

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

DONALD LEE PIPPIN, JR.,

Plaintiff,

ORDER

04-C-582-C

v.

JUDY P. SMITH - Warden of Oshkosh
Correctional Institution;

JIM SCHWOCHERT, Security Director at OSCI;

TOM EDWARDS, HSU Director at OSCI;

DR. ALEXANDER STOLARSKI, Chief Psychologist at OSCI;

CAPT. DERRINGER, 1st Shift Security at OSCI;

JOHN DOE, 1st Shift Security at OSCI (accomp. Dr. A.S. on 4/20/04);

LT. ROBERT BLECHL, 2nd Shift Security at OSCI (now Capt. and 1st Shift),

Defendants.

Plaintiff Donald Lee Pippin Jr. has been granted leave to proceed in forma pauperis on his claims that

1) an unnamed official refused to send a letter he wrote in violation of his rights under the First Amendment (plaintiff is proceeding against defendant Judy Smith for the sole purpose of discovering the name of the individual who is allegedly responsible for the refusal);

2) medical staff at the Oshkosh Correctional Institution violated his rights under the Eighth Amendment by not obtaining corrective shoes for him (plaintiff is proceeding against

defendant Tom Edwards for the sole purpose of discovering the name or names of the medical staff who are allegedly responsible for this alleged violation of the Eighth Amendment);

3) defendant Blechl refused to mail plaintiff's letters to family and friends in violation of his rights under the First Amendment;

4) defendants Stolarski, Judy Smith, Schwochert and Doe conspired to deprive plaintiff of his constitutional right of access to the courts; and

5) defendants Schwochert and Derringer conspired to deprive plaintiff of his constitutional right of access to the courts by creating false transportation costs that he could not afford to pay.

Now plaintiff has moved for the appointment of counsel, contending that having a lawyer is necessary because he is unfamiliar with the procedures of the court and does not have the same access to "materials of import to this case, as a lawyer." Plaintiff contends also that his case is "complex" and that "there are many legal issues that are far above my skills as a layperson."

Plaintiff's motion is not accompanied by a showing that he made reasonable efforts to retain counsel and was unsuccessful or that he was precluded effectively from making such efforts. This is a prerequisite to requesting appointed counsel from the court. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Ordinarily, before the court will find that the plaintiff has made reasonable efforts to secure counsel it requires a plaintiff to

provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. However, because plaintiff's motion will be denied in any event, I will assume that he has made reasonable efforts to obtain counsel.

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).

Plaintiff has not shown exceptional circumstances in his case. He appears to be at least of ordinary intelligence. Indeed, when he filed his complaint in this court, plaintiff admitted to acting in a superior legal capacity to his then co-plaintiff, Shannon Steindorf, for whom he alleged he was serving as power of attorney and assisting to litigate three separate lawsuits. The record reveals that plaintiff Pippin has produced all of the pleadings and motions he has filed to date. At the preliminary pretrial conference held in this case on

August 3, 2005, he was instructed in the use of discovery techniques available to him under the Federal Rules of Civil Procedure and defendants' counsel was requested to work with plaintiff to assist him in identifying the defendants who have not yet been identified by name.

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 Pippin 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 they are not exceptional given plaintiff's proven abilities.

Moreover, 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 unusual 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 small group of lawyers willing to provide pro bono services. 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 Americans 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.

As noted above, plaintiff's case is not exceptional, or are his circumstances. 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. 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.

ORDER

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

Entered this 19th day of August, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge