

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL L. WINSTON,

Plaintiff,

v.

PHIL KINGSTON, MIKE  
VANDENBROOK and JOHN DOES  
unlimited, sued in their official and  
individual capacities,

Defendants.

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ORDER

04-C-59-C

Plaintiff is proceeding pro se and in forma pauperis in this case on his claims that while he was confined at the Columbia Correctional Institution, defendants violated his right to be free from cruel and unusual punishment under the Eighth Amendment when they placed him temporarily in an observation cell that was excessively cold, unsanitary and lacked adequate bedding. Now plaintiff has filed a response to defendants' answer and a motion for appointment of counsel.

With respect to plaintiff's response to defendants' answer, the document will be placed in the court's file but will not be considered. It is true that defendants have raised

certain affirmative defenses in their answer, but they have not filed a motion to dismiss. If defendants were to file such a motion, plaintiff would be allowed to respond to it. Otherwise, Fed. R. Civ. P. 7(a) forbids a plaintiff to submit a reply to an answer unless the court directs him to do so. The court has not directed plaintiff to file a reply to the answer in this case. However, this will not disadvantage plaintiff. Fed. R. Civ. P. 8(d) provides that averments in pleadings to which a response is not allowed are assumed to be denied. Therefore, although plaintiff will not be permitted to respond to defendants' answer, the court assumes that he has denied the factual statements and affirmative defenses raised in that answer.

Turning to plaintiff's motion for appointment of counsel, plaintiff states that he is unable to afford a lawyer and believes the issues in his case to be complex. In addition, he states that he has limited access to a law library and almost no knowledge of the law. Finally, he points out that he has written to at least six legal service agencies to request counsel and none has agreed to represent plaintiff.

As plaintiff appears to be aware, the determination whether to appoint counsel is 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 did a remarkable job of supporting his motion for appointment of counsel with a brief containing legal authority and an affidavit. He indicates that he has a high school education. That education is evident in the pleading and other papers he has submitted in this case. Plaintiff notes that he is unskilled in the law and has no understanding of court proceedings. However, most pro se litigants are similarly disadvantaged. In this court, a preliminary pretrial conference is held early in the case. At that conference, plaintiff will have an opportunity to ask questions about this court's procedures. Also, he will be given documents that describe court procedures that will assist him in prosecuting his case.

Contrary to plaintiff's view, I do not believe plaintiff's case is complex. The subject matter of this lawsuit focuses on a single event that occurred when plaintiff was placed in an observation cell at the Columbia Correctional Institution. The law governing Eighth Amendment claims relating to conditions of confinement is well settled. The leading cases were highlighted in this court's order granting plaintiff leave to proceed on his claims. Plaintiff's need for a law library is minimal. His ability to succeed on his claims will rest entirely upon the facts presented on a motion for summary judgment or at trial.

Plaintiff argues that he will need an expert to testify about the psychological damage he suffered as a result of his experience in the observation cell. Before it will be necessary for plaintiff to prove his entitlement to compensatory damages for defendants' acts, he will

have to prove that the conditions of his confinement were so inhumane that they violated the Eighth Amendment. Plaintiff will not need expert testimony to make that showing. Even if plaintiff were ultimately to require expert testimony concerning the gravity of the conditions of his confinement and its effect on his psychological state, I would not appoint counsel for the sole purpose of shifting the cost of an expert to the lawyer. Individuals bringing actions of the serious nature required to state a claim under the Eighth Amendment are free to 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 Eighth Amendment 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.

It is difficult for lawyers to decline to take a case when the court asks them to do so. Therefore, in an ordinary conditions of confinement case such as this one, 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 Eighth Amendment cases.

ORDER

IT IS ORDERED that plaintiff's reply to the answer will be placed in the court's file but will not be considered.

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

Entered this 22nd day of April, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge