IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

Plaintiff, ORDER

v. 01-C-0589-C

C.O. LOCKWOOD,

Defendant.

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The parties in this case have completed briefing cross-motions for summary judgment. On August 5, 2003, while briefing was still in progress, plaintiff moved for appointment of counsel, complaining that because he was having difficulty obtaining discovery from defense counsel, he could not "send in his complete motion for summary judgment."

The record reveals that plaintiff moved on July 30 and again on August 13, 2003, to compel defendant to produce responses to certain discovery requests. On August 27, 2003, I granted plaintiff's motions to compel, noting that although defendant apparently had provided plaintiff with some of the requested materials, plaintiff was still waiting for production of documents defendant had not objected to providing to him. Specifically, I ordered defendant to produce Dodge Correctional Institution's non-smoking policies and

procedures updated for the years 1998-2003, and the "names of inmates that are witnesses and have written statements on Lockwood's actions in the complaint."

Despite the fact that plaintiff claims he had not obtained all the discovery he wanted, he filed his own motion for summary judgment a month earlier than the August 14, 2003 dispositive motions deadline set in my May 22, 2003 preliminary pretrial conference order. See Dkt. ## 47, 48 and 49. Defendant filed a cross motion for summary judgment on August 18, 2003. He supported the cross motion with proposed findings of fact and evidentiary materials and responded to the proposed findings of fact plaintiff had submitted in support of his motion. Plaintiff was allowed until September 18, 2003, in which to oppose the motion.

Nevertheless, instead of waiting to receive a response from this court on the motions to compel, plaintiff began responding to defendant's motion as early as August 22, 2003, by filing a large packet of documents titled "Plaintiff's Submission of Exhibit DSP in Support of Motion for Summary Judgment filed with this Court on 7-10-03 - Amended - Continuing" (Dkt. #60). Three days later on August 25, 2003, plaintiff filed

1) a brief in opposition to defendant's motion (Dkt. #61);

2) a response to defendant's proposed findings of fact (Dkt. #62) (the response contains references to plaintiff's Exhibit DSP filed on August 22);

3) a formal brief in support of his own motion (Dkt. #63); and

4) a reply to defendant's response to his proposed findings of fact numbered 1-13 (Dkt. #64).

On September 8, 2003, plaintiff filed another document titled "Plaintiff's Reply to Defendant's Proposed Findings of Fact and Conclusions of Law Amending Fed. R. 56." The document contains plaintiff's reply to defendant's response to his proposed findings of fact numbered 13-27. Defendant has indicated in a letter dated August 26, 2003, that he will not be filing a reply to the response plaintiff made to defendant's proposed findings of fact. It is doubtful that defendant will change his position after seeing plaintiff's September 8 submission, as the submission contains nothing more than plaintiff's agreement that paragraphs no. 13-26 are legal conclusions, and a statement that Exhibit DSP shows that Dodge Correctional Institution has a non-smoking policy.

As plaintiff is aware from Judge Crabb's earlier orders denying two previous motions for appointment of counsel, before the court can consider a pro se plaintiff's motion for appointment of counsel, the plaintiff must make a showing that he has made reasonable efforts to find a lawyer on his own. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff still has not done that. However, his motion would have to be denied in any event.

The determination whether to appoint counsel is to be made by considering whether the plaintiff is competent to represent himself given the complexity of the case, and if he is

not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995)(citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)).

Plaintiff is competent to read, express his thoughts in writing and follow directions generally. The legal issue in his case is moderately complex. The question is whether defendant Lockwood was deliberately indifferent to an excessive risk to plaintiff's mental health in violation of the Eighth Amendment when he smoked cigars in plaintiff's vicinity. Plaintiff's ability to succeed on his claim will rest entirely upon the facts presented on a motion for summary judgment and, if he survives summary judgment, at trial.

Plaintiff cannot argue that he could not properly move for summary judgment or oppose defendant's motion without first having received the materials I directed defendant to provide in the August 27 order. Otherwise, he would not have filed his own motion a full month before the deadline or opposed defendant's motion without waiting for a response to his motions to compel. In any event, neither Dodge Correctional Institution's non-smoking policies and procedures updated for the years 1998-2003, nor the "names of inmates that are witnesses and have written statements on Lockwood's actions in the complaint" are critical to the success of plaintiff's claim.

Unfortunately for plaintiff, his case is the kind of case that cannot succeed without the testimony of a mental health expert. In his motion for summary judgment, defendant

suggests that plaintiff was housed at the Dodge Correctional Institution on Unit 10 from August 24, 2001 until September 17, 2001, and that on only seven of those days defendant Lockwood worked on the unit. Defendant does not dispute that while he was on Unit 10, he smoked cigars. To be entitled to judgment in his favor, plaintiff must have put in evidence to prove that defendant Lockwood knew that by smoking cigars in plaintiff's vicinity, he was creating an excessive risk to plaintiff's mental health.

Plaintiff has proposed facts suggesting that he made Lockwood aware generally of his psychological aversion to cigars. Even if this were to constitute adequate proof of defendant's knowledge that what he was doing was so harmful as to create an excessive risk to plaintiff's mental health, plaintiff must prove that the exposure to cigar smoke on seven days in a three week period did in fact pose an excessive risk to his mental health. He cannot prove this prong of his claim without the testimony of a mental health expert.

Plaintiff may believe that the fact that he needs an expert is reason alone to appoint him counsel. He would be mistaken. The cost of experts is high. For this reason, most individuals of limited means suing for medical or mental health mistreatment of the serious nature required to state a claim under the Eighth Amendment seek out a lawyer who would be willing to take the case on a contingent fee basis. This means that if the plaintiff wins, the cost of the experts will be recovered and the lawyer will be paid for his or her time and expenses in pursuing the case. The contingent fee system serves as a reality check for

litigants. If no lawyer with a background in medical or mental health mistreatment cases is willing to take plaintiff's case, chances are high that the case is one the lawyers have assessed either as not likely to succeed or as not likely to result in a damage award large enough to recoup the expense of prosecuting the case.

Plaintiff has not found a lawyer willing to take his case. When a court asks a lawyer to take a case, however, it is difficult for the lawyer to decline. Therefore, in a case such as this one, I am not inclined to select a lawyer to take the case without regard for his or her assessment of the risks of incurring the expense of the lawsuit against the probability of succeeding on the merits of the case.

Because briefing on the motions for summary judgment is complete and because appointment of counsel is not likely to effect the outcome of this case, plaintiff's motion for appointment of counsel will be denied.

ORDER

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

Entered this 10th day of September, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge