IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAVIER R. SALGADO,

Plaintiff, ORDER

v. 06-C-598-C

GREGORY GRAMS, Warden; JANEL NICKEL, Security Director; SEAN SALTER, Adm. Captain; STEVE CASPERSON, Administrator; DAN WESTFIELD, Security Chief; MATTHEW FRANK, Secretary of D.O.C.,

Defendants.

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Plaintiff Javier Salgado has been granted leave to proceed in this action on his claim that defendants are violating his rights under the Religious Land Use and Institutionalized Persons Act (RLUPA) and the First Amendment by prohibiting him from possessing prayer oil, prayer beads and a prayer rug in his prison cell. A preliminary pretrial conference was held on January 4, 2007, at which Magistrate Judge Stephen Crocker set a November trial date and established a deadline of June 8, 2007 for filing dispositive motions.

Shortly after the pretrial conference, plaintiff moved for appointment of counsel. That motion was denied without prejudice on February 1, 2007, after I concluded that

plaintiff had not made reasonable efforts to find a lawyer on his own as required by Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Now before the court is plaintiff's motion to amend his complaint and second motion for appointment of counsel.

A. Motion to Amend Complaint

There are three reasons why plaintiff's motion to amend his complaint must be denied. First, plaintiff's proposed amended complaint is not a complaint that can be substituted for the original complaint, as it would have to be before I could accept it as the operative pleading in this case. It has been written more in the nature of an addendum to the original complaint, adding new claims and new defendants. Because it would be far too confusing for the court and the litigants to work with pleadings consisting of several documents scattered throughout the file, it is this court's policy to require an amended complaint to be document that stands on its own.

Second, it is too late for plaintiff to amend his complaint to add new claims and several new defendants. (In the proposed amendment, plaintiff alleges that 1) unspecified defendants have violated his First Amendment right to free expression and Fourteenth Amendment right to equal protection by denying him access to catalogs and allowing similarly situated inmates to have them; 2) unspecified defendants have violated his Fourteenth Amendment right to equal protection by denying him "electronics" and allowing

other similarly situated inmates to have them; and 3) defendants Gregory Grams and Janel Nickel and proposed new defendants Marc Clements, Captain Radtke, Chaplain Dawson, Steve Casperson and Matthew Frank have denied plaintiff "adequate meals" by failing to provide a meat substitute for pork, in violation of his First Amendment right to practice his religion.) Plaintiff was granted leave to proceed in this case more than five months ago. The parties should be well into gathering the evidence they need to prove or defend against the existing claims on a motion for summary judgment or at trial.

Third, according to the documentation of plaintiff's use of the inmate complaint review system attached to plaintiff's proposed amended complaint, plaintiff did not exhaust his administrative remedies with respect to the issues he raises in the amendment until after he filed his original complaint in this court. It is settled law in this circuit that a prisoner cannot cure a failure to exhaust his administrative remedies before bringing suit by filing an amended complaint after he has exhausted his administrative remedies. In Perez v. Wis. Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the Court of Appeals for the Seventh Circuit held that a suit brought in federal court by a prisoner before administrative remedies have been exhausted must be dismissed. A district court lacks "discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." Id. In Ford v. Johnson, 362 F.3d 395, 398-99 (7th Cir. 2004), the court held that a lawsuit is "brought" within the meaning of the exhaustion statute "when the

complaint is tendered to the district clerk."

The only instance in which the court of appeals has allowed a prisoner to exhaust his administrative remedies after beginning his lawsuit is in Barnes v. Briley, 420 F.3d 673 (7th Cir. 2005), a case in which the facts pertaining to exhaustion were unique and entirely distinguishable from cases such as this one. In Barnes, the pro se plaintiff originally filed his complaint under the Federal Tort Claims Act. Although Barnes had exhausted his administrative remedies under the act, he had not grieved his claim through the prison's inmate complaint system. Subsequently, Barnes was appointed counsel, who determined that plaintiff's claim was properly brought under 42 U.S.C. § 1983 rather than the Tort Claims Act. Counsel initiated the prison grievance process and, once plaintiff had exhausted his administrative remedies, Barnes dismissed his Tort Claims Act claim against the defendant United States and, with leave of the district court, amended his complaint to allege § 1983 claims against entirely new defendants. In that rare instance, the court of appeals held that Barnes had properly exhausted his administrative remedies under the Prison Litigation Reform Act because his amended complaint was "the functional equivalent of filing a new complaint." Barnes, 420 F.3d at 678.

Although failure to exhaust administrative remedies is an affirmative defense, it is permissible to take into account the lack of exhaustion when considering whether to allow an amended complaint to be filed. No purpose is served in allowing an amendment that will

have to be denied promptly. Because plaintiff has raised claims in his proposed amended complaint that he failed to exhaust before he filed his original complaint, he may not amend his complaint to assert the claims. If he wants those claims considered, he will have to file a new lawsuit raising them.

B. Second Motion for Appointment of Counsel

Plaintiff has renewed his motion for appointment of counsel, now having obtained letters from three lawyers who have told him that they will not represent him. This satisfies plaintiff's obligation to make a reasonable effort to find a lawyer on his own. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992).

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 says that he has had the help of another inmate in preparing his submissions thus far. He states that he is "functionally illiterate" and suffers from a mental disease. He states also that the inmate who has been helping him is now housed in a different facility and is unable to continue providing him assistance. Unfortunately, however, plaintiff has submitted only outdated documentation of his illiteracy, and nothing in the file of this case supports completely plaintiff's characterization of his shortcomings.

When he filed his first motion for appointment of counsel, plaintiff submitted several documents. One is a copy of a letter dated June 3, 1997, addressed to a plaintiff's mother from a David Whelan, MSW, on Sinai Samaritan Medical Center stationery. In it, Mr. Whelan notes that plaintiff was diagnosed with a conduct disorder, "oppositional defiant disorder," and "attention deficit hyperactivity disorder." The second document is dated October 28, 1994. It appears to have been prepared by a multidisciplinary team at plaintiff's high school. In this document, the team concludes that although plaintiff is enrolled in the 10th grade, his intellectual functioning is "within the mildly retarded range" and that "he is unable to read or write."

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 precisely in the same situation as Gil. Federal case law governs his claims and the law itself is fairly well settled. However, if it is true that he is illiterate and mildly retarded, these disabilities would likely prevent him from adequately conducting discovery or otherwise gathering the evidence he needs to prove his case. Moreover, if his allegations are true that he is a Muslim who is being denied prayer oil, a prayer rug and prayer beads, a lawyer may well make a difference in the outcome of the case. Thus, if there is documentation of plaintiff's continued illiteracy, I would be inclined to appoint him counsel. Therefore, I will stay a decision on plaintiff's second motion for appointment of counsel to allow him an opportunity to submit information from his prison file tending to show that he continues to be illiterate.

ORDER

IT IS ORDERED that

1. Plaintiff's motion to amend his complaint is DENIED;

2. A decision on plaintiff's motion for appointment of counsel is STAYED until April 23, 2007, by which time plaintiff is to submit documentation from his prison file supporting his claim that he is illiterate.

Entered this 6th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge