IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STACEY MILLER,

Plaintiff,

v.

BRIAN BLANCHARD, JAC HEITZ,
TIM HAMMOND,

Defendants.

ORDER

04-C-255-C

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Plaintiff Stacey Miller is proceeding pro se in this action on his claim that defendants Blanchard, Heitz and Hammond violated his right to equal protection under the Fourteenth Amendment when they backed out of an agreement to request a reduction in his sentence. Plaintiff asserts that his race was a motivating factor in defendants' decision to withdraw their support for a reduction of plaintiff's sentence. Now plaintiff has moved for the appointment of counsel to represent him. The request will be denied.

Pursuant to 28 U.S.C. § 1915(e)(1), the court may request an attorney to represent any person unable to afford counsel. Plaintiff is not proceed in forma pauperis in this action and his motion is not accompanied by an affidavit of indigency and a trust fund account statement from which a finding could be made that he qualifies financially for appointed

counsel. Even if he did qualify for appointed counsel under § 1915, however, I would not appoint counsel in this case.

Appointment of counsel for an indigent litigants is appropriate when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)(quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not, however, whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

This is a straightforward case of race discrimination. Plaintiff is at least of ordinary intelligence. He has produced all of the pleadings and motions he has filed to date. He has followed court instructions in connection with service of his complaint on the defendants. At the preliminary pretrial conference held in this case on October 21, 2004, he was instructed in the use of discovery techniques available to him under the Federal Rules of Civil Procedure. There is no reason to believe that plaintiff is not competent to prosecute

his case himself.

Of course, like any litigant bringing a claim of race discrimination, plaintiff faces an uphill battle to prove his claim because there is rarely direct evidence to support such claims. Plaintiff asserts in his complaint that from January 2002 to February 2004, defendants entered into oral and written agreements with over fifty Caucasian inmates to seek lower sentences in exchange for their assistance with state cases and that defendants consistently fulfilled the terms of those agreements. Although this allegation was sufficient at the first stage of plaintiff's lawsuit to allow him to proceed on his race discrimination claim, it will be extremely difficult for plaintiff to succeed in proving that each of the fifty Caucasian inmates was similarly situated to him so that an inference may be drawn that race must have been a motivating factor in defendants' decision to withdraw their support for his sentence reduction. Given the multitude of factors affecting the decisions of prosecutors to enter into bargains with persons charged with crime who may be able to assist in the prosecution of other persons engaged in crime, it seems doubtful that in the end, plaintiff will be able to prove that he was similarly situated to any Caucasian inmate who retained a recommendation for a reduced sentence from defendants. In sum, I believe that plaintiff is competent to prosecute his own case in light of the complexity of the legal issues involved and that having a lawyer would not make a difference in the outcome of the lawsuit.

ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

Entered this 27th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge