

## UNITED STATES DISTRICT COURT

## DISTRICT OF SOUTH DAKOTA

## SOUTHERN DIVISION

MICHAEL EUGENE KOCH,  
GUY ALLEN BLESİ,  
JAMES EDWARD HAYES,  
JOSIA JEREMIAH FUERST,  
JEFFERY JACOB-DANIEL  
KLINGHAGEN,  
UNKNOWN MIKE DURFEE STATE  
PRISON INMATES,

Plaintiffs,

vs.

DENNIS KAEMINGK, SOUTH  
DAKOTA SECRETARY OF  
CORRECTIONS; IN HIS INDIVIDUAL  
AND OFFICIAL CAPACITY; ROBERT  
DOOLEY, WARDEN AT MDSP AND  
THE DIRECTOR OF PRISON  
OPERATIONS FOR THE SOUTH  
DAKOTA DOC; IN HIS INDIVIDUAL  
AND OFFICIAL CAPACITY; JOSHUA  
KLIMEK, UNIT MANAGER AT MDSP;  
IN HIS INDIVIDUAL AND OFFICIAL  
CAPACITY; TAMMY DEJONG, UNIT  
COORDINATOR AT MDSP; IN HER  
INDIVIDUAL AND OFFICIAL  
CAPACITY; SUSAN JACOBS,  
ASSOCIATE WARDEN AT MDSP; IN  
HER INDIVIDUAL AND OFFICIAL  
CAPACITY; REBECCA SCHIEFFER,  
ASSOCIATE WARDEN AND THE  
ADMINISTRATIVE REMEDY  
COORDINATOR AT MDSP; IN HER  
INDIVIDUAL AND OFFICIAL  
CAPACITY; JENNIFER STANWICK,  
DEPUTY WARDEN AT MDSP; IN HER  
INDIVIDUAL AND OFFICIAL  
CAPACITY; MICHAEL DOYLE,

4:15-CV-04103-RAL

OPINION AND ORDER DENYING  
MOTIONS FOR REVIEW OF  
DENIAL OF COUNSEL, DENYING  
OBJECTIONS TO ORDER,  
AND DENYING MOTION  
TO APPOINT COUNSEL

CORRECTIONAL OFFICER, WITH THE RANK MAJOR, AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JEREMY LARSON, CORRECTIONAL OFFICER, WITH THE RANK SERGEANT, AND THE DISCIPLINARY HEARING OFFICER AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; COREY TYLER, CORRECTIONAL OFFICER, WITH THE RANK SERGEANT, AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; MICHAEL MEYER, CORRECTIONAL OFFICER AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; KELLY TJEERDSMA, CORRECTIONAL OFFICER, WITH THE RANK CORPORAL, AT MDSP; IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; LORI DROTZMAN, GENERAL EDUCATION DIPLOMA TEACHER, WHO ALSO IS IN CHARGE OF THE LAW LIBRARY AT MDSP; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; MICHAEL JOE HANVEY, PHYSICIANS ASSISTANT AND HEALTH CARE PROVIDER AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; ANDRA GATES, NURSING SUPERVISOR AND HEALTH CARE PROVIDER AT MDSP; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; KELLY SWANSON, HEALTH SERVICES SUPERVISOR AT MDSP; IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; STEPHANIE HAMILTON, NURSE AT MDSP; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; MARY CARPENTER, EMPLOYEE OF THE SOUTH DAKOTA DEPARTMENT OF HEALTH AND ASSISTS WITH INMATE HEALTH CARE DECISIONS FOR INMATES INCARCERATED AT MDSP; IN HER INDIVIDUAL AND OFFICIAL

CAPACITY; BARRY SCHROETER, SUPERVISOR FOR CBM CORRECTIONAL FOOD SERVICES AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JENNIFER BENBOON, DIETITIAN EMPLOYED BY CBM CORRECTIONAL FOOD SERVICES; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; CBM CORRECTIONAL FOOD SERVICES, PRIVATE FOR PROFIT COMPANY CONTRACTED BY THE SOUTH DAKOTA DOC TO PROVIDE MEALS TO INMATES INCARCERATED AT MDSP; DELMAR SONNY WALTERS, ATTORNEY AT LAW CONTRACTED BY THE SOUTH DAKOTA DOC TO PROVIDE LEGAL SERVICES TO INMATES INCARCERATED AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; UNKNOWN DEPARTMENT OF CORRECTIONS EMPLOYEES, CORRECTIONAL OFFICERS EMPLOYED BY THE SOUTH DAKOTA DOC WHO WORK AT MDSP; UNKNOWN DEPARTMENT OF CORRECTIONS HEALTH SERVICES STAFF, HEALTH SERVICES DEPARTMENT STAFF EMPLOYED BY THE SOUTH DAKOTA DOC TO PROVIDE HEALTH CARE FOR INMATES INCARCERATED AT MDSP; AND UNKNOWN CBM CORRECTIONAL FOOD SERVICES EMPLOYEES, EMPLOYEES OF CBM CORRECTIONAL FOOD SERVICES AT MDSP;

Defendants.

Plaintiff-inmates filed this lawsuit pursuant to 42 U.S.C. § 1983. Doc. 1. Plaintiffs Jeffery Jacob-Daniel Klinghagen and Michael Eugene Koch now move for review of denial of counsel. Doc. 118; Doc. 120. Koch also objects to

United States Magistrate Judge Veronica L. Duffy's order denying his motion for a temporary restraining order and preliminary injunction, Doc. 124, and moves this Court to appoint him counsel. Doc. 134. For the following reasons, plaintiffs' motions are denied.

## **I. DISCUSSION**

### **A. Motions for Review of Denial of Counsel**

Under the Federal Rules of Civil Procedure,

When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

Fed. R. Civ. P. 72(a).

#### **1. Klinghagen's Motion for Review of Denial of Counsel**

Klinghagen requests that this Court review Magistrate Judge Duffy's order denying him counsel. Doc. 118. He seeks to amend his complaint and argues that he requires the assistance of counsel in order to do so. *Id.* This Court agrees with the analysis and conclusion in Magistrate Judge Duffy's order denying Klinghagen's motion to appoint counsel. *See* Doc. 116. Klinghagen seeks to amend his complaint to raise a claim under the Americans with Disabilities Act ("ADA"). Doc. 118. Because the complaint contains claims under the ADA, it appears that Klinghagen has the ability to bring a claim under the ADA or access to someone who does. This Court finds that

nothing in Magistrate Judge Duffy's order denying Klinghagen's motion is clearly erroneous or contrary to law. Therefore, Klinghagen's motion for review is denied.

## **2. Koch's Motion for Review of Denial of Counsel**

Koch requests that this Court review Magistrate Judge Duffy's order denying him counsel. Doc. 120. He argues that he does not understand his medical files and does not know how to extract the information he needs from them. *Id.* This Court agrees with the analysis and conclusion in Magistrate Judge Duffy's order denying Koch's motion to appoint counsel. *See* Doc. 117. It appears that Koch can represent himself adequately. This Court finds that nothing in Magistrate Judge Duffy's order denying Koch's motion is clearly erroneous or contrary to law. Therefore, Koch's motion for review is denied.

Both Klinghagen and Koch ask that their motions, if denied, be considered notices of appeal to the Court of Appeals for the Eighth Circuit. Doc. 118; Doc. 120. "In most circuits, an order denying a motion for appointment of counsel in a § 1983 action is not immediately appealable, because there is no final decision of the district court." *Ward v. Smith*, 721 F.3d 940, 942 (8th Cir. 2013). However, the Eighth Circuit is different based on *Nelson v. Shuffman*, 476 F.3d 635 (8th Cir. 2007), making an order denying appointment of counsel appealable apparently under the collateral order appeal doctrine. *See Ward* 721 F.3d at 942. Therefore, Klinghagen and Koch may appeal this order, and the Court construes their motions as notices of appeal.

**B. Objection to Magistrate Judge Duffy’s Decision on Dispositive Motions**

Koch also objects to Magistrate Judge Duffy’s denial of his motion for temporary restraining order and preliminary injunction. Doc. 124. He argues that this is a dispositive matter and should not be decided by a Magistrate Judge. *Id.* In the order denying Koch’s motion for temporary restraining order and preliminary injunction, Magistrate Judge Duffy explained that Koch’s motion was dismissed because the complaint had not then been served on defendants, and the court did not have jurisdiction over the defendants. Doc. 121. This Court agrees with this analysis and conclusion and finds that nothing in Magistrate Judge Duffy’s order denying Koch’s motion is clearly erroneous or contrary to law. Therefore, Koch’s objections are overruled and dismissed.

**C. Motion to Appoint Counsel**

Koch again moves the Court to appoint him counsel. Doc. 134. He argues that he wishes to add claims, including ADA claims, to the complaint but does not know how. *Id.* He also wants to bring a separate lawsuit without the other plaintiffs. Koch may file a new lawsuit on his own at any time. His motion to appoint counsel, however, is denied for the reasons outlined above and stated in Magistrate Judge Duffy’s orders denying similar motions.

**II. ORDER**


Accordingly, it is ORDERED

1. Klinghagen’s motion for review of denial of counsel, Doc. 118, is denied.

2. Koch's motion for review of denial of counsel (or) notice of appeal, Doc. 120, is denied.
3. Klinghagen and Koch's motions are construed as notices of appeal, and the Clerk of Court should treat them as such.
4. Koch's objection to Magistrate Judge Duffy's order denying his motion for temporary restraining order and preliminary injunction, Doc. 124, is overruled and dismissed.
5. Koch's motion to appoint counsel, Doc. 134, is denied.

Dated January 23<sup>rd</sup>, 2017.

BY THE COURT:



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ROBERTO A. LANGE  
UNITED STATES DISTRICT JUDGE