

In the United States Court of Federal Claims

No. 10-648C

(Filed March 18, 2011)

NOT FOR PUBLICATION

ERIC MARTIN MATTHEWS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

Among the matters pending before the Court is plaintiff’s “Motion for Advisory/Standby Counsel(s),” filed December 14, 2010. In this motion, Mr. Matthews requests that the Court appoint, pursuant to 28 U.S.C. § 1915(e)(1),¹ civilian counsel and Judge Advocate General (“JAG”) counsel to assist plaintiff with his case. Plaintiff relies on civil rights cases from other circuits to argue the Court should appoint counsel for him. To support the appointment of JAG counsel, plaintiff argues that he is still on active duty and therefore should receive assistance of JAG counsel under military regulations.

In response, defendant argues that appointment of counsel is inappropriate in this case. Defendant argues that a right to appointment of counsel exists only in limited circumstances where an indigent litigant’s personal freedom is at stake (such situations including when quasi-criminal penalties or severe civil remedies attach). Simply put, defendant argues this case does not present the “extraordinary circumstances” where appointment of counsel is warranted. Concerning JAG counsel, defendant argues that Navy regulations would require approval of the Judge Advocate General, which was not obtained in this case, to engage in litigation adverse to the United States.

The government’s position is correct. Section 1915(e) does not authorize a court to “appoint” an attorney to represent an indigent litigant, but instead merely to “request” one to do so. *See Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 300-09 (1989). The Court

¹ Section 1915(e)(1) provides: “The court may request an attorney to represent any person unable to afford counsel.”

generally refrains from making such requests, which an attorney may feel leaves him no choice but to accept. The very concept of a branch of our national government compelling an attorney to represent a party without payment for his services is inimical to the purpose of our Court, which exists to ensure that citizens are compensated when the government takes or contracts for their property or services. Accordingly, when sought by a plaintiff in a civil matter who is unable to afford counsel,² courts may appropriately involve themselves in the securing of counsel only in “extraordinary circumstances” with severe potential consequences -- such as the danger of being civilly committed, *see Vitek v. Jones*, 445 U.S. 480 (1980) (plurality opinion in relevant part), or of losing custody of a child. *See Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981). This wrongful discharge/back-pay case does not present any “extraordinary circumstances” that would justify the Court itself requesting that an attorney represent Mr. Matthews. *See Washington v. United States*, 93 Fed. Cl. 706, 708-09 (2010) (civilian suing the Army for damages not entitled to appointed counsel).

Regarding the availability of JAG counsel, the relevant statute merely states that a service Secretary “*may* provide legal assistance,” 10 U.S.C. § 1044(a) (emphasis added), and the Navy regulations provide that “legal assistance *may* be extended to retired military personnel.” 32 C.F.R. § 727.5 (emphasis added). The regulations make this assistance mandatory for active duty personnel only,³ but forbid counsel from representing plaintiffs in suits against the United States absent specific approval of the Judge Advocate General, 32 C.F.R. § 727.7(d) -- which was not obtained for this case. In any event, even if plaintiff did qualify for JAG counsel, neither the statute nor its implementing regulations appear to mandate the payment of money damages to a party, *see* 10 U.S.C. § 1044; 32 C.F.R. §§ 727.1-.15, and thus it is doubtful these are within the Court’s jurisdiction to enforce. Having failed to identify authority requiring appointment of counsel, or to demonstrate the extraordinary circumstances that would make it appropriate for the Court to request that a lawyer represent him, plaintiff’s motion is **DENIED**.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge

² Plaintiff’s inability to afford counsel rests on a conclusory statement in his brief, *see* Serviceman’s Motion for Advisory/Standby Counsel(s) at 2, and not on the sort of information that is typically required to support claims of indigence. *See* 28 U.S.C. § 1915(a)(1)-(2) (requiring an affidavit with a statement of assets or a certified copy of a trust fund account).

³ As Mr. Matthews points out in his reply, his “contention that he is still on active duty goes to the heart of the case.” Reply to Gov’t’s Resp. to Mot. for Counsel at 6. Plaintiff would like the Court to presume he is correct in his contention that the discharge was invalid and then use that presumption to justify appointing counsel to help him prove it.