

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

SYLVESTER HENRY,

Plaintiff,

v.

CASE NO.08-3110-SAC

JOHNNIE GODDARD, et al.,

Defendants.

O R D E R

This matter is before the court on a civil complaint filed under 42 U.S.C. § 1983 while plaintiff was incarcerated in a Kansas correctional facility. Plaintiff proceeds pro se, and seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915 without prepayment of the \$350.00 district court filing fee. Also before the court are plaintiff's "Emergency [Motion] to Amend and Consolidate," "Emergency [Motion] for Injunction," and "Motion to Appoint Counsel."

The court enters this preliminary order to decide these pending motions.

*Motion for Leave to Proceed In Forma Pauperis*

Pursuant to 28 U.S.C. § 1915(b)(1), plaintiff must pay the full \$350.00 filing fee in this civil action. If granted leave to proceed in forma pauperis, plaintiff is entitled to pay this filing fee over time, as provided by payment of an initial partial filing fee to be assessed by the court under 28 U.S.C. § 1915(b)(1) and by the periodic payments from plaintiff's inmate trust fund account as detailed in 28 U.S.C. § 1915(b)(2). Because any funds advanced to

the court by plaintiff or on his behalf must first be applied to plaintiff's outstanding fee obligations,<sup>1</sup> the court grants plaintiff leave to proceed in forma pauperis in the instant matter without payment of an initial partial filing fee. Once these prior fee obligations have been satisfied, however, payment of the full district court filing fee in this matter is to proceed under 28 U.S.C. § 1915(b)(2).

*Motion to Amend*

Plaintiff's "Emergency [Motion] to Amend and Consolidate" to add two additional defendants is denied. Generally, plaintiff may amend his complaint "once as a matter of course" prior to defendants filing their response to the complaint. Fed.R.Civ.P. 15(a). Plaintiff's proposed amendment, however, appears to overlap or duplicate a companion case filed by plaintiff, Henry v. Fogle, Case No. 08-3121-SAC.

In the original complaint, plaintiff alleges the violation of his constitutional rights while confined in the Ellsworth Correctional Facility (ECF), and names two ECF defendants. In his proposed amendment, plaintiff states that he has been transferred to the Winfield Correctional Facility (WCF), and seeks to add two WCF defendants as trying to prevent plaintiff from filing the original complaint. One WCF defendant is the facility itself, which is not a proper entity that can be sued. The second WCF defendant is Correctional Officer Fogle, one of the defendants named in plaintiff's companion case, and plaintiff's motion to amend suggests

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<sup>1</sup>See Henry v. Wichita Police Dept., Case No. 97-3495-GTV (\$150.00 district court filing fee) and (\$105.00 appellate filing fee).

the same facts and allegations presented in the companion case.

*Motion for Preliminary Injunction and Restraining Order*

Plaintiff's related "Emergency [Motion for an] Order for Injunction" is denied because plaintiff's pleading centers on allegations of misconduct at WCF, and seeks restraint over WCF staff who are not parties to the present action.

*Motion for Appointment of Counsel*

Plaintiff's motion for appointment of counsel under the Sixth Amendment is denied without prejudice. Plaintiff has no right to the assistance of counsel in this civil action. Durre v. Dempsey, 869 F.2d 543, 647 (10th Cir. 1989). Having reviewed petitioner's claims, his ability to present said claims, and the complexity of the legal issues involved, the court finds the appointment of counsel in this matter is not warranted. See Long v. Shillinger, 927 F.2d 525, 526-27 (10th Cir. 1991)(factors to be considered in deciding motion for appointment of counsel).

*Screening of the Complaint*

Because plaintiff initiated this action while he was a prisoner, the court is required to screen the complaint and to dismiss it or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. § 1915A(a) and (b). Plaintiff is advised that the court will do so by separate order after reviewing the records in the present case and in plaintiff's companion case.

IT IS THEREFORE ORDERED that plaintiff's motion for leave to proceed in forma pauperis (Doc. 2) is granted, with payment of the \$350.00 district court filing fee to proceed as authorized by 28

U.S.C. § 1915(b)(2) after satisfaction of plaintiff's prior filing fee obligations.

IT IS FURTHER ORDERED that plaintiff's motion to amend (Doc. 4), motion for injunction (Doc. 5), and motion for appointment of counsel (Doc. 6) are denied.

**IT IS SO ORDERED.**

DATED: This 10th day of June 2008 at Topeka, Kansas.

s/ Sam A. Crow  
SAM A. CROW  
U.S. Senior District Judge