

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

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FREDERICK ROGERS,

Plaintiff,

v.

C.O. HERWIG,

Defendant.

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ORDER

04-C-977-C

On February 14, 2005, I granted plaintiff Frederick Rogers leave to proceed in forma pauperis in this case on his claim that defendant Herwig withheld his asthma inhaler for three hours while plaintiff gasped for air on the floor and eventually passed out, in violation of his rights under the Eighth Amendment. In the same order, I denied a motion for appointment of counsel that accompanied plaintiff's complaint, on the grounds that plaintiff had failed to show that he had made reasonable efforts to find a lawyer on his own and that this case was too new to allow me to assess petitioner's abilities. Although defendant has not yet filed a responsive pleading, plaintiff has filed a second motion for appointment of counsel, together with a showing that he has contacted three lawyers who declined to represent him.

In a separate order entered today, I denied plaintiff's motion for appointment of counsel in another of his cases, Rogers v. Scheffer, 04-C-979-C. In that case, I concluded that plaintiff was competent to represent himself because the legal issue was not complex and because plaintiff's litigation history in this court showed that he had substantial experience in civil procedure, discovery matters, and defending against motions for summary judgment. This case is no different.

Plaintiff's claim arises out of a single incident involving one defendant. The law governing Eighth Amendment claims of deliberate indifference to serious medical needs was explained to plaintiff in the order granting him leave to proceed. Moreover, in Hudson v. McHugh, 148 F.3d 859, 862 (7th Cir. 1998), the court of appeals declined to find that it was an abuse of the court's discretion to deny the prisoner plaintiff's request for a lawyer to represent him on his claim that he had been denied epilepsy medication for 11 days, precipitating a seizure. The court of appeals acknowledged that although prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," it was reasonable for the court to evaluate the plaintiff to be as competent as any other average pro se litigant to present his case. Id. at n.1.

Plaintiff faces the same challenges in this lawsuit as any other pro se litigant claiming deliberate indifference to a serious medical need. Like the plaintiff in Hudson, plaintiff will

have to prove defendants' state of mind and the medical causation for his injury, if he has one. Such proof may well be difficult to come by. But the fact that matters of state of mind and medical causation are tricky to prove is not sufficient reason by itself to find that plaintiff's case presents exceptional circumstances warranting appointment of counsel. If it were, it would be established law that district courts are not free to decline to appoint counsel for pro se litigants raising claims of denial of medical care.

Plaintiff has available to him all of the discovery tools described in the Federal Rules of Civil Procedure. In addition, he has personal knowledge of the treatment he received and he should be able to obtain access to his own medical records to corroborate the alleged injury he sustained as a result of defendant's alleged refusal to attend to his serious medical need. If plaintiff's injury was such that his symptoms are not beyond a layperson's grasp, he will not need an expert witness. Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004) (citing Ledford v. Sullivan, 105 F.3d 354, 360 (7th Cir. 1997)). Even if plaintiff were to require a medical expert, he suggests no reason why he could not seek out such a professional witness on his own. If plaintiff is requesting counsel with the idea that he will be able to shift to the lawyer the cost of hiring an expert, he should understand that regardless whether he is represented by counsel, his indigent status does not do away with his obligation to pay the costs of deposing witnesses or hiring experts to testify on his behalf.

In summary, I believe that plaintiff is capable of prosecuting this lawsuit and that

having appointed counsel will not make a difference in the case's outcome.

ORDER

IT IS ORDERED that plaintiff's second motion for appointment of counsel is DENIED.

Entered this 24th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge