

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

THOMAS W. REIMANN,

Plaintiff,

v.

DAVID ROCK, JOHN PAQUIN,
MS. TIERNEY, CATHERINE FERREY
and LIZZIE TEGELS,

Defendants.

ORDER

05-C-501-C

Plaintiff is proceeding in this action on four claims:

1. Defendant Rock violated his Eighth Amendment rights by failing to implement a soft restraint restriction when plaintiff is transported outside the prison;
2. Defendants Catherine Ferrey and Lizzie Tegels violated his First Amendment rights when they ordered his transfer from the New Lisbon Correctional Institution to the Jackson Correctional Institution in November 2004 in retaliation for plaintiff's having threatened to file a lawsuit regarding non-delivery of his mail.
3. Defendants John Paquin and Ms. Tierney violated plaintiff's First Amendment rights when they transferred him from the Jackson Correctional Institution to the Stanley

Correctional Institution in retaliation for his having filed inmate complaints.

4. Defendant Rock violated plaintiff's rights under the Eighth Amendment by reducing his medications.

Present before the court is plaintiff's second motion for appointment of counsel to assist him in the case. The motion will be denied.

As plaintiff is already aware, before I can consider his motion, I must first find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he asked to represent him in this case and who turned him down. Plaintiff has done that. He has attached several letters from lawyers declining to represent to his motion.

Second, I must review plaintiff's motion for the existence of "exceptional circumstances" justifying an appointment of counsel. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)(quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). Exceptional circumstances will exist where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would

the presence of counsel [make] a difference in the outcome?" Id. The test is not whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

Plaintiff asserts that he is about to be transferred to another prison, where he will have "no way to secure affidavits from prisoners on the other side of the compound." He will have no access to a typewriter for at least two months. He does not believe he will be able to prove on his own the inadequate "efficacy of treatment provided by [defendant] Rock." He is having difficulty obtaining discovery from defendants' counsel and he has ongoing medical problems, including "testicular atrophy," which "will make plaintiff unable to father any children upon release from prison."

Plaintiff does not explain why he will not be able to communicate with other prisoners to obtain their affidavits. His physical distance from them should be irrelevant. If he believes another inmate was a witness to his events giving rise to his lawsuit, he may request permission from prison officials to communicate with that inmate in writing.

Plaintiff's temporary lack of access to a typewriter is not a ground for appointing counsel. Although plaintiff notes that he suffers daily pain and fatigue, among other ailments such as "pitting edema" and "'Terrny's Nails' (red palms)," he suggests no reason why he cannot hand-write documents he wishes to file in this case or use computer equipment in the prison law library to prepare his filings.

As for plaintiff's alleged inability to prove his claim that defendant Rock is violating his Eighth Amendment rights by reducing his narcotic pain medication, it appears fairly certain after the facts pertaining to this claim were developed more fully in connection with plaintiff's motion for a preliminary injunction that plaintiff will not succeed in any event on this Eighth Amendment claim. Having a lawyer will not make a difference in the outcome of this matter.

Plaintiff knows precisely what to do about the difficulties he is having with discovery. He has already filed and obtained decisions on four separate motions to compel discovery.

Finally, although plaintiff points out that he suffers from "testicular atrophy, pitting edema, Terry's Nails, constant pain, chronic fatigue, pruritus, abdominal distention, weight gain, arthralgias, myalgias, worsening of his neuropathy. . . depression, cognitive dysfunction," and a high viral load, these ailments have not prevented him from submitting a 35-page complaint in this case, moving twice for a preliminary injunction and supporting the motions with multiple affidavits, moving multiple times for reconsideration of various orders and succeeding in part on one of them, moving to strike pleadings and conducting discovery. Although plaintiff has a tendency to argue from time to time about matters unrelated to the claims on which he has been allowed to proceed in this action, his intermittent lack of focus is not an exceptional circumstance warranting appointment of counsel.

In Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004), the court of appeals reiterated a view it has held for at least 15 years that denying a request for appointment of counsel will constitute an abuse of discretion if it would result in fundamental unfairness infringing on the plaintiff's due process rights. It found such a fundamental unfairness to exist in Gil, because Gil's status as a Colombia national created serious language barrier problems for him that rendered him incapable of litigating his case in light of the complexities of applying state law and rules of evidence to his claims under the Federal Tort Claims Act and federal law and rules of evidence to his Eighth Amendment claim.

Plaintiff Reimann is not similarly situated to Mr. Gil. Federal case law and evidentiary rules govern all of his claims. Plaintiff speaks, writes and understands English. The obstacles he faces in gathering the evidence he needs to prove his case may be difficult but, as I have already informed plaintiff, the inherent difficulty in proving cases raising claims of retaliation and denial of medical care is not sufficient by itself to require appointed counsel.

As helpful as it would be to plaintiff and to the court to have the assistance of counsel, I solicit such help only in rare instances in which the plaintiff is unusually handicapped in presenting his case or the issue raised is one of significance. Only a limited number of lawyers are capable of representing indigent plaintiffs in civil cases and willing to do so without any compensation and without reimbursement for expenses. Federal courts

and federal plaintiffs are not the only supplicants for help from this limited group.

According to the Wisconsin State Bar's website, <http://www.wisbar.org>, an estimated 467,943 Wisconsin residents are presently living below 100% of the federal poverty threshold. Approximately 220,000 of these persons need civil legal services each year. Approximately 63,800 of these individuals actually seek access to the legal system. 18,500 are assisted by legal services programs (a number that is dwindling because of budgetary cuts) and approximately 3,000 are assisted by Wisconsin lawyers participating in volunteer lawyer panels. The areas of need are multiple. Wisconsin's lawyers assume the costs of pro bono representation in civil cases raising claims of violations of the Americans with Disability Act (especially employment discrimination, accessibility, specialized transportation, and right to community service) the Fair Housing Act, Medicaid and Medicare regulations, Social Security, Homestead Credit, and Title VII discrimination. They assist persons with claims of deinstitutionalization from mental health facilities; abuse and neglect in institutions, schools, and community settings; the right to free and appropriate education, access to Assistive Technology (communication devices, education aids); and insurance discrimination. They assist numerous others with claims relating to family law, child support, family preservation, subsidized housing, welfare, consumer complaints, unemployment compensation and driver's license reinstatement. They litigate cases for persons living with HIV or AIDS on a variety of matters including, estate planning,

guardianships, discrimination, bankruptcy and insurance disputes. They take on cases raising claims of unconstitutional conditions of confinement in Wisconsin's prisons and represent churches and other non-profit entities with their legal needs. Nevertheless, approximately 42,300 of the individuals seeking relief in Wisconsin's courts had to represent themselves. The Legal Services Corporation, which was created in 1974 to provide legal assistance to low-income Americans, estimates that four out of every five income-eligible people who apply for assistance are turned away because of the lack of resources to help them all. Legal Services Corporation, "Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress" (2000). Simply put, there are not enough lawyers to meet the needs of all of the persons who want or need their help.

The record shows that plaintiff is more savvy than most pro se litigants prosecuting cases in this court. He appears to understand the rules governing civil actions and has used them to his benefit. He has been provided written procedures to be followed on motions for summary judgment and for emergency injunctions and for calling witnesses to trial. He will receive additional instruction concerning his preparation for trial if his case advances that far. In sum, I believe 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 second motion for the appointment of counsel is DENIED.

Entered this 26th day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge