IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

ORDER

Plaintiff,

04-C-979-C

v.

C.O. SCHEFFER,

Defendant.

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In an order dated February 15, 2005, I granted plaintiff Frederick Rogers leave to proceed in forma pauperis on his claim that defendant Scheffer used excessive force against him on April 28, 2003, by pulling on a tether around his right hand and "injuring and breaking [plaintiff's] finger and wrist and upper forearm." Defendant has not yet filed a responsive pleading. Now plaintiff has filed a motion for appointment of counsel, together with an affidavit and brief in support and a list of three lawyers who have declined to represent him.

"Although civil litigants do not have a constitutional or statutory right to counsel, the district court has the discretion pursuant to 28 U.S.C. § 1915(e) to request attorneys to represent indigents in appropriate cases." Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir.

1997 ). "As a threshold matter, a litigant must make a reasonable attempt to secure private counsel." Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995). As noted above, plaintiff has submitted a list of three lawyers he asked to represent him and who declined to do so. I am satisfied that he has made a reasonable attempt to secure private counsel. "After meeting this threshold burden, the plaintiff must demonstrate that her case is one appropriate for the appointment of counsel." Id. The court must inquire whether "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome." Donald v. Cook County Sheriff's Dept., 95 F.3d 548, 554 n.1 (7th Cir. 1996) (quoting Farmer v. Haas, 990 F. 2d 319, 322 (7th Cir. 1993)). However, the test is not whether a good lawyer may have done better than the pro se litigant. Lutrell, 129 F.3d at 936.

I am not convinced that plaintiff's case is so complex or difficult that appointed counsel is warranted. He alleges a one-time incident of the use of excessive force against a single defendant. The law regarding excessive force claims is well-established and was set out in the order granting plaintiff leave to proceed. Plaintiff's complaint is competently drafted, as is his motion for appointment of counsel. Plaintiff appears to worry that his claim might require him to obtain the testimony of an expert witness, but his concern is unfounded. The testimony of a medical expert might be required if plaintiff were alleging deliberate indifference to a serious medical need, but that is not the case here. Plaintiff is alleging the

use of excessive force. If his medical records show that defendant broke his bones and the evidence reveals that plaintiff's own behavior did not warrant the use of such force, then plaintiff will succeed in proving his Eighth Amendment claim. See, e.g., Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004) (citing Ledford v. Sullivan, 105 F.3d 354, 360 (7th Cir. 1997)) (where plaintiff's injury is not beyond layperson's grasp, no expert witness needed).

Plaintiff expresses concern about his lack of legal skill. However, this court's own records reveal that he is a seasoned litigant. In this court alone he has filed seven different lawsuits. He is experienced in discovery matters and defending against motions for summary judgment. He is familiar with preliminary pretrial conferences and court procedure. His ability to succeed will rest largely upon the evidence he is able to obtain to prove his claims. In this regard, plaintiff should have personal knowledge of the incident giving rise to his claim and, as noted above, his medical records should show the extent of his injuries.

In sum, the challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every other pro se litigant claiming the use of excessive force and he is better equipped than the average pro se litigant to present the matter himself. Therefore, I conclude that plaintiff is capable of prosecuting this lawsuit and that having appointed counsel will not make a difference in the case's outcome.

ORDER

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

Entered this 24th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge