

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRUCE L. CARMEAN,)
)
 Plaintiff,)
)
 v.) Civ. No. 03-054-SLR
)
 CHRISTOPHER S. JENSEN, ROBERT)
 GEORGE, Warden, SGT. MALIBAH)
 SGT. LARSON, and LT. MILLMAN,)
)
 Defendants.)

Bruce L. Carmean, Sussex Correctional Institution, Georgetown,
Delaware. Pro se.

Stuart B. Drowos, Deputy Attorney General, Wilmington, Delaware.
Counsel for Defendants.

MEMORANDUM OPINION

Date: September 16, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On January 16, 2003, plaintiff filed a complaint alleging that defendants verbally and physically assaulted him in violation of his Eighth and Fourteenth Amendment rights. (D.I. 1) Plaintiff's motion to proceed in forma pauperis was granted. (D.I. 4) On October 10, 2003, plaintiff filed an amended complaint. (D.I. 30) On November 5, 2003, plaintiff was ordered to file USM-285 forms for each defendant and the Attorney General within 120 days. (D.I. 31) Before the court is defendants' motion to dismiss¹ and plaintiff's motion for representation by counsel. (D.I. 32, 33)

II. BACKGROUND

Plaintiff is incarcerated at the Sussex Correctional Institution in Georgetown, Delaware. (D.I. 47 at 1) On May 23, 2002, plaintiff's name was called to report to the violation of probation quarterdeck for work. (D.I. 30 at 3) When asked to board the work van, which was scheduled to take the inmates to perform community service, plaintiff refused without reason. (D.I. 30 at 3) After the third refusal, plaintiff was

¹The motion to dismiss was filed by defendant Jensen, as he was the only defendant being represented by counsel. The reply brief was filed as the reply for all of the defendants. At the time the reply brief was filed all of the defendants were jointly represented. Because the reply brief does not contain arguments outside those in the original motion, the motion to dismiss is treated as a motion made by all the defendants.

"capstunned" by defendant Jensen. (D.I. 30 at 5) Plaintiff was then immediately handcuffed and alleges that he was verbally assaulted by defendant Malibah. (Id.) During this time, defendant Millman was the lieutenant in charge of Jensen and Malibah. (Id.) Defendant Millman did not intervene during plaintiff's encounter with Jensen or Malibah. (Id.) Plaintiff alleges that he remained in the loading area for approximately an hour and a half, handcuffed, with "capstunne" burning his eyes and face. (Id.) When the next crew of officers arrived, plaintiff was unhandcuffed and defendant Larson ordered him to work with the garden crew on the facility grounds. Plaintiff alleges that the entire six hours in the garden his eyes and face were burning with "capstunne." Plaintiff further alleges that defendant George, the warden, was aware of the abusive conduct of the correctional staff and failed to take action to prevent it. (D.I. 30 at 4)

III. MOTION FOR REPRESENTATION BY COUNSEL

Plaintiff, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to appointed counsel. See Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). It is within this court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [plaintiff] resulting from [plaintiff's]

probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case.” Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984); accord Tabron v. Grace, 6 F.3d 147, 155 (3d Cir. 1993) (stating that representation by counsel may be appropriate under certain circumstances, after a finding that a plaintiff’s claim has arguable merit in fact and law). Having reviewed plaintiff’s complaint, motion for representation by counsel and response to defendant Jensen’s motion to dismiss, the court finds that his allegations are not of such a complex nature that representation by counsel is warranted at this time. The various papers and pleadings submitted by plaintiff reflect an ability to coherently present his arguments. Therefore, plaintiff’s motion for representation by counsel is denied. (D.I. 32)

III. MOTION TO DISMISS

Defendants argue that the plaintiff’s claims should be dismissed because, among other things: (1) defendants were not properly served within the 120 day requirement of Fed. R. Civ. P. 4(m);² and (2) service was never made upon the Attorney General,

²Defendant Larson was served on March 12, defendant Millman was served on March 15, defendant George was served on March 12, and defendant Malibah was served March 10. (D.I. 38-41) The 120 days, which plaintiff was given to return 285 forms to the court, expired on March 5, 2004. Defendant Jensen was never served.

State Solicitor or Chief Deputy Attorney General.³ Pursuant to 10 Del. C. § 1303(c), "[n]o service of a summons upon . . . any officer of the state government concerning a matter arising in connection with the exercise of his or her official powers or duties, shall be complete until such service is made upon . . . the Attorney General or . . . State Solicitor or . . . Chief Deputy Attorney General."

In this case, plaintiff was directed to submit "U.S. Marshal 285" forms for every defendant and the Attorney General by March 5, 2004. (D.I. 31) Although plaintiff filed forms for four of the five defendants, he did not file one for the Attorney General or the fifth defendant.⁴ Consequently, this court must dismiss this action due to plaintiff's failure to properly serve the defendants.

V. CONCLUSION

For the reasons stated, plaintiff's motion for representation of counsel is denied and defendants' motion to dismiss is granted. (D.I. 32, 33) An order consistent with this memorandum opinion shall issue.

³There is no record of a USM-285 form ever being received for the Attorney General.

⁴In his response to defendants' motion, plaintiff does not address these two forms.