

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

ANTHONY D. TURNER,

Plaintiff,

v.

ORDER
05-C-508-C

PETER HUIBREGTSE,
DANE ESSER and SGT. MICKELSON,¹

Defendants.

Plaintiff is proceeding in this action brought pursuant to 42 U.S.C. § 1983 on his claim that defendants Esser and Mickelson sexually assaulted him on April 4, 2005, and that defendant Huibregtse knew both that Mickelson was involved in a series of sexual assaults and that there was a high risk that Mickelson would assault plaintiff, yet he consciously disregarded that risk. Presently before the court is plaintiff's motion for appointment of counsel.

In deciding whether to appoint counsel, I must first find that plaintiff has made

¹When the office of the Attorney General accepted informal service of plaintiff's complaint on defendant Esser, it advised the court that defendant Esser's first name is Dane, not Derrick as plaintiff had indicated in his complaint. Therefore, I have altered the caption of the case to reflect defendant Esser's true name.

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 not done that. He simply asserts that he has “tried numerous time to obtain counsel on his own, but has had no success.”

Even if plaintiff had submitted copies of rejection letters he received from three lawyers, I would deny his request. Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. 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)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable 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 has little access to the law library, limited knowledge of the

law, no prior experience in prosecuting a case and that if he fails to argue his case properly, defendants might be able to convince the jury that the violation of plaintiff's rights was justified. As for his lack of legal know-how, he is in no worse position than any other prisoner who files his first lawsuit pro se. He appears to be at least of ordinary intelligence. He appears to have produced his own filings in this case to date. At the preliminary pretrial conference scheduled to be held on January 4, 2006, he will be instructed in the use of discovery techniques available to him under the Federal Rules of Civil Procedure and informed of procedures he will be expected to follow in moving his case to resolution.

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 Turner 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 the

inherent difficulty in proving cases raising claims of abuse by prison guards is not sufficient by itself to require appointed counsel. If this were the case, there would be legal precedent mandating the appointment of counsel in such cases. There is no such precedent, nor is there likely to be.

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.

Plaintiff's case is not exceptional and neither are his circumstances. As noted above, he will be provided with this court's procedural rules to assist him in bringing or defending against a motion for summary judgment, and his motions and other papers will be construed generously by the court to determine whether they fit within the Federal Rules of Civil Procedure. If this case goes to trial, plaintiff will receive written instruction about the manner in which the trial will be conducted and what he will be expected to prove. 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. Therefore, his motion for appointment of counsel will be denied.

ORDER

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

Entered this 9th day of December, 2005.

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