IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS W. REIMANN,

ORDER

Plaintiff,

05-C-501-C

v.

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

Defendants.

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In this civil action brought pursuant to 42 U.S.C. § 1983, plaintiff is proceeding on three claims:

1) Defendant David Rock violated plaintiff's 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 transferred plaintiff from the New Lisbon Correctional Institution to the Jackson Correction Institution in retaliation for plaintiff's threats to exercise his First Amendment right to file a lawsuit regarding non-delivery of his mail; and

3) Defendants John Paquin and Ms. Tierney transferred plaintiff from the Jackson

Correctional Institution to the Stanley Correctional Institution in retaliation for plaintiff's exercise of his First Amendment right to file inmate grievances.

After I screened plaintiff's original complaint, plaintiff filed, among other things, a motion for reconsideration of the screening order and a proposed amended complaint. In an order dated November 10, 2005, I gave plaintiff two weeks to inform the court whether he wanted the court to consider his proposed amended complaint or whether he wanted to stand on his original complaint and have the court consider his motion for reconsideration.

Now plaintiff has filed 1) a motion for appointment of counsel (Dkt. #16); 2) an affidavit in support of his motion for reconsideration (Dkt. #17); and 3) a document entitled "Plaintiff's Affidavit in Response to November 10, 2005 Court Order" (Dkt. #18), in which plaintiff "requests that this Court deem the Motion for Reconsideration as moot, incorporate documents that were attached to the Affidavit in Support of Motion for Reconsideration to the original Amended Complaint as proof that SCI-2005-22612 was exhausted in full prior to the filing of this original action."

From this last document, I understand plaintiff to have chosen to have the court consider his proposed amended complaint. Therefore, I will deny his motion for reconsideration as moot with one exception. In the screening order, I denied plaintiff leave to proceed on his claim that defendant Rock violated his rights under the Eighth Amendment by reducing his medication because it appeared that plaintiff had not exhausted

his administrative remedies with respect to that claim. Now, however, plaintiff has attached documentation to his affidavit (Dkt. #17) which shows that he exhausted his administrative remedies with respect to this claim. Therefore, I will allow him to proceed on this claim against defendant Rock.

I turn now to plaintiff's proposed amended complaint, which I construe as including a motion for leave to file an amended complaint. I will deny the motion for leave to amend without prejudice to plaintiff's filing a new amended complaint. The proposed amended complaint plaintiff has already submitted does not conform to this court's policy concerning amended complaints. A cursory review of the amended complaint reveals that plaintiff has added two defendants who were not in his original complaint, omitted seven defendants who were in his original complaint and included many new allegations that were not in his original complaint. In short, it is difficult to discern what is new in the proposed amended complaint and what claims remain that I already have screened. Therefore, to avoid any confusion about exactly what plaintiff wishes to add or subtract from his proposed amended complaint, he will have to submit the proposed amended complaint in the following format: he should begin with a duplicate copy of his original complaint. He must then draw a line through the allegations that he no longer wishes the court to consider and highlight all allegations that he is adding to the complaint. It must be very clear to the court which allegations are new and which ones are old, as well as which ones plaintiff is dropping. If

plaintiff decides to submit a new amended complaint, he need not resubmit the documentation of his exhaustion efforts that he submitted with his original complaint and his recent affidavit.

I turn then to plaintiff's motion for appointment of counsel. Before the court can appoint counsel in a civil action such as this, it must find first that the plaintiff made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a plaintiff must list the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. In his motion, plaintiff states that he has written "numerous" lawyers concerning his case without success. However, he has not provided the names or addresses of any of the lawyers he has contacted.

Second, the court must consider 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)). Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer, 990 F.2d at 322 (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Seventh Circuit will

find such an appointment reasonable where 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. The test is not, however, 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).

In Hudson v. McHugh, 148 F.3d 859, 862 (7th Cir. 1998), the court of appeals found that it was not an abuse of the court's discretion to deny the prisoner plaintiff's request for a lawyer to represent him on his claim that he had been denied epilepsy mediation for 11 days, precipitating a seizure. The court of appeals acknowledged that although prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," it was reasonable for the court to evaluate the plaintiff to be as competent as any other average pro se litigant to present his case. Id. at n.1.

The challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every other pro se litigant claiming retaliation and deliberate indifference to a serious medical need. Like the plaintiff in Hudson, plaintiff will have to prove defendants' state of mind and the medical causation for his injury, if he has one. (At this early stage of the proceedings, there is no evidence in the record that plaintiff suffered any injury as a result of defendants' alleged reduction of his medication and refusal to enforce

a soft restraint restriction.) Such proof may be difficult to come by. But the fact that matters of state of mind and medical causation are tricky to prove is not sufficient reason by itself to find that plaintiff's case presents exceptional circumstances warranting appointment of counsel. If it were, it would be established law that district courts are not free to decline to appoint counsel for pro se litigants raising claims of denial of medical care.

Plaintiff argues that he is unskilled in drafting and filing documents. However, he does not allege any impairments, such as an inability to read or write. His submissions in this case, which he has presumably filed without the assistance of another inmate, reveal that he is at least as capable as the average pro se litigant to present his claims. His written submissions reflect his ability to understand what this court has said in its previous orders and to respond to them. Therefore, plaintiff's motion for appointment of counsel will be denied.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion for reconsideration is GRANTED in part. Plaintiff's request for leave to proceed in forma pauperis is GRANTED on his claim that defendant Rock violated his rights under the Eighth Amendment by reducing his medications.

2. Plaintiff's motion for reconsideration is DENIED in all other respects as moot.

3. Plaintiff's motion for leave to file an amended complaint is DENIED without prejudice; and

4. Plaintiff's motion for appointment of counsel is DENIED.

Entered this 1st day of December, 2005.

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