IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL HILL,

Plaintiff,

v.

GARY THALACKER, GREGORY GOODHUE, MICHAEL BARTKNEHT, TERRY CARD and JOHN SHOOK,

Defendants.

ORDER

04-C-732-C

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This is a civil action for money damages brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). On November 22, 2004, I granted plaintiff leave to proceed on his claims that defendants Gary Thalacker, Terry Card and John Shook denied him a pay grade promotion because of his race, that defendants Thalacker, Card and Shook, Gregory Goodhue and Michael Barknecht retaliated against plaintiff for filing an administrative grievance about the allegedly discriminatory promotional practices and that all defendants conspired to retaliate against plaintiff for filing a grievance. Defendants have not yet filed an answer. Now plaintiff has moved for appointment of counsel. In addition, he has moved to submit an affidavit of a fellow inmate

ex parte and place the affidavit under seal.

Plaintiff's motion to file an affidavit ex parte and under seal will be denied. It is not this court's practice to consider documents filed by one party that have not been served on the opposing party in compliance with Fed. R. Civ. P. 5. In any event, the affidavit is unnecessary to a decision on plaintiff's motion for appointment of counsel. It simply confirms plaintiff's assertion in his brief that he has received the assistance of other inmates to prepare the documents he has filed in this case. If plaintiff does not want the affidavit to be part of the public record of this case, he should advise the court promptly of the name and address of the person to whom he wishes the affidavit sent so that it may be removed from the file.

Turning to plaintiff's motion for appointment of counsel, the Court of Appeals for the Seventh Circuit has held that before a district court can consider such motions, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff suggests that he has made reasonable efforts to find a lawyer, but the papers he submitted in support of his request do not bear this out. To show that he has made reasonable efforts to find a lawyer, plaintiff must submit the names and addresses of at least three lawyers that he asked to represent him and who turned him down. Plaintiff has submitted letters he wrote in late October and early November to

lawyers in Milwaukee, Wisconsin, New York, New York, Chicago, Illinois, Champaign, Illinois and Cincinnati, Ohio. He has not supplied this court with a copy of any letter rejecting his requests, but even if he had, I would not find that his attempts to seek help from lawyers in states other than Wisconsin constitutes a reasonable effort. It is not reasonable to expect a lawyer to accept a pro bono case that requires him or her to absorb the expenses of traveling hundreds of miles to visit with his client or investigate the facts of his client's complaint. If plaintiff is to make the necessary showing of having made a reasonable effort, he will have to solicit help from lawyers in Madison or areas closer to Oxford, Wisconsin, where he is confined and await the responses to those letters so that he can submit them to the court. He can obtain the names of lawyers in the Western District of Wisconsin whose practices include race discrimination and First Amendment retaliation cases by contacting the Wisconsin State Bar Lawyer Referral and Information Service at P.O. Box 7158, Madison, Wisconsin, 53707, 1-800-362-8096.

Plaintiff should be aware that even if he is unsuccessful in finding a lawyer on his own, that does not mean that one will be appointed for him. At that point, this court must consider whether plaintiff is able to represent himself given the legal difficulty of the case, and if he is not, whether having a lawyer 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 states that he has an IQ of 65 and has relied on help

from other inmates to bring this case. In addition, he states that he will not be able to depend on inmate assistance to prosecute his case to completion. Even accepting plaintiff's allegation that his IQ is lower than average, I may deny his motion under certain circumstances that may yet develop. For example, if defendants were to respond to plaintiff's complaint by filing a motion to dismiss for plaintiff's failure to exhaust his administrative remedies, I would not consider a renewed motion to appoint counsel until after the motion to dismiss had been decided. Under this hypothetical circumstance, I would expect one of two things to occur. Either plaintiff could obtain the assistance of another inmate to help him gather and submit proof of exhaustion, if he had such proof or, if he did not have such proof, I would have to grant the motion to dismiss. Having a lawyer would make no difference in the outcome.

In short, this case is simply too new to allow the court to evaluate plaintiff's abilities or the likely outcome of the lawsuit. Therefore, the motion will be denied without prejudice to plaintiff's renewing his request at a later time.

ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED without prejudice.

Entered this 7th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge