

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

John E. Brown,)
)
 Plaintiff)
)
 v.) Civil Action No. 02-1686-KAJ
)
 Robert George, James Kid,)
 and Angel Malabet,)
)
 Defendants.)

MEMORANDUM ORDER

The Plaintiff, John E. Brown, is a *pro se* litigant. Presently before me is Brown’s Motion for Appointment of Counsel (Docket Item [D.I.] 30), Plaintiff’s “Request Appointed [sic], or Designate Officer by the Court to take the testimony of witnesses upon the Attached Deposition of written questions” (D.I. 21; the “Appointment-of-Officer Motion”), and Plaintiff’s Motion to proceed in Forma Pauperis (D.I. 29.) For the reasons that follow, Plaintiff’s Motion for Appointment of Counsel is GRANTED, Plaintiff’s Motion to proceed *in forma pauperis* is DENIED as moot, and Plaintiff’s Appointment-of-Officer Motion is DENIED without prejudice.

Plaintiff alleges violations of his Eighth and Fourteenth Amendment Due Process Rights. (D.I. 2.) Plaintiff states that on June 27, 2002, Corporal James Kid yelled “Stop eyeball [expletive deleted] me” and ordered Plaintiff to go to an area in the prison called the “wood pile” or “rose garden” as punishment for speaking to another inmate and staring at Corporal Kid. (D.I. 2.) Plaintiff alleges that after entering the “wood pile” Corporal Kid ordered him to do a “crab walk” and a “mule kick.” (D.I. 2.) According to Plaintiff, the “crab walk” is performed when one places his/her legs and hands flat on

the ground and walks like a crab with a log on his/her chest. Plaintiff describes the “mule kick” as performed when one gets down on his/her hands and knees, flat on the ground, and kicks a log around like a mule. (D.I. 2.) Plaintiff asserts that he tried to perform these tasks, but was unable to perform them. (D.I. 2.) Plaintiff alleges that Corporal Kid threatened to spray his face with mace if he did not continuing performing the tasks. (D.I. 2.) After Plaintiff refused to continue performing the tasks, Corporal Kid allegedly punched Plaintiff in the shoulder and neck area and sprayed Plaintiff with mace. (D.I. 2.)

Plaintiff asserts that in an attempt to elude the mace, he moved away from Corporal Kid. (D.I. 2.) According to Plaintiff, he was met and apprehended by many V.O.P. Unit Correctional Officers moments after moving away from the mace. (D.I. 2.) Plaintiff states that after he was apprehended, handcuffed, and lying on the ground, Corporal Kid sprayed an entire can of mace in his face. (D.I. 2.) Immediately after Corporal Kid finished spraying Plaintiff with the mace, Correctional Officer Angel Malabet allegedly sprayed another entire can of mace in the Plaintiff’s face. (D.I. 2.)

Plaintiff names seven correctional officers that he contends stood by and watched and/or participated in this incident. (D.I. 2.) Plaintiff further asserts that thirteen inmates witnessed the incident, and he named seven inmates that he was able to contact. (D.I. 2.) Plaintiff states that he has received severe physical injury to his left eye and currently has blurred vision. (D.I. 2.) He also asserts that he is being refused proper medical treatment for his eye. (D.I. 2.)

Corporal Kid admits that he ordered Plaintiff to the “wood pile,” yet he denies the reasons for doing so stated by the Plaintiff. (D.I. 14.) Corporal Kid states that he gave

Plaintiff “multiple direct orders” at the “wood pile” with which Plaintiff did not comply with “in a timely fashion.” (D.I. 14.) Corporal Kid admits that he radioed for assistance and sprayed Plaintiff with pepper spray. (D.I. 14.) Corporal Kid also agrees that Officer Malabet sprayed Plaintiff with pepper spray. (D.I. 14).

A plaintiff has no constitutional or statutory right to the appointment of counsel in a civil case. See *Parham v. Johnson*, 126 F.3d 454, 456-57 (3d Cir. 1997); *Tabron v. Grace*, 6 F.3d 147, 153-54 (3d Cir. 1993). Under certain circumstances, the Court may in its discretion request an attorney to represent an indigent civil litigant. See 28 U.S.C. § 1915 (e)(1).

In *Tabron* and again in *Parham*, the Third Circuit Court of Appeals articulated the standard for evaluating a motion for appointment of counsel filed by a *pro se* plaintiff. Initially, the court must examine the merits of a plaintiff’s claim to determine whether it has some arguable merit in fact and law. See *Parham*, 126 F.3d at 457 (citing *Tabron*, 6 F.3d at 157); accord *Macklin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981) (per curiam) (cited with approval in *Parham* and *Tabron*). Only if the Court is satisfied that the claim is factually and legally meritorious should it then examine the following factors: (1) the plaintiff’s ability to present his/her own case; (2) the complexity of the legal issues; (3) the extensiveness of the factual investigation necessary to effectively litigate the case and the plaintiff’s ability to pursue such an investigation; (4) the degree to which the case may turn on credibility determinations; (5) whether the testimony of expert witnesses will be necessary; and (6) whether the plaintiff can attain and afford counsel on his/her own behalf. See *Parham*, 126 F.3d at 457-58 (citing *Tabron*, 6 F.3d at 155-

56, 157 n.5). This list is illustrative and by no means exclusive. See *id.* At 458. Nevertheless, it provides a sufficient foundation for the Court's decision.

The Plaintiff's claim is not frivolous within the meaning of 28 U.S.C. §§ 1915 (e)(2)(B) - 1915 (b)(1). The Plaintiff also has successfully shown that, in light of the *Parham* and *Tabron* factors, this matter should be referred to the Federal Civil Panel of this Court for review for the appointment of counsel. Although Plaintiff has presented his case in a clear and concise manner, it appears from the allegations and the record that Plaintiff may need assistance gathering facts to support his claim because further investigation is necessary to effectively litigate the case. Moreover, the testimony of expert medical witnesses may be required, and the case may turn on credibility determinations. Therefore, the Court finds that the evidence in the record is sufficient to support reference of the case to the Federal Civil Panel of this Court.

Plaintiff's Appointment-of-Officer Motion (D. I. 21) is denied without prejudice. Because I am granting Plaintiff's Motion for Appointment of Counsel, the clerk of this court will refer representation of the Plaintiff to a member of the Federal Civil Panel. If an attorney on the Federal Civil Panel accepts Plaintiff's case and provides legal assistance to Plaintiff, counsel can conduct depositions for Plaintiff. Therefore, the motion is denied, without prejudice to the Plaintiff's right to review the Motion if no counsel can be found to represent him.

Plaintiff's Motion to proceed *in forma pauperis* (D.I. 29) is also denied as moot because I have previously granted a motion in this case giving the Plaintiff the opportunity to proceed *in forma pauperis* and he is currently prosecuting the case in that status. (D.I. 1.)

NOW, THEREFORE, IT IS HEREBY ORDERED this 11th day of March, 2004, as follows:

1. The Motion for Appointment of Counsel (D.I. 30) is GRANTED and the clerk of this court is directed to attempt to refer representation of the Plaintiff to a member of the Federal Civil Panel.

2. The Court's Standing Order regarding the establishment of a Federal Civil Panel to provide legal assistance to indigent parties in certain civil litigation is incorporated herein by reference.

3. The Appointment of Officer Motion is DENIED without prejudice.

4. The Motion to proceed *in forma pauperis* is DENIED as moot.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware