IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

PARISH GOLDEN,

Plaintiff,

ORDER

03-C-0403-C

v.

GERALD BERGE and JON LITSCHER,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Plaintiff is proceeding in this case on his claims that while he was a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, defendants Berge and Litscher violated his Eighth Amendment rights by denying him the ability to exercise, subjecting him to sleep deprivation and other physical and psychological injuries as the result of constant cell illumination, and causing him physical injury as a result of severe cell temperatures. Presently before the court is plaintiff's second motion for appointment of counsel.

On October 22, 2003, I denied plaintiff's motion for appointment of counsel on two grounds. I concluded that first, it was too early in the lawsuit to determine whether plaintiff was capable of litigating this action and, second, that plaintiff had failed to make the showing required by Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992), that he

had made reasonable efforts to retain counsel on his own.

In support of his second motion, plaintiff lists the following factors he believes weigh in favor of appointed counsel: 1) his case is factually complex; 2) he expects he will have to counter or cross-examine "medical/psychological expert witnesses called by the defendants, or both parties"; 3) he is presently confined at the Dodge Correctional Institution, where he will be unable to interview, locate or identify potential inmate witnesses who were housed at the Wisconsin Secure Program Facility at the time he was confined there; 4) there will be a credibility contest between the parties; 5) he does not know how to present his case at trial or prepare a pretrial report or summary judgment motion; and 6) he has limited access to a law library. In addition, plaintiff has made a showing that he has written to three law firms for assistance in prosecuting this case and that two of the firms have declined to assist him. I presume the third firm will also decline to represent plaintiff, given the fact that it is a firm known primarily for its personal injury practice and not for work it might do in the area of constitutional law or prisoner rights litigation.

As I told plaintiff in the October 22 order, once he has satisfied his obligation to search for counsel on his own, the court must determine whether 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)). I am not

persuaded that plaintiff is unable to represent himself or that counsel would make a difference in the outcome of his lawsuit.

Although plaintiff contends that his case is complex, that there will be a credibility contest and that he needs to learn the identities of other inmate witnesses, I disagree with these assessments. The claims plaintiff must prove are relatively straightforward. First, he will have to prove that his health was threatened by the lack of opportunity to exercise and the severity of his cell temperatures. His medical records and inmate complaints about his health relating to cell temperatures and lack of exercise will be a starting point in obtaining evidence to prove these claims. These documents are readily available to plaintiff. In addition, plaintiff can conduct discovery to obtain any records defendants may have of the cell temperatures in his housing unit at the time he claims he was subjected to unconstitutional conditions. Plaintiff will not be able to prove these claims by calling on other inmate witnesses to testify about the temperatures in their cells or the effects they may have suffered from a lack of exercise. As the magistrate judge explained to plaintiff at the November 18, 2003 preliminary pretrial conference held in this case, he can find an explanation of how he might get information and documents from the defendants in Rules 26 through 37 of the Federal Rules of Civil Procedure, a book that is available to plaintiff in the prison law library.

With respect to plaintiff's claim that he was subjected to sleep deprivation and other

physical and psychological injuries because of constant cell illumination, it is unlikely that having counsel will make a difference in the outcome of the claim. In another lawsuit brought by an inmate challenging the Wisconsin Secure Program Facility's constant illumination, Pozo v. Hompe, 02-C-12-C, slip op. April 8, 2003 (W.D. Wis.), defendants put in evidence to prove that during 1999, 2000 and most of 2001, the nightlight at the facility consisted of a 7- watt, twin tube fluorescent light mounted in the center of the ceiling; that near the end of 2001, prison officials began replacing the 7-watt bulbs with 5-watt bulbs; and that now all bulbs are 5 watts. I concluded that such constant low-light illumination, by itself, does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Moreover, in Horton v. Berge, 02-C-470-C (W.D. Wis. Mar. 12, 2003), I concluded that defendants were entitled to qualified immunity on plaintiff's claim for money damages for alleged sleep deprivation based on this same lighting.

Under the liberal construction I must give allegations in a complaint at its initial stage, I allowed plaintiff to proceed in forma pauperis on his cell illumination claim on the remote chance that plaintiff would be able to prove that the lighting in his cell was more severe than the 7-watt bulbs already proved to have been in use and that his prolonged exposure to the more intense lighting caused him physical or emotional harm. Plaintiff should be able to obtain discovery from defendants to learn what wattage bulbs were in place in his cell at the time of his incarceration at the facility. If he learns that the bulbs were not

significantly greater than 7 watts, his claim is doomed.

It is true that if plaintiff were to succeed in obtaining evidence that his particular cell lighting was significantly greater than 7 watts, he will have to prove not only that he suffered physical and psychological injury, but that his injuries were caused by the lighting and not some other factor. This will likely be impossible without expert testimony to make a scientific connection between plaintiff's documented symptoms and proof of ill effects and the lighting in his cell. Plaintiff notes that his potential need for an expert is a ground for appointing him counsel. However, because the chance is so slim that plaintiff will be able to prove that his cell temperatures exceeded those that defendants have proved to exist in other cases in this court, I am not willing to appoint counsel on this ground.

Finally, plaintiff states that his time in a law library is limited and that he does not know how to prepare a pretrial report, a motion for summary judgment or present his case at trial. Every pro se litigant who prosecutes a lawsuit for the first time is unfamiliar with court procedure. However, plaintiff had an opportunity to ask specific questions about his concerns during the preliminary pretrial conference held on November 18, 2003. In addition, he has received this court's summary judgment procedure, which is attached to the magistrate judge's preliminary pretrial conference order. This procedure was written in part to insure that all litigants, including pro se litigants, have clear instructions on the requirements for filing or defending motions for summary judgment.

As noted above, plaintiff's ability to succeed in this case depends far more on the evidence he will be able to gather and submit in support of his claims than on providing the court with legal citations. His limited time to visit the prison law library does not warrant appointment of counsel.

Finally, because it is far too early to tell whether this case will survive dispositive motions, I will not consider at this time whether plaintiff possesses the skills to present his case at trial.

ORDER

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

Entered this 1st day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge