IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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VINCENT FAYNE,

Plaintiff, ORDER

v. 03-C-0215-C

CORRECTIONAL OFFICER WALTER,

Defendant.

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Plaintiff is proceeding pro se and in forma pauperis in this action. Now plaintiff has filed a motion for appointment of counsel. Although plaintiff does not explain why he wants appointed counsel, I presume plaintiff believes he will be disadvantaged in prosecuting his case by a lack a legal education or experience in civil litigation and that he is concerned about his limited knowledge of court procedure.

In considering whether counsel should be appointed, I first must determine whether plaintiff made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff does not indicate that he made any effort to find a lawyer on his own. Ordinarily, before the court will find that the plaintiff has made reasonable

efforts to secure counsel it requires a plaintiff to provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. However, even if plaintiff had fulfilled this requirement, I would deny his motion for appointed counsel.

The question whether to appoint counsel in civil cases is resolved by determining whether a pro se plaintiff is competent to represent him or herself 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).

Even assuming that plaintiff is unskilled in the law and has little understanding of court proceedings, he is in the same position as most other pro se litigants. In this court, persons who represent themselves are given an opportunity early on in the lawsuit to ask questions they may have about court procedure. As soon as defendant files a response to plaintiff's complaint, the court will schedule a preliminary pretrial conference to be held by telephone before the United States Magistrate Judge. At the conference, the magistrate judge will set a trial date and schedule deadlines for gathering evidence, naming witnesses and filing certain types of motions. Also, the magistrate judge will answer any questions about procedure that plaintiff has. In addition, he will send plaintiff written confirmation of the deadlines that are set and a written copy of various procedures discussed at the

conference.

The issues plaintiff raises in his case are not particularly complex. Plaintiff has been allowed to proceed on claims that defendant Walter used excessive force against him and refused to get him medical treatment for the nerve damage injury he sustained as a result of the use of force, and that defendant engaged in both of these wrongful acts because of plaintiff's race. The law governing equal protection, excessive force and medical mistreatment claims is well-settled. It is explained in this court's May 22, 2003 order allowing plaintiff to proceed in forma pauperis. Plaintiff's ability to succeed on his claims will rest largely upon the evidence plaintiff is able to obtain to prove his claims. In this regard, plaintiff should have personal knowledge of the incidents giving rise to his claims and his medical records should show the extent of his injuries.

It is true that plaintiff will need to obtain expert medical testimony to prove his claim that defendant Walter was deliberately indifferent to a serious medical need. However, plaintiff's need for expert testimony does not by itself warrant appointment of counsel. Most individuals suing for medical 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 mistreatment cases is willing to take plaintiff's case, chances are high that the claim 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.

As noted earlier, plaintiff has not indicated that he has asked any lawyer to take his case. Once he begins this process, he will either find a lawyer willing to take the case or he will discover that no lawyer is willing to do so. It is difficult for lawyers to decline to take a case when the court asks them to do so. Therefore, in situations such as this, it is inappropriate for a court 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. 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, although it may be difficult for plaintiff to prove his equal protection claim given the likelihood that there will be little evidence, if any, that plaintiff's race was the motivating factor behind defendant Walter's alleged actions, I am not convinced that a lawyer would make a difference in the outcome of this claim.

In summary, I believe that plaintiff has the ability to prosecute this case given its

moderate complexity.

ORDER

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

Entered this 13th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge