

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

KENNETH E. KING,

Plaintiff,

ORDER

v.

06-C-257-C

DAVID L. DITTER,

Defendant.

Plaintiff Kenneth King, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, is proceeding in this case on his claim that defendant David Ditter, his former prison job supervisor, lowered his pay and ultimately fired him in retaliation for plaintiff's writing a letter of complaint to the warden and telling co-workers and staff that defendant's change in his and other workers' work schedule was illegal and that defendant was racist. Now 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 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.

Next, I must consider whether "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 makes an argument advanced by virtually every pro se prisoner seeking appointment of counsel: that he has little access to the law library and limited knowledge of the law. However, plaintiff appears to be at least of ordinary intelligence, he has produced his own filings in this case to date and is more generally aware of the laws protecting his civil and constitutional rights than most pro se filers. This court understands that pro se litigants rarely have broad access to legal resources. In every case, it takes particular care to insure that the law it is applying is the proper law under the facts of the case. The primary focus of a pro se litigant should be to gather the factual evidence he needs to prove his claim.

Plaintiff contends that he is attempting to obtain discovery but that defendant is thwarting his efforts and that he might have better luck getting the information he wants if he has a lawyer. The record shows that plaintiff is competent to craft interrogatories and seek production of documents, that he has won at least in part on his first motion to compel discovery and that he has a second motion to compel pending.

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. The court's decision to deny plaintiff's motion for appointment of counsel requires him to hurdle certain obstacles in gathering the evidence he needs to prove his case, but the inherent difficulty in proving cases raising claims of retaliation for the exercise of a constitutional right 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. 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 21st day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge