IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAROME ANDRE POWELL,

Plaintiff, ORDER

v. 06-C-58-C

SERGEANT FINK, LIEUTENANT DURDIN
and CORRECTIONAL OFFICER KOPEHAMER,

Defendants.

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In an order dated February 7, 2006, plaintiff was granted leave to proceed on his claim that defendants Fink, Durdin and Kopehamer used excessive force against him in violation of the Eighth Amendment when they slammed his head into a shower door. Plaintiff was denied leave to proceed on his claim that defendants violated his Eighth Amendment rights when they placed him in a filthy prison cell for a period of 35 hours. Now before the court are plaintiff's motion for reconsideration of the February 7 order, "letter of clarification" (which I construe as a motion for clarification), motion for leave to file an amended complaint and second motion for appointment of counsel. I will address each in turn.

A. Motions for Reconsideration and Clarification

In his "letter of clarification," plaintiff corrects several "small misunderstandings" contained in the February 7 order. Amongst other things, plaintiff alleges that although he was handcuffed to the shower door, he was never "in" the prison shower stall; that after he was beaten, he was taken to the "disciplinary segregation building dayroom," not to the health services unit; that he was in controlled segregation status for 3 days, not 35 hours (35 hours is the length of time he was kept naked in the segregation cell); and that defendants Durdin, Fink and Kopehamer placed him in controlled segregation, not former defendants John Does 1-10. None of these facts changes the legal analysis of plaintiff's claims in this case.

In plaintiff's motion for reconsideration, he contends that the court erred in denying him leave to proceed on his claim that defendants violated his Eighth Amendment rights when they placed him in a filthy cell for three days. Plaintiff contends that under Wis. Admin. Code § DOC 303.71, defendants were required to provide him with adequate clothing, essential hygiene supplies, nutritionally adequate meals, a clean mattress, sanitary toilet and sink and adequate ventilation and heating. Plaintiff alleges that because defendants violated this rule, they deprived him of his Eighth Amendment rights.

It may be that defendants violated state administrative code provisions by requiring plaintiff to remain naked in a filthy cell for 35 hours and depriving him of hygiene supplies

and a clean cell for a period of three days. But, as I explained in the February 7 order, such conditions do not violate plaintiff's rights under the Eighth Amendment of the United States Constitution. For this reason, plaintiff's motion for reconsideration will be denied.

B. Motion for Leave to File Amended Complaint

Next, plaintiff has requested leave to file an amended complaint in order to "add[] a new legal claim." It appears that plaintiff wants to amend his complaint in order to add legal arguments concerning Wis. Admin. § DOC 303.71 and its applicability to his dismissed Eighth Amendment claims (see above), as well as claims arising under the Fourteenth Amendment's equal protection clause and the First Amendment of the United States Constitution. Plaintiff does not allege additional facts in support of these claims.

Plaintiff's request to amend his complaint appears to stem from the misconception that he must mention laws by name in order for the court to consider their applicability to his case. However, plaintiff need not plead particular legal theories or particular facts in order to state a claim. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). A complaint should contain "a short and plain statement of the claim" that will give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Id. Plaintiff's failure to name every law that could conceivably apply to the facts of his case is not an omission that would require him to amend his complaint.

Plaintiff has not alleged any facts in his complaint or in his motion for leave to amend indicate that plaintiff has alleged facts that state a claim under either the Fourteenth or the First Amendment. Plaintiff has not indicated that he was treated differently from other similarly situated inmates and therefore has not stated a claim under the equal protection clause. Moreover, plaintiff's allegations do not implicate the First Amendment. Plaintiff alleges that defendants beat him when he made sexually graphic comments about their female relatives. However, to state a retaliation claim, a plaintiff must first demonstrate that his speech related to a matter of public concern and not simply to his own interests. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999). Plaintiff's expressed desire to have sex with defendants' daughters is not a statement to which First Amendment protection can be extended. Therefore, plaintiff's motion to amend his complaint will be denied.

C. Second Motion for Appointment of Counsel

"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). Plaintiff submitted such

evidence in support of his first motion for appointment of counsel, which was denied in an order dated February 2, 2006. I am satisfied that he has made a reasonable attempt to secure private counsel.

"After meeting this threshold burden, the plaintiff must demonstrate that h[is] 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 do better than the pro se litigant. Lutrell, 129 F.3d at 936. In his motion, plaintiff contends that the complexity of his case necessitates the appointment of counsel. I am not convinced this case is complex in any way. He alleges a one-time incident of the use of excessive force by defendants. The law regarding excessive force claims is well established and explained in the order granting plaintiff leave to proceed. Plaintiff's complaint is competently drafted, as is his motion for appointment of counsel.

Plaintiff should have personal knowledge of the facts surrounding the incident that occurred in the shower stall. In addition, he should have access to any medical records that confirm that he suffered injuries resulting from the alleged beating. If his medical records show that he was injured and the evidence reveals that plaintiff's 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 has litigated one other lawsuit in this court, Powell v. Kingston, 05-C-112-C. He reads and writes intelligibly. The challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every other pro se litigant alleging the use of excessive force. He appears 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. Plaintiff's second motion for appointment of counsel will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for reconsideration of the court's February 7, 2006 order is DENIED;

2. Plaintiff's motion for clarification of the February 7 order is GRANTED;

3. Plaintiff's motion for leave to file an amended complaint is DENIED as

unnecessary; and

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

Entered this 16th day of March, 2006.

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