

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

JEFFREY D. LEISER,

Plaintiff,

v.

BELINDA SCHRUBBE, R.N., *et al.*,

Defendants.

ORDER

11-cv-254-slc

Plaintiff Jeffrey D. Leiser has filed a civil rights complaint under 42 U.S.C. § 1983, alleging that the defendants (Belinda Schrubbe, Charles Larson, Debbie Lemke, Paul Sumnicht, Mark Jensen, Sandy Jackson, Tonia Rozmarynoski, Cynthia Thorpe and Tammy Giese) violated his Eighth Amendment right to receive medical care while he was incarcerated at the Waupun Correctional Institution. The case is proceeding to trial on November 13, 2012.

Now pending before the court is Leiser's motion for appointment of counsel. Leiser also has filed a motion to reconsider a ruling made previously on October 23, 2012, denying his request for writs of habeas corpus ad testificandum for the following inmate witnesses: Robert Price, Robert Osowski and his brother, Loren Leiser. Each motion is considered separately below.

Motion for Counsel

Unlike indigent criminal defendants, civil litigants have no automatic right to court-appointed counsel. *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997). The federal *in forma pauperis* statute provides that “[a] court may request an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1). Absent any mandatory language, this statute merely confers discretion “to recruit a lawyer to represent an indigent civil litigant *pro bono publico*[.]” *Pruitt v. Mote*, 503 F.3d 647, 653-54 (7th Cir. 2007) (en banc). In other words, it authorizes the court to recruit a volunteer. *See id.*

Leiser's motion for appointment of counsel be denied because he fails to meet the threshold requirement of reasonable diligence. In that respect, before deciding whether to appoint counsel, I must find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, Leiser must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Leiser, who concedes that he has asked only one unidentified attorney to represent him, does not satisfy this criteria.

Leiser has been aware of the deadlines in this case since the pretrial conference order issued nearly a year ago on November 23, 2011. Leiser explains that he did not seek counsel earlier because he did not think his complaint would survive summary judgment. This is not a valid excuse and it is not reasonable, in this court's view, to wait until the eve of trial to attempt to locate *pro bono* counsel or to file a motion for appointment of counsel. Granting this last-minute motion would force this court to move the trial date back in order to give new counsel time to prepare, resulting in undue delay. Leiser's lack of diligence is reason enough to deny his motion for appointment of counsel. *See Jackson*, 953 F.2d at 1072. Because Leiser offers no valid reason for his delay, the motion for appointed counsel will be denied.

Alternatively, even had Leiser filed his motion well in advance of trial, I would still deny his request for appointment of counsel. The test for determining whether to appoint counsel is two-fold: "[T]he question is whether the difficulty of the case – factually and legally – exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). In other words, given the complexity of the case, does this plaintiff appear to be competent to try the case on his own? *See Santiago v. Walls*, 599 F.3d 749, 761 (7th Cir. 2010) (citing *Pruitt*, 503 F.3d at 654). Here, Leiser simply

asserts that counsel is needed because the “issues are complex in this case” and he is “not a schooled lawyer[.]”

With regard to the difficulty of the claim, Leiser’s complaint has been narrowed to a straightforward Eighth Amendment claim that the defendants were, in one way or another, deliberately indifferent to his serious medical need. The law governing this type of claim has been settled since *Estelle v. Gamble*, 529 U.S. 97 (1976), and was explained to plaintiff both in the order granting him leave to proceed and in connection with defendants’ motion for summary judgment.

I conclude that appointed counsel is not warranted because the challenges that Leiser 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. Although it is true that prisoner cases raising Eighth Amendment claims of denial of medical care almost always present “tricky issues of state of mind and medical causation,” *Hudson v. McHugh*, 148 F.3d 859, 862, n.1 (7th Cir. 1998), this is not sufficient reason by itself to find that plaintiff’s case presents exceptional circumstances warranting appointment of counsel. Like the plaintiff in *Hudson*, plaintiff will have to prove defendants’ state of mind and the medical causation for the injuries he suffered, if any. 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 by itself an exceptional circumstance warranting appointment of counsel. If it were, every prisoner civil rights case involving deliberate indifference would require such an appointment.

The record in this case reveals that Leiser has competently represented himself thus far and that he is capable of continuing to litigate his claims. All of his submissions have been reasonably articulate and neatly typed. These submissions also reflect that Leiser has an understanding of the issues present in an Eighth Amendment deliberate indifference case and that he has ample access to discovery materials. With the exception of his claim that he was

wrongfully denied access to medical recreation, Leiser successfully defeated defendants' motion for summary judgment. Based on this record, Leiser's asserted lack of legal training does not amount to an exceptional circumstance given that most inmates have little or no formal education and limited courtroom experience. Leiser has been provided with a trial preparation order, dkt. #82, which contains detailed instructions relating to the conduct of trial. Therefore, I conclude that Leiser's motion for appointment of counsel must be denied.

Motion to Reconsider Witnesses

In an order dated October 23, 2012, dkt. #108, I denied Leiser's request for writs of habeas corpus ad testificandum to secure the presence of three inmate witnesses (Price, Osowski and Loren Leiser). Leiser asks for reconsideration, arguing that these proposed witnesses would testify that Leiser was in a pain and complained about his treatment frequently. None of the proposed witnesses have first-hand information about the treatment that Leiser received or the medical decisions that form the basis of Leiser's complaint. Leiser's own testimony about the degree of pain that he experienced is preferable to second-hand accounts made by others, who lack personal knowledge of Leiser's actual condition. To the extent that Leiser proffers that these witnesses could offer accounts of their own allegedly inadequate medical treatment, it is not likely that this evidence would pass the relevancy threshold of F.R. Ev. 401; even if it did, F.R. Ev. 403 would apply because any arguable probative value of such evidence (which is only sketchily outlined) is substantially outweighed by the danger of unfair prejudice, confusing the jury, undue delay, and wasting time. Additionally, Leiser has not shown that such testimony would qualify as admissible "other acts" evidence under F.R. Ev. 404(b). Therefore, I will deny Leiser's motion to reconsider issuing writs of habeas corpus ad testificandum for these above-referenced inmates.

ORDER

It is ORDERED that:

- (1) Plaintiff Jeffrey D. Leiser's motion for appointment of counsel, dkt. #113, is DENIED.
- (2) Plaintiff Jeffrey D. Leiser's motion for reconsideration, dkt. #114, is DENIED.

Entered this 7th day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge