

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

FRANCISCO M. RUIZ,

Plaintiff,

v.

GLEN HEINZL, M.D.;
CANDACE WARNER, RN, BSN, HSM;
WARDEN TIMOTHY LUNDQUIST;
SECRETARY MATTHEW FRANK;
RICK RAEMISCH;
SANDRA HAUTAMAKI;
SHARON ZUNKER; and
MILDRED PARISE,

Defendants.

ORDER

06-C-478-C

Plaintiff Francisco Ruiz has renewed his motion for appointment of counsel in this action in which he contends that defendants are violating his Eighth Amendment rights by enforcing a medication policy that requires prison officials to deny treatment to inmates who have been diagnosed with genotype 1 hepatitis C and are within 18 months of their mandatory release date. Defendants have answered plaintiff's complaint and the case has been set for a preliminary pretrial conference before United States Magistrate Judge Stephen

Crocker for December 13, 2006 at 9:30 a.m. In contrast to his first motion, plaintiff has supported his renewed motion with a showing that he has made a reasonable effort to find a lawyer on his own and has been unsuccessful.

As I advised plaintiff in the order denying his first motion for appointment of counsel, even if he could not convince a lawyer to represent him, one would not necessarily be appointed for him. The court must consider whether plaintiff is able to represent himself given the legal difficulty of the case, and if he is not, whether having a lawyer would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)).

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer, 990 at 322 (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.1991)). The Seventh Circuit will find such an appointment reasonable where plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. The test is not whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

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.

The challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every 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’s claim is not complex. It is a straightforward Eighth Amendment claim of denial of medical care. The law governing this type of claim has been settled since Estelle v. Gamble, 429 U.S. 97, 103 (1976), and was explained to plaintiff in the order granting him leave to proceed. Moreover, defendants do not dispute plaintiff’s allegation that he has

been diagnosed with Hepatitis C and that they are refusing to provide him with the medication he wants. The only questions to be resolved are whether plaintiff qualifies for treatment under the Department of Corrections' protocol and whether the failure to provide treatment subjects plaintiff to an excessive risk to his health about which defendants are aware.

Plaintiff suggests that he needs a lawyer to help him with his case because he lacks "legal knowledge to file documents" and will have to supply "professional support" of a medical physician. However, he does not allege any impairments that would prevent him from seeking out the opinion of a medical expert to support his position 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. As for plaintiff's legal abilities, he has revealed to date that he is at least as capable as the average pro se litigant to present his claim. He appears to be able to read and understand the court's orders.

Plaintiff has available to him all of the discovery tools described in the Federal Rules of Civil Procedure. If he has questions about how to use those tools, he is free to ask the magistrate judge for guidance at the preliminary pretrial conference.

In summary, I believe that plaintiff is capable of prosecuting this lawsuit. At this time, I am not convinced that having appointed counsel will make a difference in the case's

outcome.

ORDER

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

Entered this 7th day of December, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge