

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

GLENN M. DAVIS,

Plaintiff,

v.

ORDER
05-C-374-C

CATHERINE J. FERRY,
Warden of New Lisbon Corr. Inst.,¹

Defendant.

Plaintiff is proceeding against defendant Catherine Ferry in this action on his claim that for eight months beginning in December 2004, prison officials in the mail room at the New Lisbon Correctional Institution opened seven pieces of his legal mail, all of which were clearly labeled as legal mail. (Plaintiff is proceeding against defendant Ferry for the sole purpose of learning who might have been personally involved in these incidents.) In response to the complaint, defendant moved to dismiss the action for plaintiff's failure to exhaust his administrative remedies as he is required to do under 42 U.S.C. § 1997e. According to a briefing schedule established by the clerk of court, plaintiff has until

¹Defendant has pointed out in her response to plaintiff's complaint that plaintiff misspelled defendant's name in the caption of his complaint. I have corrected the caption to reflect the proper spelling.

October 11, 2005, in which to oppose the motion. Now, however, Plaintiff has filed what appear to be two motions for appointment of counsel (Dkt. ## 18 and 19) and a document titled "Notice of Motion and Motion for Writ of Habeas Corpus ad Testificandum" (Dkt. #20). None of these documents appears to have been served on Assistant Attorney General Mary Batt, who is representing the defendant in this case. Therefore, for the sake of efficiency but this one time only, I am sending Ms. Batt a copy of plaintiff's submissions. In the future, however, the court will not consider documents plaintiff files unless he marks them clearly with a notation that he has served a copy on Ms. Batt.

Plaintiff's motion for a writ of habeas corpus ad testificandum will be denied as premature. Plaintiff asks that he be allowed to attend the trial of this case, but the trial date has not yet been scheduled in this case. At the preliminary pretrial conference which will be held on October 20, 2005, I will schedule a trial date and establish deadlines for completing discovery and filing dispositive motions. If plaintiff's case is resolved on a dispositive motion, such as a motion to dismiss, there will be no trial. If, however, it later becomes clear that the case cannot be resolved without a trial, the court will on its own initiative issue a writ of habeas corpus ad testificandum to secure plaintiff's presence at trial.

Plaintiff's motions for appointment of counsel also will be denied. In an order dated August 29, 2005, Judge Crabb considered a request for appointment of counsel that plaintiff included in his complaint. Judge Crabb told plaintiff that before the court could consider

his request, he would have to show that he had made reasonable efforts to retain counsel on his own and had been unsuccessful. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff's recent motions are not accompanied by such a showing. Instead, plaintiff argues simply that he is not capable of researching complex legal issues, conducting discovery or taking depositions and that it is unfair for the defendant to have a lawyer but not him.

Plaintiff is not incapable of responding to defendant's motion to dismiss. The motion will be decided on the basis of the administrative exhaustion materials submitted by the parties. Plaintiff does not have to research the legal issues, conduct discovery or take a deposition in order to present proof that he filed one or more inmate complaints about the alleged improper opening of his legal mail and that he appealed any adverse responses to his inmate complaints to the corrections complaint examiner and the secretary of the Department of Corrections as prison regulations require. If plaintiff's case survives the motion to dismiss, he can renew his motion for appointment of counsel so long as it is accompanied by the showing of the steps he has taken to find a lawyer on his own as Judge Crabb has already advised him he is required to take.

ORDER

IT IS ORDERED that plaintiff's motion for a writ of habeas corpus ad testificandum (Dkt. #20) is DENIED as premature.

Further, IT IS ORDERED that plaintiff's motions for appointment of counsel (Dkt. ##s 18 and 19) are DENIED without prejudice.

Entered this 5th day of October, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge