IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM SCOTT SELDEN,

Plaintiff, ORDER

v. 03-C-332-C

SHERIFF DENNIS HILLSTEAD,
DEPUTY CARMEN HANSEN, CAPT.
KAREN HUMPHRIES, and NURSE SUE LINDBERG

Defendants.

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In this civil action, plaintiff was granted leave to proceed in forma pauperis on a claim that defendants gave him another inmate's medication on February 19, 2003, causing him to suffer an allergic reaction. Shortly after defendants answered the complaint, the court and defendants' counsel lost contact with plaintiff. The case was dismissed without prejudice on October 22, 2003, for plaintiff's failure to prosecute.

More than a year later, in early November 2004, plaintiff wrote to the court to ask what he had to do to reopen the case. In a memorandum dated November 8, 2004, I told plaintiff that I was hesitant to reopen his case, given his earlier abandonment of the lawsuit

with no notice to the court and opposing counsel. I told plaintiff that before I would reopen his case, he would have to file a motion to reopen and convince me that he is prepared to diligently litigate this case to completion. In addition, I called plaintiff's attention to the original order granting him leave to proceed, in which I spelled out for him what he would have to prove in order to succeed on his claim. I reminded plaintiff that he would have to prove that each defendant gave him the wrong medication (although it seemed unlikely that four different people actually handed him or directed that he receive a single dose of someone else's medication) *knowing* that it was not his medication and *knowing* or *recklessly disregarding* the risk that the medication would cause him serious harm (which I also thought dubious, given plaintiff's allegation that he was taken to the hospital as soon as the risk to his health became apparent). Finally, I reminded plaintiff that if the evidence in this case were to show that one or more of the defendants simply made a mistake in administering the wrong medication to him, he could not succeed on his Eighth Amendment claim, even though the consequences of that mistake were very serious.

Now, plaintiff has filed a letter postmarked December 21, 2004, which reads in full, "I'm in the middle of a civil lawsuit. I'm requesting to reopen my case. I'm sorry to bother you but any help would be much appreciated. Thank you very much." On January 3, 2005, plaintiff filed a motion for appointment of counsel. These submissions are presently before the court.

Neither of plaintiff's recent submissions persuades me that plaintiff is prepared to prosecute his case diligently if it were to be reopened. Indeed, plaintiff suggests in support of his motion for appointment of counsel that he has "little knowledge of . . . the law," cannot "expose the nature of the evidence involved in this case," and is unable to present his case without counsel. He contends that the "issues are too complex" for him and that he cannot rely on inmate assistance to help him with his lawsuit.

Plaintiff has 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. He lists the names and addresses of 10 lawyers to whom he has written who have declined to represent him. Nevertheless, were this case to be reopened, I have statutory authority to appoint counsel for indigent litigants when "exceptional circumstances" justify such appointments. 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 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).

As noted above, I already have expressed my view that plaintiff may not be able to prove his claim that defendants violated the Eighth Amendment when they gave him the wrong medication. Indeed, it is quite possible that plaintiff did not realize at the time he filed his complaint that a claim that a prison official was simply careless in dispensing medication is a state law negligence claim that should be brought in state court, not federal court. It was only because there was a remote possibility that plaintiff could eventually adduce some evidence that the misdelivery of medication was deliberate and intended to cause him harm (a construction I am required by federal law to give complaints at the screening stage) that I allowed him to proceed on his complaint.

If plaintiff is going to pursue this action, he will have to do it on his own. He appears to be at least of ordinary intelligence. Despite his view to the contrary, the issue he raises is not complex. Either one or more of the defendants intentionally distributed the wrong medication to him hoping to harm him or the incident was a mistake. Plaintiff has suggested no reason to conclude that he cannot use the federal rules for discovery to learn whether any evidence exists to prove that his Eighth Amendment rights were violated. Moreover, because there is only the slimmest chance that evidence of an evil motive exists, I am convinced that a lawyer would not make a difference in the outcome of plaintiff's case.

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 Seldon is not similarly situated to Mr. Gil. Federal case law and evidentiary rules govern all of his claims. The case law was explained to plaintiff in the order granting him leave to proceed. In addition, at the first stage of every lawsuit, the magistrate judge routinely assists pro se litigants in understanding discovery procedures and other procedures that must be followed in litigating their cases. 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 Eighth Amendment claims 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 Eighth Amendment cases. There is no such precedent.

Plaintiff's case is not exceptional, nor are his circumstances. If plaintiff were to advise me that he is willing to pursue this case on his own, he would be 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 and, as noted above, he would be advised about the use of discovery mechanisms at a preliminary pretrial conference. Moreover, if this case were to go to trial, plaintiff would receive written instruction about the manner in which the trial would be conducted and what he would 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, plaintiff's motion for appointment of counsel will be denied.

Because plaintiff may have believed that his motion for appointment of counsel would be granted when he asked to reopen this case, I will stay a decision on the motion to reopen to allow plaintiff to consider whether he is prepared to prosecute this case on his own and, if he is, to advise me of that fact.

ORDER

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

Further, IT IS ORDERED that a decision on plaintiff's motion to reopen is STAYED until January 18, 2005, by which time plaintiff must advise this court, in writing, that he continues to wish the case reopened and that he will prosecute this action on his own. If, by January 18, 2005, plaintiff fails to confirm his desire to reopen this case, then I will

consider that the motion has been withdrawn and the case will remain closed.

Entered this 6th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge