

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LARRY D. MARVEL,

Plaintiff,

v.

PRISON INDUSTRIES, INC.,
STANLEY TAYLOR,
JOYCE TALLEY, DAVE KAHLILI,
ED BOWERS, ED MOORE,
ROBERT SNYDER, and PRISON
HEALTH SERVICES, and their JOHN
DOE and JANE DOE employees

Defendants.

C.A. No. 99-113 GMS

MEMORANDUM AND ORDER

Larry Marvel is presently incarcerated at the Delaware Correctional Center (“DCC”) in Smyrna, Delaware. On March 2, 1999, Marvel filed this *pro se* civil rights action. In his complaint, Marvel alleges that the “State” defendants (Prison Industries, Bowers, Moore, and Kahlili) as well as Prison Health Services (“PHS”) violated his Eighth Amendment rights in contravention of 42 U.S.C. § 1983 by requiring him to work in a prison auto shop without proper safety equipment. Additionally, Marvel also alleges that PHS committed medical malpractice under state law by failing to timely treat his alleged injuries. The “State” defendants and PHS both filed a motions to dismiss. On August 24, 2000, the court granted these motions in part, and denied them in part. (D.I. 55).

On July 17, 1999, Marvel filed a second complaint (Civ. A. No. 99-442-GMS) alleging that the prison officials retaliated against him for filing the initial complaint. The defendants filed a motion to dismiss the retaliation claim. The court granted the motion in part and denied it in part on July 24, 2001. (D.I. 35 Ca. No. 00-442).

Prior to the court's July 2001 decision, Marvel filed a motion for appointment of counsel on December 27, 2000. (D.I. 76).^{1,2} Marvel alleged that as part of their retaliation, the prison officials assaulted him, placed him in restrictive segregation, and confiscated his legal documents and files. According to Marvel, these alleged actions have rendered him unable to continue to proceed *pro se*.

Because the appointment of counsel appears to be warranted at this stage of the litigation, the court will grant Marvel's motion. The court will also dismiss all pending motions in this case without prejudice to the parties ability to refile these or other motions at a later point in these proceedings. The court will now explain the reasons for its decision.

I. STANDARD OF REVIEW

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). Nevertheless, under certain circumstances, the court may in its discretion appoint an attorney to represent an indigent civil litigant. *See* 28 U.S.C.A. § 1915(e)(1) (West 2000).

¹ Marvel's request for counsel is not presented or titled as a "motion." However, the court will treat it as a motion because he is seeking action from the court.

² Marvel filed an identical motion in his second case. *See* D.I. 30 (Ca. No. 99-442).

In *Tabron* and, again, in *Parham*, the Third Circuit Court of Appeals articulated the standard for evaluating a motion for the 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 *Maclin 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 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 own behalf. *See Parham*, 126 F.3d at 457-58 (citing *Tabron*, 6 F.3d at 155-56, 157 n.5). This list, of course, is illustrative and, by no means, exhaustive. *See id.* at 458. Nevertheless, it provides a sufficient foundation for the court's decision.

II. THE FACTUAL AND LEGAL MERIT OF MARVEL'S CASE

The court believes that Marvel's claims have arguable merit in fact and law. He has alleged that the prison officials caused him to work in a poorly ventilated area without the proper equipment - equipment recommended by the manufacturer. He further alleges that he was denied prompt medical treatment. At minimum, Marvel's allegations appear to rise above the level of frivolity which would require an immediate dismissal of the case. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (recognizing that

a “frivolous” complaint generally contains “inarguable legal conclusions” or “fanciful factual allegations”); *Perkins v. New Jersey Department of Labor*, 154 F.R.D. 132, 133-34 (E.D. Pa. 1994) (“If a complaint is fanciful or describes ‘fantastic or delusional scenarios,’ then it is factually baseless. Further, if it states an inarguable legal conclusion, it lacks basis in law.”) (citations omitted). Indeed, the fact that Marvel’s complaint has survived a motion to dismiss is a strong indication that his complaint is not totally frivolous. Therefore, the court will consider the six factors outlined in the *Parham* and *Tabron* decisions.

III. THE REMAINING *PARHAM* AND *TABRON* FACTORS

The first factor is the plaintiff’s ability to present his own case. Marvel contends that the allegedly retaliatory actions of the defendants - such as removing legal files and materials - are preventing him from conducting his case. If his allegations are accepted as true, it is reasonable to believe that there would be difficulty in his continued *pro se* representation.

The court finds that the issues here are not complicated. Thus, the second factor is not implicated. However, the court finds that the third and fourth factors are relevant here. Although not legally complicated, this case is factually complex because there are a number of witnesses and disputed facts that will need to be investigated. Indeed, discovery has already begun, but may be better served by the presence of counsel.³ Moreover, credibility determinations may become important because as noted in

³ The fact that the plaintiff has filed a motion to compel the defendants to answer interrogatories (D.I. 99) indicates that he may be encountering some difficulty in the discovery process. Indeed, when the defendants have responded, their responses have provided little useful information even to the plaintiff’s reasonable requests.

the court's previous opinion, at minimum, there are disputed factual issues. (D.I. 55 at 11).⁴ If the court determines that these disputed factual issues should cause this case should go to a jury, Marvel will need the assistance of counsel to present these issues to the fact-finder.⁵

Most important, the court finds that expert testimony is necessary in this case. Marvel has alleged that PHS committed medical malpractice under state law. In Delaware, a medical malpractice claim may not be sustained unless the party supplies expert witness testimony to substantiate the claim. *See* 18 Del. C. § 6853. At this point, Marvel has not yet been able to obtain expert witnesses on his behalf. The court believes that it is unfair to rule on this aspect of Marvel's claims without affording him an opportunity to meet this burden. The court further finds that given the defendant's substantial objections to permitting Marvel to be examined by an off-campus physician, Marvel may need the assistance of counsel in meeting this burden.

Finally, Marvel cannot afford counsel. He was granted permission to proceed *in forma pauperis* for both complaints.⁶ Therefore, it appears that he is unable to afford legal representation. *Cf. Tabron*, 6 F.3d at 157 n.5 ("If counsel is easily attainable and affordabl[e to] the litigant, but the plaintiff simply has made no effort to retain an attorney, then counsel should not be appointed by the court.") (citing *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir. 1989)). Since the majority of the relevant factors weigh in favor of the appoint of counsel, the court will grant Marvel's request.

⁴ This statement is not intended in any way to reflect the court's position on the validity of any claims or defenses under either set of facts.

⁵ The court is not expressing any opinion regarding whether this case or any particular claim or defense will or will not survive summary judgment and, therefore, be allowed to go to a jury.

⁶ Although Marvel withdrew his initial request for IFP status, the court notes that there is a large disparity between a one-time \$150.00 filing fee and the substantial fees charged by attorneys.

IV. CONCLUSION

For the foregoing reasons, the court will order the appointment of counsel. In light of this ruling, the court will also dismiss without prejudice all pending motions in this case to enable counsel who enters his or her appearance in this matter an opportunity to properly prosecute and defend any appropriate pre-trial motions.

For these reasons, IT IS HEREBY ORDERED that:

1. The Plaintiff's motions for the appointment of counsel (D.I. 76) and D.I. 30 (Ca. No. 99-442)) are GRANTED;
2. The Plaintiff's Motion for Default (D.I. 60) is DENIED as MOOT;
3. The Plaintiff's Motion for Leave to file Third Amended Complaint (D.I. 62) is DISMISSED WITHOUT PREJUDICE;
4. The Plaintiff's Motion to Strike Insufficient Affirmative Defenses in Defendant PHS's Answer (D.I. 66) is DISMISSED WITHOUT PREJUDICE;
5. The Plaintiff's Motion to Strike Insufficient Affirmative Defenses in State Defendant's Answer (D.I. 80) is DISMISSED WITHOUT PREJUDICE;
6. The Plaintiff's Motion to Compel Defendant Snyder to Provide Arraignments for plaintiff's Examination by Medical Injury Specialists (D.I. 68) is DISMISSED WITHOUT PREJUDICE;
7. The Defendant PHS's Motion for Summary Judgment (D.I. 96) is DISMISSED WITHOUT PREJUDICE;
8. The Plaintiff's Motion to Strike Defendant PHS's Motion for Summary Judgment (D.I. 100) is DISMISSED WITHOUT PREJUDICE;
9. The Plaintiff's Cross-Motion for Summary Judgment (D.I. 103) is DISMISSED WITHOUT PREJUDICE;
10. The Plaintiff's Motion to Compel Defendants to Answer Interrogatories (D.I. 99) is

DISMISSED WITHOUT PREJUDICE;

11. The Plaintiff's Motion for Trial (D.I. 111) is DISMISSED WITHOUT PREJUDICE;
12. The Plaintiff's Motion to Extend Time to File Reply to PHS's Opposition to Plaintiff's Motion to Strike (D.I. 78) is DISMISSED AS MOOT.

Dated: February 7, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE