IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff, ORDER

v. 02-C-459-C

GEORGE DALEY, Director for the Bureau of Health Services; SHARON ZUNKER, Assistant Director of B.H.S.; MARC CLEMENTS, W.C.I.'s security director; BETH DITTMANN, Health Services Unit (H.S.U.) Supervisor at W.C.I.; PAM BARTELS, Supermax's H.S.U. Supervisor; DR. PHILLIPE BELGADO, Doctor at W.C.I.; DR. HASSELHOFF, doctor at Supermax; UNIDENTIFIED MEMBERS OF THE PROGRAM REVIEW COMMITTEE; S. HOUSER, Captain at W.C.I.; WILLIAM SCHULTZ, staff at W.C.I.; KEN LANGE, nurse at Supermax; C.O. FRIDAY, guard at W.C.I.; and SGT. BURNS, a sergeant at W.C.I.;

Defendants.

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Plaintiff Lindell has filed a motion for appointment of counsel, an undated letter in which he asks for a "protective order" against certain actions of prison officials that make it more difficult for him to prosecute this case, such as skipping him at meal time if he is sleeping, harassing him with warnings and demoting him, and for an order compelling

defendants to give him copies of photographs related to plaintiff's claim that he suffered a broken nose that defendants refuse to treat. In addition, plaintiff has submitted a letter dated April 8, 2003, in which he repeats his request for an order compelling discovery, contends that defendants have failed to identify the Doe defendants as required by the magistrate judge's March 13, 2003 preliminary pretrial conference order, and asks for an order compelling prison officials to give him paper, carbon paper, envelopes, postage and photocopies of documents he needs to prosecute this case now that he has exceeded his $200 legal loan limit for the year.

I will start with plaintiff's requests for an order compelling defense counsel to disclose the names of the Doe defendants. According to the magistrate judge's preliminary pretrial conference order, counsel had until April 3, 2003, in which to identify all Doe defendants fitting the description provided in plaintiff's complaint, that is, members of the Program Review Committee who allegedly assigned plaintiff to a cell housing another prisoner who assaulted him. Plaintiff was given until April 17, 2003 in which to amend his complaint to replace all references to the Doe defendants with the names provided by counsel.

The court's file reflects that on April 3, 2003, defense counsel sent plaintiff a copy of a letter addressed to Clerk of Court Joseph Skupniewitz. Another copy of the letter is enclosed to plaintiff with a copy of this order. In the letter, counsel lists the names of the Program Review Committee members who made decisions regarding plaintiff's placement.

Also in his letter, counsel comments that Program Review Committee members do not have authority to make cell assignments.

Although it is quite possible that plaintiff has received defendants' counsel's letter identifying the names of the Program Review Committee members named in plaintiff's complaint, he may not have kept it or read it carefully, given the fact that it was addressed to the Clerk of Court rather than to plaintiff or to Magistrate Judge Crocker, who ordered the disclosure. Therefore, I will allow plaintiff one week, or until Monday, May 12, 2003, in which to amend his complaint to substitute the names of the members where the names of the Does previously existed. However, before plaintiff decides to pursue the amendment, he should consider carefully whether the members of the Program Review Committee will be entitled to prompt dismissal on the ground that they were not personally involved in assigning plaintiff to a cell in which he was in physical danger. Plaintiff is reminded that he has been allowed to proceed in forma pauperis against defendant Burns and the members of the Program Review Committee on his claim that these defendants were deliberately indifferent to his safety when they assigned him to a cell with a black inmate, knowing the combination would be volatile and a danger to his physical safety. He has not been granted leave to proceed on a claim that his constitutional rights were violated by his transfer to or retention at the Waupun Correctional Institution, where the assault occurred.

Plaintiff has moved for an order compelling defendants to answer his requests for

discovery, which I presume includes a request for a copy of photographs taken of plaintiff after he was assaulted by his cell mate. However, in an order dated April 15, 2003, I granted defendants an enlargement of time to May 10, 2003, in which to respond to plaintiff's discovery requests. Accordingly, plaintiff's motion for an order compelling discovery will be denied as premature.

In his motion for a protective order, plaintiff contends that prison officials are harassing him by skipping him at meal time if he is sleeping, and by giving him warnings and demotions. Plaintiff contends that these actions are making it difficult for him to prosecute this case.

I construe plaintiff's motion as a motion for an order enjoining prison officials from interfering with his ability to litigate this lawsuit. The motion will be denied, because plaintiff has not shown that the alleged interference directly and physically prevents him from performing the acts he is required to perform in order to move this case to resolution. Certainly, plaintiff cannot contend that a missed meal or warnings and demotions keep him from writing motions and filing them in this case, as is evidenced by the list of motions that I am addressing in this orders. Unless plaintiff has evidence that prison officials are physically preventing him from prosecuting this case, he should not raise his complaints about harassing behavior in this case. Plaintiff's motion for an order enjoining prison officials from interfering with his ability to litigate this lawsuit will be denied.

Finally, plaintiff has moved for appointment of counsel to represent him in this case. Plaintiff is aware that before I can consider a motion for appointed counsel, he must show 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 has satisfied that prerequisite. He has identified eight different lawyers to whom he has written about his case and who have declined to represent him.

Nevertheless, 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 cannot seriously argue that he lacks the mental ability to litigate his case given its complexity or that he is unfamiliar with court procedure. In the last two years, he has earned the status of a frequent litigator in this court. In December 2002, he was actively prosecuting nine separate lawsuits in state and federal court. He is a self-professed jailhouse lawyer who has attempted in the past to prosecute claims on behalf of other inmates. See Lindell v. Litscher, 02-C-79-C (W.D. Wis. July 15, 2002)(dismissing case where co-plaintiffs gave plaintiff permission to litigate their claims, without prejudice to plaintiffs' filing separate lawsuits). He makes cogent legal arguments and is familiar with almost every kind

of constitutional claim that can arise in the modern prison setting. He does not need appointed counsel to help him with discovery or even to defend against a motion for summary judgment. He is intimately familiar with those processes.

Plaintiff's request for appointed counsel is motivated almost entirely by his admitted inability to pay the costs of litigating his many cases. He concedes that he has no means to take depositions or hire an expert to testify about the seriousness of the injuries he sustained at the hands of his cell mate. He has come to realize the consequence of litigating multiple lawsuits simultaneously. He is out of money, has no means to pay back past legal debts and has surpassed the $200 legal loan limit for another year. Thus, according to plaintiff, he does not even have enough money to pay the costs of postage for mailing his filings in this case to the court and opposing counsel, or obtain photocopies of his medical records or other documents necessary to prove his claims, because of his utter destitution.

Sadly, the difficulties plaintiff faces in continuing the prosecution of this lawsuit are difficulties plaintiff should have considered *before* he filed his lawsuit. He has shown no willingness to weigh the relative importance of his claims or the urgency of prosecuting them simultaneously. Instead, he has found no official indiscretion too small to avoid challenge in a lawsuit. See, e.g., Lindell v. Doe, 01-C-209-C (claim that one withheld issue of periodical publication violates plaintiff's First Amendment rights). In January 2003 in Lindell v. Doe, 01-C-209-C, I cautioned plaintiff about continuing his practice of filing

frivolous motions, given his growing legal loan debt and his inability to earn an income sufficient to keep pace with his litigation costs. In that order, I noted that plaintiff had a history of exceeding his own resources and the legal loans provided to him by the state by filing frivolous or repetitive motions. See, e.g., Lindell v. Litscher, case no. 02-C-21-C, (W.D. Wis. Dec. 22, 2002) (noting plaintiff's practice of filing frivolous motions despite having exceeded his annual $200 legal loan limit by $500). On January 31, 2003, I denied plaintiff leave to proceed in forma pauperis in a new lawsuit, Lindell v. McCallum, 02-C-473-C, because it was evident from the 62-page complaint and the host of claims spanning a four-year period that he lacked the means to prosecute the suit to completion and because no claim was the type requiring prompt review in order to protect plaintiff from imminent danger of serious physical injury. In reaching this conclusion, I considered the large debt plaintiff owes for his past lawsuits, his total lack of income, and the likelihood that he would be unable to pay the costs of mailing and photocopying documents needed to successfully prosecute all of the other cases he had pending at that time. The wisdom of that decision is confirmed by plaintiff's current predicament.

It is unfortunate that plaintiff has chosen to file more lawsuits than he can afford to prosecute at one time. However, his doing so is not a valid reason to appoint counsel. Ordinarily, lawyers are willing to represent plaintiffs on a contingent fee basis in cases alleging medical mistreatment. Under this arrangement, 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 mistreatment cases is willing to take a 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.

Eight lawyers have passed on the opportunity to represent plaintiff in this case. The fact that plaintiff has been unable to find a lawyer on his own is an indication that the costs of litigating his suit outweigh its potential for a damage award sufficient to recoup the expenses of an expert. In any event, I will not appoint a lawyer for the sole purpose of shifting the costs of plaintiff's lawsuit to a member of the bar. If plaintiff is to be represented by counsel, he will have to find counsel on his own. If he wishes, he may contact the Wisconsin State Bar Lawyer Referral and Information Service at P.O. Box 7158, Madison, Wisconsin, 53707, 1-800-362-8096, to obtain the names and phone numbers or addresses of lawyers whose practices include medical malpractice or Eighth Amendment cases.

Finally, I will not order prison officials to give plaintiff extensions of his legal loan privileges beyond what they believe is appropriate under the state's rules governing legal loans. I have advised plaintiff on numerous other occasions that he does not have a

constitutional right of access to the court that requires a state to grant him unlimited amounts of free postage and paper. If plaintiff chooses, he may request voluntary dismissal of this case immediately and I will consider granting the motion without prejudice to his filing a new lawsuit at a later date when he is able to pay the costs of litigating his case. Otherwise, plaintiff will have to litigate this case to completion using the limited resources he is allowed or face dismissal of the case down the road for his failure to prosecute.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for an order compelling defendants to give him the names of the Doe defendants is DENIED as moot. The names of the Doe defendants are listed in the letter attached to plaintiff's copy of this order.

2. Plaintiff may have until May 12, 2003, in which to amend his complaint to substitute the names provided in defendants' April 3, 2003 letter for the "Unidentified Members of the Program Review Committee." If, by May 12, 2003, plaintiff fails to amend his complaint, I will dismiss the Doe defendants from this case.

3. Plaintiff's motion to compel discovery is DENIED as premature.

4. Plaintiff's motion for an order enjoining prison officials from interfering with his ability to litigate this lawsuit is DENIED because plaintiff has not shown that he is entitled

to such relief in the context of this lawsuit.

5. Plaintiff's motion for the appointment of counsel is DENIED.

6. Plaintiff's motion for an order compelling prison officials to allow him to exceed the legal loan limits in order to prosecute this action to completion is DENIED.

Entered this 2nd day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge