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

JEFFREY E. OLSON,

Plaintiff,

v.

DONALD MORGAN, RANDY SCHNEIDER and DR. LILLY TENEBRUSCO,

Defendants.

ORDER

11-cv-282-slc

Plaintiff was granted leave to proceed *in forma pauperis* in this case on his claims that defendants Morgan and Schneider failed to protect him from an attack by another inmate, defendant Schneider filed conduct reports against plaintiff in retaliation for plaintiff's complaints that Schneider failed to protect him, and that defendant Tenebrusco failed to provide plaintiff with medical treatment for the injuries caused by the other inmate's attack. On July 25, 2011 defendants filed an answer raising various affirmative defenses. Now plaintiff has filed both a response to defendants' answer and a motion for appointment of counsel. *See* dkts. 22 and 23.

As a starting point, this court would appoint a lawyer to almost every pro se plaintiff if lawyers were available to take these cases. But they are not. Most lawyers do not have the time, the background or the desire to represent pro se plaintiffs in a pro bono capacity, and this court cannot make them. So the court only appoints counsel in cases where there is a demonstrated need, using the appropriate legal test.

In deciding whether to appoint counsel, I must first find that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he asked to represent him on the

issues on which he has been allowed to proceed and who turned him down. Plaintiff has not yet taken this first step. However, even if plaintiff had shown that he made a reasonable effort, plaintiff must also demonstrate that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). It is too early to make that determination in this case.

In his motion, plaintiff says he requires the assistance of a lawyer because his imprisonment greatly limits his ability to litigate this case, the issues in this case are complex , he has only limited access to the law library and a lawyer would be better able to conduct discovery and present evidence at trial. Further, plaintiff states that he suffers from severe depression, which is worsening due to his recent transfer to the Wisconsin Secure Program Facility.

Although it is understandable that plaintiff is concerned that he may not be able to litigate this case himself, he should know that he is in the same position as most other pro se litigants, almost none of which have legal training of any kind. At the preliminary pretrial conference, which is scheduled for August 17, 2011, I will provide plaintiff with information about how to use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. In addition, plaintiff will have an opportunity to ask questions about this court's procedures and he will be sent a written copy of the procedures discussed at the conference, which were written for the very purpose of helping pro se litigants understand how these matters work.

Thus far, plaintiff is doing a capable job of representing himself. His submissions are well written and he appears capable of following instructions and making intelligible arguments in his pleadings. In addition, plaintiff has personal knowledge of the facts and circumstances surrounding his claims and he should be able to fill in the gaps through discovery. Accordingly,

I will deny plaintiff's motion without prejudice at this time. Plaintiff is free to renew his motion at a later date.

Turning to plaintiff's response to defendants' answer and affirmative defenses, plaintiff does not need to be concerned. Although defendants have raised certain affirmative defenses in their answer, defendants have not filed an actual motion to dismiss. Therefore, plaintiff does not need to reply to the answer. If defendants later file an actual motion to dismiss, then plaintiff will be allowed to respond to that motion. In the meantime, Rules 7(a) and 8(b)(6) of the Federal Rules of Civil Procedure work together to protect plaintiff from defendants' claims in the answer. Because of those rules, this court does not need plaintiff to reply to the answer; instead, the court automatically assumes that plaintiff has denied the factual statements and affirmative defenses raised in that answer.

ORDER

IT IS ORDERED that:

(1) Plaintiff's reply to the answer, dkt 22, will be placed in the court's file but will not be considered; and

(2) Plaintiff's motion for appointment of counsel, dkt. 23, is DENIED without prejudice.

Entered this 1st day of August, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge