements:

- 1) that the conduct complained of was committed by a person acting under color of state law;
- 2) that the conduct deprived Plaintiff of his rights secured by the Constitution or laws of the United States, here the due process clause of the Fourteenth Amendment to the United States Constitution; and
- 3) that the Defendant's acts were the proximate cause of the deprivation.

I shall now examine each of the three elements in greater detail.

First Element: Color of State Law

The first element of any claim under section 1983 is that the acts of the defendant be done under "color of state law." In other words, the acts complained of must have occurred while the defendant was acting or purporting to act in the performance of his official duties. I instruct you, as a matter of law, that all Defendants were acting under color of state law and that Plaintiff has proven this element of all of his constitutional claim.

Second Element: Deprivation of Right

The second element of Plaintiff's claim is that he was deprived of a constitutional right to due process. A person is entitled to due process under the United States Constitution where he has a constitutionally recognized liberty or property interest. As a matter of law, in the context of this case Plaintiff has a protected liberty interest under the Fourteenth Amendment to be free from confinement in the Special Housing Unit and, therefore, was entitled to due process protections before being so confined.

In order for Plaintiff to establish this element, he must show by a preponderance of evidence that a Defendant committed some act or acts as alleged by Plaintiff which

caused Plaintiff to be deprived of his due process rights and, that, in performing such act or acts the Defendant acted intentionally.

As I have outlined above, Plaintiff's claim arises from alleged violations of his due process rights during a prison disciplinary hearing. Inmates are guaranteed certain procedural due process protections during prison disciplinary hearings. The procedural due process that an inmate is entitled to is as follows:

- (1) advance notice of the claims against him and a chance to prepare a defense;
- (2) a statement by the hearing officer as to the evidence relied upon and the reasons for any disciplinary action taken;
- (3) the opportunity to present evidence and call witnesses in his defense when doing so would not be unduly hazardous to institutional or correctional goals;
- (4) a fair and impartial hearing and hearing officer;
- (5) substantive assistance in collecting evidence and presenting a defense; and
- (6) only face disciplinary action when the verdict is supported by some evidence.

With respect to Plaintiff's opportunity to present evidence in a disciplinary hearing, an inmate in prison has a right to call witnesses and present evidence in his defense where it would not be unduly hazardous to "institutional safety or correctional

goals.” This is a flexible standard that balances the prisoner’s right to due process against the institutional needs of the prison.

An inmate has no constitutional right of cross-examination of witnesses at prison disciplinary hearings, nor does he have a right to call witnesses whose testimony will be redundant or cumulative. Furthermore, an inmate does not have the right to be present when witnesses are examined by the hearing officer if there is reason to believe that the inmate’s presence would be unduly hazardous to institutional safety or correctional goals.

A hearing officer is not required to call a witness if he reasonably concludes it would be redundant, cumulative, or futile, such as when an inmate witness refuses to testify. However, a hearing officer’s decision not to call or interview witnesses must be logically or reasonably related to preventing undue hazards to institutional safety or correctional goals. In this regard, the burden is never upon the inmate to prove the hearing officer’s conduct was arbitrary or capricious, but upon the official to prove the logical or rational basis for his position.

With respect to a fair and impartial hearing and hearing officer, that contemplates that the hearing be one in which the outcome is not arbitrarily and adversely predetermined.

In essence, in the context of a prison disciplinary hearing, due process is satisfied when the inmate is given adequate notice and an opportunity to be heard and the decision of the hearing officer is supported by “some evidence.” In the present case, you must decide whether the manner in which Defendant Freer conducted Plaintiff’s hearing was fair and impartial; provided the Plaintiff with the opportunity to present evidence; and whether the Hearing Officer’s decision is supported by some evidence. Your job is not to retry the disciplinary hearing or to substitute your judgment for that of the Hearing Officer. Also, the state court decision referred to during the course of the trial may not be considered by you as evidence of a lack of due process. Whatever a state court may determine with respect to the appropriateness of the procedure involved is not relevant to the issue before you. That issue is whether there was a constitutional violation of Plaintiff’s right to due process in light of the criteria set forth in these instructions.

Third Element: Proximate Cause of Plaintiff’s Injury

Plaintiff must show that Defendants’ actions caused a deprivation of Plaintiff’s constitutional due process rights.

SUPERVISORY OFFICIALS:

As I stated earlier, Defendant Mann and Defendant Selsky are being sued due to their supervisory capacity. Therefore, if you find that the conduct of Defendant Hearing Officer Freer denied the Plaintiff his rights under federal law, you must consider whether Defendant Mann and/or Defendant Selsky, as supervisory officials, may be liable for that conduct as well.

You may not find any of the Defendants liable merely because of a supervisory position they may have held. You may not find them liable merely because of their position in the chain of command or because of the actions of their subordinates. A defendant must be “personally involved” in the deprivation of Plaintiff’s constitutional rights.

There are several ways in which a supervisory official may be personally involved in a constitutional deprivation within the meaning of Section 1983. First, a defendant may have directly participated in the infraction. Second, a supervisory official, after learning of the violation through a report or appeal, may have failed to remedy the wrong. Third, a supervisory official may be liable because he has created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue. Finally, a supervisory official may be personally liable if he was grossly negligent in managing subordinates who caused the unlawful condition or event.

VIII. DAMAGES

If Plaintiff has proven by a preponderance of the credible evidence that a Defendant is liable on his claim, then you must determine the amount of damages to which Plaintiff is entitled for that claim. However, you should not infer that Plaintiff is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide the issues of liability outlined above, and I am instructing you on damages only so that you will have guidance should you decide that Plaintiff is entitled to recovery.

A. Compensatory Damages

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, resulting from a Defendant's violation of Plaintiff's rights. If you find that a Defendant is liable on Plaintiff's claim, as I have explained it, then you must award Plaintiff sufficient damages to compensate him for any injury proximately caused by that Defendant's conduct. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission was a substantial contributing factor in causing the injury or damage.

These are known as compensatory damages. Compensatory damages seek to make Plaintiff whole--that is, to compensate him for any damage he may have suffered. A

prevailing plaintiff is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of a defendant's conduct.

In the present case, Plaintiff has alleged that he suffered physical and emotional injury as a result of his being held in the Special Housing Unit for 17 ½ months. Plaintiff has the burden of proof to show that his placement in the Special Housing Unit was proximately caused by the Defendants' violation of his rights to due process.

You are to use your sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

B. Nominal Damages

Even if you find that Plaintiff has failed to provide proof that he is entitled to compensatory damages on his constitutional claim, you may still be required to award nominal damages in the amount of one dollar. Nominal damages must be awarded if you find that a Defendant violated Plaintiff's constitutional rights, even though Plaintiff suffered no injury as a result of this violation. In other words, you must award Plaintiff nominal damages in the amount of one dollar if you find that Plaintiff's constitutional rights were violated without any resulting physical or emotional damage.

IX. CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. This DOES NOT mean that the foreperson's vote is entitled to any greater weight than the vote of any other juror. Each juror's vote carries the same weight.

Your job as jurors is to reach a fair conclusion from the law and evidence. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other. You must deliberate with a view to reaching an agreement, but only if you can do so without violating your individual judgment and conscience. Do not surrender your honest convictions just for the purpose of returning a verdict. On the other hand, do not hesitate to re-examine your views. Remember you are not partisans. You are the judges -- judges of the facts. Your duty is to seek the truth from the evidence presented.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony read to you or my instructions further explained. I caution you, however, that the read-back of testimony may take some time and effort. You should, therefore, make a conscientious effort to resolve any questions as to testimony through your collective recollections.

Should you desire to communicate with the Court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshal who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom. In any communications with the Court, you should never state your numerical division.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the marshal a verdict has been reached. A verdict form has been prepared for each of you. I will now review it with you before you retire to the jury room.

A proximate cause is an act or omission that, in a natural course, produces injury and without this act or omission the injury would not have occurred.

Plaintiff need not prove, however, that a Defendant's conduct was the sole cause of his injuries. It is sufficient if the Defendant's conduct caused an aggravation of a pre-existing injury.

In order for Plaintiff to establish this element, he must show these things by a preponderance of evidence: first, that a Defendant committed the acts alleged by Plaintiff; second, that those acts caused Plaintiff to suffer the loss of a federal right; and, third, that, in performing the acts alleged, the defendant acted intentionally.

BOILERPLATE FOR CASES THAT FALL WITHIN THE EXTRAORDINARY EXCEPTION
CREATED BY PATTERSON:

However, if you find that Plaintiff's due process rights were violated specifically due to the failure of the Defendants to interview certain witnesses or to allow those witnesses to testify without a logical or rational basis, then the burden shifts to the Defendants to show that Plaintiff's placement in the Special Housing Unit would have occurred even if those witnesses had been interviewed or testified at the hearing.