

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREDERICK ROGERS,

Petitioner,

ORDER

v.

01-C-589-C

C.O. LOCKWOOD,

Respondent.

On November 26, 2001, I reviewed petitioner's request for leave to proceed in forma pauperis in this action. I concluded that a decision on the request would have to be stayed because petitioner had not supplied enough factual information to determine whether he stated a claim of a violation of his constitutional rights. I directed petitioner to file a supplement to his complaint clarifying what respondent Lockwood knew about his mental health condition and what specific actions respondent took, if any, to suggest that he was ignoring a serious risk to petitioner's mental health. Petitioner has complied with the court's directive and filed a supplement to his complaint. In addition, petitioner has moved for the appointment of counsel to assist him with his case.

On the basis of petitioner's proposed complaint, as supplemented, I find that

petitioner alleges facts sufficient to state a claim that his Eighth Amendment right to be free from deliberate indifference to a serious risk to petitioner's health, petitioner's request to proceed in forma pauperis will be granted. Because petitioner has not demonstrated that he has made reasonable efforts to secure counsel, I will deny his motion for appointment of counsel.

The original allegations of facts are set out in the order dated November 26, 2001. I summarize below only the additional allegations of fact included in the supplemental submission.

ALLEGATIONS OF FACT

Respondent was aware of petitioner's mental disorders stemming from serious abuse of petitioner involving burns from cigars being put out on his body. On several occasions, petitioner told respondent why his smoking cigars caused petitioner mental and physical suffering. Petitioner was moved to Unit 10, respondent's unit, because of his mental disorders; all of the staff, including respondent, knew about petitioner's disorders. Respondent gave petitioner medications for his disorders.

In order to give petitioner his medications, other correctional officers would open the trap door and pass the medication through, but respondent would often open the cell door with petitioner's medications in one hand and a cigar in the other. On many occasions,

petitioner's cellmate witnessed respondent delivering medications to petitioner in this manner. Petitioner reported respondent's acts to the sergeant and the doctors at the institution, who then warned respondent about his cigar smoking. Respondent continued to smoke. When petitioner asked respondent to stop smoking cigars, respondent answered, "Like you don't smoke," or "you would like that," or "sorry I don't have any crack for you to smoke, Rogers."

DISCUSSION

A. Eighth Amendment Cruel and Unusual Punishment

Petitioner alleges that respondent Lockwood has violated his Eighth Amendment right to be free from cruel and unusual punishment by smoking cigars at Dodge, a non-smoking institution. In Helling v. McKinney, 509 U.S. 25 (1993), the Supreme Court held that unreasonable environmental tobacco smoke can constitute an Eighth Amendment violation, provided that a two-part test is satisfied. First, a plaintiff "must show that he himself is being exposed to unreasonably high levels of [environmental tobacco smoke]" and that the smoke caused or is likely to cause him serious health problems. Id. at 35-36. Second, prison officials must have acted with deliberate indifference by knowing of and disregarding an excessive risk to plaintiff's health. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

In the order dated November 26, 2001, I determined that petitioner satisfied the first

part of the test. As to the second part of the test, the alleged facts suggested the respondent might have been deliberately indifferent to an excessive risk to petitioner's health. Petitioner was given the opportunity to amend his complaint to clarify respondent's knowledge of petitioner's mental health condition and disregard, if any, of that risk. In the amended complaint, petitioner alleges that respondent knew about petitioner's mental health condition for several reasons. First, petitioner was placed on respondent's unit because of his mental health. In addition, petitioner told respondent about his mental disorder and respondent delivered petitioner medications for his disorder. The amended allegations of fact are sufficient to allege that respondent knew about petitioner's mental health condition.

In the amended complaint, petitioner alleges facts sufficient to suggest that respondent disregarded the risk to petitioner's health. Petitioner alleges that respondent would open the cell door with a cigar in hand to deliver petitioner's medications, but that other staff would open only the trap door. According to petitioner, security staff and doctors at the institution asked respondent to stop smoking cigars after petitioner complained to them about it, but that respondent continued. Finally, petitioner alleges that when he asked respondent to stop smoking cigars, respondent responded with sarcastic remarks. The allegations of fact suggest that respondent disregarded the excessive risk to petitioner's health caused by his smoking cigars. Petitioner's request for leave to proceed in forma pauperis will be granted.

B. Motion for Appointment of Counsel

Petitioner has requested that counsel be appointed to assist him. In determining whether counsel should be appointed, I must find first that petitioner has made reasonable efforts to retain counsel and was unsuccessful or that he was precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner must provide the court with the names and addresses of at least three lawyers whom he has asked to represent him in this case and who have declined to take the case before I can find that he has made reasonable efforts to secure counsel.

Petitioner should be aware that if he attempts to obtain a lawyer and is unsuccessful, that does not mean that one will be appointed for him automatically. At that point, the court must determine the pro se plaintiff's abilities and skills in light of the complexity of the legal issues and evidence in the case. See Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). "The simpler the case, the less intelligent or experienced the Plaintiff need be to handle it without assistance of counsel." Id. at 321. This case is simply too new to permit the court to assess petitioner's abilities. Therefore, his motion for the appointment of counsel will be denied, without prejudice to his renewing the motion at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Petitioner Frederick Roger's request for leave to proceed in forma pauperis is GRANTED;

2. Petitioner's motion for appointment for counsel is DENIED without prejudice; and

3. Petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondent, he should serve the lawyer directly rather than respondent. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent or to respondent's lawyer.

Entered this 14th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge