IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH HARRIS,

Plaintiff, ORDER

v. 3:07-cv-678-bbc

GREGORY GRAMS, SGT. LINDA HINICKLE and COII RYAN (Female, First Name Unknown ("FNU")),

Defendants.

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In an order entered in this case on January 14, 2008, I screened plaintiff Kenneth Harris's complaint as I am required to do under the Prison Litigation Reform Act. I concluded that plaintiff could proceed in forma pauperis on the following claims:

1. On April 17, 2005, defendants Ryan and Hinickle were deliberately indifferent to plaintiff's serious medical needs when they deliberately ignored his extreme pain and refused to call the health services unit to arrange for him to receive his scheduled injection of Toradol, a pain relieving drug.

2. Defendants Ryan and Hinickle refused to get medical assistance for plaintiff on

April 17, 2005 because plaintiff had filed two lawsuits earlier and had helped another inmate file a grievance.

3. Defendant Grams retaliated against plaintiff for pursuing a John Doe proceeding against Ryan and Hinickle by having plaintiff put in temporary lock up and investigating him for allegedly fraternizing with a nurse.

Defendants have been served with plaintiff's complaint and are expected to file an answer within a short time. Now, however, plaintiff has filed a proposed amended complaint. I construe plaintiff's submission as including a request for leave to file the amended complaint because, under the Prison Litigation Reform Act, every complaint filed by a prisoner, including a proposed amended complaint, must be screened before it can become the operative pleading. 28 U.S.C. § 1915A.

I have reviewed plaintiff's amended complaint and conclude that other than minor cosmetic changes, it contains one new claim, and that claim is legally meritless. Therefore, it would serve only to delay the progress of this suit if I were to accept it for filing.

The only major change to plaintiff's complaint is his attempt to throw a new legal theory into the mix. If I understand him correctly, he wants the court to permit him to proceed on a claim that when defendants violated his Eighth and First Amendment rights as described above, their actions constituted arbitrary governmental action in violation of his Fourteenth Amendment substantive due process rights. However, in an effort to place

responsible limits on the concept of substantive due process, the Supreme Court has directed lower courts to analyze claims under more specifically applicable constitutional provisions in place of engaging in a substantive due process inquiry. Albright v. Oliver, 510 U.S. 266, 273 (1994). "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that amendment not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). Plaintiff has been granted leave to proceed under the First and Eighth Amendment, the constitutional provisions specific to his grievances. Therefore, plaintiff's proposed substantive due process claim is legally meritless.

Because it is unnecessary for plaintiff to amend his complaint to make cosmetic changes and because his only substantive amendment is legally meritless, I will deny his request for leave to file an amended complaint.

One other matter requires attention. When he filed his complaint, plaintiff moved for the appointment of counsel to represent him and made a showing that he had made a reasonable effort to find a lawyer on his own. Plaintiff says he needs a lawyer because he is imprisoned, he has limited access to the prison law library and knows little about the law. In addition, he anticipates that there will be conflicting testimony at trial that will require cross examination.

In resolving a motion for appointment of counsel, a district court must consider both the complexity of the case and the pro se plaintiff's ability to litigate it himself. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). In particular, the court must analyze the plaintiff's capabilities in light of the challenges specific to his case, including evidence gathering, preparing and responding to motions and other court filings, and trial.

From the documents he has submitted thus far in this case, I conclude that plaintiff Harris's ability exceeds the average pro se litigant's ability to articulate his claims and the facts supporting them. To the extent that he contends he is at a disadvantage because he does not have unlimited access to a law library and knows little about the law, this is a common situation for every pro se prisoner plaintiff. Plaintiff will be instructed at a preliminary pretrial conference soon to be set in this case about how to use discovery techniques available to all litigants under the Federal Rules of Civil Procedure so that he can gather the evidence he needs to prove his case. In addition, he will receive this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work. In sum, plaintiff's lack of familiarity with court procedure is not circumstances warranting appointment of counsel

With respect to the complexity of the case, there is nothing in the record to suggest that this case is factually or legally difficult. Plaintiff's first claim raises a straightforward

Eighth Amendment claim that he was denied medical care on a single occasion in April of 2005. The law governing this type of claim has been settled since Estelle v. Gamble, 429 U.S. 97 (1976), and was explained to plaintiff in the order granting him leave to proceed. Plaintiff has personal knowledge of the treatment he was denied and his medical records should show when and how often he was to receive pain medication and whether that medication was dispensed at the proper time. It seems highly unlikely at this time that plaintiff would require the services of a medical expert. Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004)(expert witness unnecessary where injuries suffered not beyond layperson's grasp). In sum, I can conceive of no reason why he cannot prosecute this claim on his own.

Plaintiff's second and third claims are slightly more difficult. He has to prove that his exercise of his First Amendment rights was at least one of the reasons the defendants Ryan and Hinickle refused to get him medical assistance and defendant Grams put him in temporary lock up and began investigating him for an improper association with a nurse. This kind of claim is notoriously easy to make and in every case difficult to prove. There is rarely direct evidence to support the claim. This means that the plaintiff must attempt to convince a jury primarily through his own testimony and possibly a smattering of circumstantial evidence that a particular defendant was motivated to take action against him at least in part because of his protected conduct. The defendants' version of the facts is likely to be contradictory, and the jury will have to decide who to believe. No doubt a

lawyer could do a better job than plaintiff of cross-examining the defendants in an attempt to shake their credibility. But the test is not whether a good lawyer would do a better job than the pro se litigant. A lawyer is always presumed to be more capable at litigating a case than a lay person. Instead, the test is whether the case, factually and legally, exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself. Pruitt v. Mote, 503 F.3d at 655.

Although I appreciate the challenge plaintiff faces in convincing a jury that his version of the facts is more believable than defendant's version, the fact that the case will likely turn on the jury's determination of credibility is not a sufficient ground by itself to require appointment of counsel. Every retaliation case presents this same challenge. If this obstacle alone were enough to require appointed counsel, then counsel would be mandated in such cases under the law. They are not. In Pruitt, the court of appeals emphasized that there are no "categorical rules regarding recruitment of counsel in particular types of cases." Id. at 656. A judge has unfettered discretion to deny counsel if, in the opinion of the judge, the plaintiff has demonstrated that he is capable of litigating his case on his own.

Having examined carefully the complexity of this case against plaintiff's demonstrated ability to litigate his claim, I conclude that plaintiff's motion for appointment of counsel should be denied.

ORDER

IT IS ORDERED that plaintiff's request for leave to file an amended complaint is DENIED.

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

Entered this 11th day of February, 2008.

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