

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ORLANDO MATTHEWS,

Plaintiff,

ORDER

v.

04-C-482-C

MARTEN TRANSPORT, LTD.; RANDY
MARTEN and WILLIAM (BILL) KENNEDY,
in their official and individual capacities,

Defendants.

Having satisfied the prerequisite set out in Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992), to make reasonable efforts to find a lawyer on his own, plaintiff has moved a third time for the appointment of counsel to assist him with this case.

Federal district courts are authorized by statute to appoint counsel for an indigent litigant 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).

In his complaint, plaintiff alleges that he has been subjected to race discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1985. In particular, he alleges that beginning at least around November 1, 2002, the defendants conspired to discriminate against him on the basis of his race by maintaining unwritten policies and practices for performing inadequate vehicle maintenance checks on company vehicles driven by defendants' black employees. In addition, plaintiff alleges that defendants conspired to "shame, ridicule, embarrass and unjustly terminate him" from his job because of his race, using as a pretext to discharge him his alleged failure to exercise due diligence in connection with a vehicle accident. Plaintiff alleges that defendants terminate African-American employees at a "much higher rate" than Caucasian employees and engage in a pattern and practice of evaluating, compensating and promoting African-American employees less generously than Caucasian employees.

It is not easy to prove a claim of race discrimination. Plaintiff will have to undertake

extensive discovery to gather the evidence to prove his claims. Nevertheless, plaintiff appears to be at least of ordinary intelligence. He has produced all of the pleadings and motions he has filed to date. His response to defendants' motion to dismiss (Dkt. #20) is tailored precisely to the issues raised in the motion. He has followed court instructions in connection with his various motions for appointment of counsel. At the preliminary pretrial conference held in this case on November 4, 2004, he was instructed in the use of discovery techniques available to him under the Federal Rules of Civil Procedure. Indeed, plaintiff has already utilized discovery procedures in an effort to learn the name of the administrator of the estate of defendant William Kennedy, who died before he could be served with plaintiff's complaint.

In Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004), the court of appeals reiterated a view it has held for at least 15 years that denying a request for appointment of counsel will constitute an abuse of discretion if it would result in fundamental unfairness infringing on the plaintiff's due process rights. It found such a fundamental unfairness to exist in Gil, because Gil's status as a Colombia national created serious language barrier problems for him that rendered him incapable of litigating his case in light of the complexities of applying state law and rules of evidence to his claims under the Federal Tort Claims Act and federal law and rules of evidence to his Eighth Amendment claim.

Plaintiff Matthews is not similarly situated to Mr. Gil. Federal case law and

evidentiary rules govern all of his claims. Plaintiff speaks, writes and understands English. The obstacles he faces in gathering the evidence he needs to prove his case may be difficult, but the inherent difficulty in proving cases raising claims of discriminatory intent or motive is not sufficient by itself to require appointed counsel. If this were the case, there would be legal precedent mandating the appointment of counsel in all Title VII cases. There is no such precedent, nor is there likely to be.

As helpful as it would be to plaintiff and to the court to have the assistance of counsel, I solicit such help only in rare instances in which the plaintiff is unusually handicapped in presenting his case or the issue raised is one of significance. Only a limited number of lawyers are capable of representing indigent plaintiffs in civil cases and willing to do so without any compensation and without reimbursement for expenses. Federal courts and federal plaintiffs are not the only supplicants for help from this limited group.

According to the Wisconsin State Bar's website, <http://www.wisbar.org>, an estimated 467,943 Wisconsin residents are presently living below 100% of the federal poverty threshold. Approximately 220,000 of these persons need civil legal services each year. Approximately 63,800 of these individuals actually seek access to the legal system. 18,500 are assisted by legal services programs (a number that is dwindling because of budgetary cuts) and approximately 3,000 are assisted by Wisconsin lawyers participating in volunteer lawyer panels. The areas of need are multiple. Wisconsin's lawyers assume the costs of pro

bono representation in civil cases raising claims of violations of the American's with Disability Act (especially employment discrimination, accessibility, specialized transportation, and right to community service) the Fair Housing Act, Medicaid and Medicare regulations, Social Security, Homestead Credit, and Title VII discrimination. They assist persons with claims of deinstitutionalization from mental health facilities; abuse and neglect in institutions, schools, and community settings; the right to free and appropriate education, access to Assistive Technology (communication devices, education aids); and insurance discrimination. They assist numerous others with claims relating to family law, child support, family preservation, subsidized housing, welfare, consumer complaints, unemployment compensation and driver's license reinstatement. They litigate cases for persons living with HIV or AIDS on a variety of matters including, estate planning, guardianships, discrimination, bankruptcy and insurance disputes. They take on cases raising claims of unconstitutional conditions of confinement in Wisconsin's prisons and represent churches and other non-profit entities with their legal needs. Nevertheless, approximately 42,300 of those individuals seeking relief in Wisconsin's courts had to represent themselves. The Legal Services Corporation, which was created in 1974 to provide legal assistance to low-income Americans, estimates that four out of every five income-eligible people who apply for assistance are turned away because of the lack of resources to help them all. Legal Services Corporation, "Serving the Civil Legal Needs of Low-Income

Americans: A Special Report to Congress” (2000). Simply put, there are not enough lawyers to meet the needs of all of the persons who want or need their help.

Plaintiff’s case is not exceptional, nor are his circumstances. He is free to utilize the Wisconsin Self-Help Center at <http://www.wicourts.gov/services/public/selfhelp/info.htm> to obtain links to legal law libraries and federal law. In addition, he has been provided with this court’s procedural rules to assist him in bringing or defending against a motion for summary judgment, and his motions and other papers will be construed generously by the court to determine whether they fit within the Federal Rules of Civil Procedure. At the preliminary pretrial conference held in this case on November 3, 2004, plaintiff was schooled in the use of discovery mechanisms. If this case goes to trial, plaintiff will receive written instruction about the manner in which the trial will be conducted and what he will be expected to prove. In sum, I believe that plaintiff is capable of prosecuting this lawsuit and that having appointed counsel will not make a difference in the case's outcome. Therefore, his motion for appointment of counsel will be denied.

Next, I turn to the question whether William Kennedy can be maintained as a defendant in this lawsuit. As I noted earlier, when a deputy United States Marshal attempted to serve defendant Kennedy with plaintiff’s complaint, he learned that defendant Kennedy had died. That fact is shown in the court’s record as of August 4, 2004, when the Marshal’s process and receipt form made out for Kennedy was returned unexecuted.

In an order dated August 9, 2004, I informed plaintiff that under Fed. R. Civ. P. 25(a)(1), he had 90 days from August 4 (the date the suggestion of Kennedy's death appeared in the court's record) within which to file a motion for substitution of Kennedy's estate in place of Kennedy. I directed plaintiff to advise the court in writing no later than September 6, 2004, whether he intends to dismiss his claims against defendant Kennedy or move to substitute defendant Kennedy's estate as a defendant. I noted also that if plaintiff advised the court that he would be moving for substitution of the parties, he should be prepared either to provide the name and address of the person to be served with his complaint on behalf of defendant Kennedy's estate or to advise the court of his progress in learning the name of such individual.

On September 7, 2004, plaintiff filed a letter in which he stated that he was in the process of trying to find Kennedy's next of kin. He advised the court that he was forwarding a copy of his letter to Susan Deetz, the Human Resource Manager at Marten Transport, in the hopes she would provide plaintiff or the court with that information. On September 14, 2004, plaintiff filed a document titled "Motion for Discovery" (Dkt. #10), in which he asked the court to order defendants Marten Transport and Randy Marten to disclose the address of defendant William Kennedy's estate administrator.

On October 5, 2004, Magistrate Judge Stephen Crocker denied plaintiff's motion as premature. The magistrate judge advised plaintiff that discovery in civil lawsuits involving

pro se litigants does not begin until after the preliminary pretrial conference, which in this case was scheduled for November 3. He told plaintiff that at the conference, he would discuss discovery generally and direct the parties to file motions “pursuant to the rules laid down by the court.” Apparently, the magistrate judge did not realize at the time that the 90-day deadline for substituting Kennedy’s estate would occur on November 1, 2004, two days before the preliminary pretrial conference. Nor did he note that the information plaintiff wanted from the defendants in discovery is available to him in public records.

Curiously, there is no indication in the court’s record that plaintiff raised the matter of defendant Kennedy’s death at the November 3 conference or that he asked any questions of the magistrate judge about how he might learn who Kennedy’s estate administrator is so that he could substitute the estate as a party. Nevertheless, I conclude that it is in the interests of justice to allow plaintiff one final opportunity to make the substitution. Although it may be that defendants possess information about who was named as the administrator of defendant Kennedy’s estate, they are not required to divulge such information to plaintiff if plaintiff can just as easily obtain the information from the public record. In this instance, plaintiff should be able to obtain the information he needs directly from the Register in Probate for Buffalo County, Wisconsin. The phone number for the county register is (608) 685-6202.

ORDER

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

Further, IT IS ORDERED that plaintiff may have until December 17, 2004, in which to substitute defendant William Kennedy's estate for William Kennedy and provide an address at which the estate administrator may be served with plaintiff's complaint. If, by December 17, 2004, plaintiff fails to provide the information necessary to serve the estate with his lawsuit, then this action will be dismissed as to defendant Kennedy.

Entered this 22nd day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge