

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

EUGENE L. CHERRY,

Petitioner,

v.

JON LITSCHER, GERALD BERGE,
JIM PARISI, TIMOTHY MASON,
PAM BARTELS, KATHRYN McQUILLAN,
JOHN SHARPE,

Respondents.

ORDER

02-C-394-C

Plaintiff Eugene Cherry has moved for the third time for appointment of counsel in this case. His first motion was denied on the ground that it was too early in the lawsuit to decide whether appointed counsel would be needed; his second motion was denied because it appeared plaintiff wanted a lawyer solely for the purpose of asking the lawyer to absorb the costs of his lawsuit.

In the present motion, plaintiff says that he wants a lawyer to help him with his claims that he was denied food and medication in an attempt to modify his behavior and deliberately denied medical care for a stomach virus and herpes in violation of his Eighth

Amendment rights. Here, again, he states that it will be necessary to get an expert witness to testify about the appropriateness of his treatment or lack of treatment and suggests that if he had appointed counsel, it would be counsel who assume those costs. However, as I already have told plaintiff, his desire to shift the cost of litigation from himself to counsel is not a sufficient reason to appoint an attorney.

Plaintiff states as well that he is unschooled in the law and will be disadvantaged in gathering evidence to support his claims and in trying his case. Evidence regarding plaintiff's claims of food deprivation and denial of medical care should be readily available to plaintiff in prison records and through plaintiff's own personal affidavit stating what did or did not happen to him. Moreover, most litigants proceeding without lawyers have little or no legal education. However, plaintiff is fast becoming a seasoned litigant in this court. This case is the second of three lawsuits he filed this year. The order granting him leave to proceed in forma pauperis refers plaintiff to the law governing his claims and the magistrate judge's preliminary pretrial conference order includes clear instruction on how plaintiff will be expected to respond to a motion for summary judgment, if one is filed. I am persuaded that plaintiff has the ability to represent himself at this time. If it turns out that the case is not resolved on a motion to dismiss or motion for summary judgment, plaintiff may renew his motion for appointment of counsel to assist him at trial.

One further point needs to be addressed. Plaintiff attached to his motion a letter

from Thomas Bartell, Jr., a lawyer at the law firm of Stupar, Schuster & Cooper in Milwaukee, Wisconsin, in which Bartell declines to represent plaintiff on a contingency basis and because he “[is] not able to forward the costs” of expert witnesses. Bartell closes his letter with the comment, “. . . if you are able to get a court appointment on this case I would be willing to represent you at that time.” Plaintiff has highlighted this last sentence to bring Bartell’s position to the court’s attention.

A member of my staff contacted Mr. Bartell to ask whether he would be willing to represent plaintiff and Mr. Bartell has declined to accept an appointment. Mr. Bartell was not aware when he wrote to plaintiff that lawyers who accept appointments in civil cases such as this receive no guarantee of reimbursement for their expenses. Therefore, because Mr. Bartell is not financially able to absorb the costs of litigating plaintiff’s case, he was unwilling to accept an appointment to the case.

ORDER

IT IS ORDERED that plaintiff’s third motion for appointment of counsel is DENIED

without prejudice.

Entered this 19th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge