

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

GERARD M. MOCNIK,

Plaintiff,

v.

DR. WILLIAMS,

Defendant.

ORDER

06-C-191-C

In an order entered in this case on May 3, 2006, I granted plaintiff leave to proceed in forma pauperis on his claim that defendant Williams violated his Eighth Amendment rights by sexually assaulting him on September 10, 2004. According to the allegations in plaintiff's complaint, plaintiff's purpose in seeing Williams was to get medication for acne. However, during the visit, Williams placed a finger or fingers in plaintiff's anus without plaintiff's consent. Defendant has answered plaintiff's complaint. In addition, the parties have participated in a preliminary pretrial conference at which the magistrate judge has scheduled a trial date and deadlines for completing discovery, naming witnesses, and filing dispositive motions. Now plaintiff has filed a motion for appointment of counsel.

In deciding whether to appoint counsel, 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. His motion is accompanied by letters from three lawyers who have declined to represent him in this case. Nevertheless, plaintiff's motion for appointed counsel will be denied.

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 no prior experience in prosecuting a case. However, 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. Plaintiff complains also that he will be prevented from obtaining confidential files concerning the investigation conducted by the Department of Corrections into his allegations of wrongdoing against defendant Williams. However, at the preliminary pretrial conference, plaintiff was 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. If defendant refuses to respond to his requests for production of documents or provide answers interrogatories to which he may be entitled, he is free to move the court to compel defendant to turn over the documents or answer the questions under Fed. R. Civ. P. 37.

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 Mocnik 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.

Approximately 220,000 Wisconsin residents living below 100% of the federal poverty threshold need civil legal services each year. Wisconsin State Bar, available at <http://www.wisbar.org/AM/Template.cfm?Section=ProBono> (last visited July 7, 2006). Approximately 63,800 of these individuals actually seek access to the legal system. Id. Wisconsin's three largest civil legal services programs only had the resources to handle approximately 16,000 cases using a combination of staff lawyers, volunteer lawyers, and partially compensated private lawyers. The areas of need are legion.

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 has been 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 5th day of September, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge