IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONY WALKER,

ORDER

Plaintiff,

00-C-0281-C

v.

SHARON K. ZUNKER,
JEANANNE GREENWOOD,
DANIEL R. BERTRAND,
JEFFREY JAEGER,
METODIO REYES and
WENDY BURNS,

Defendants.

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Plaintiff has moved to amend his complaint to reinstate the Department of Corrections, Bureau of Health Services, and Green Bay Correctional Institution as defendants in this action. In addition, he has filed motions for a preliminary injunction and for appointment of counsel.

<u>Motion for Appointment of Counsel</u>

In support of his request for appointed counsel, plaintiff argues that the issues raised in

his case are complex and that he does not believe he will be able to adequately investigate the operation of the prison or obtain essential expert testimony.

Before the court can consider a pro se plaintiff's motion for appointment of counsel, the plaintiff must make a showing that he has made reasonable efforts to find a lawyer on his own. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff has not done that. However, his motion would have to be denied in any event.

The determination whether to appoint counsel is to be made by considering whether the plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel 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)). Although it is early in this case, it appears that plaintiff is competent to read, express his thoughts in writing, and follow directions generally.

Plaintiff's case raises only one legal issue: whether government officials are being deliberately indifferent to plaintiff's serious back pain by their decision to deny him treatment. Plaintiff appears to recognize that in order to succeed on his claim that defendants are being deliberately indifferent to his serious medical needs, he will need to find a medical expert willing to testify that his back pain is so serious that failure to treat it constitutes cruel and unusual punishment. It is not plaintiff's incarceration or his pro se status that makes this task difficult.

Any plaintiff suing for lack of medical treatment will have to contact different doctors until he finds one willing to testify on his behalf and he has to pay the high cost of the expert's services.

Because the cost of medical experts is so great, most individuals suing for medical mistreatment seek out a lawyer who would be willing to take the case on a contingent fee basis. This means that if the plaintiff wins, the cost of the experts will be recovered and the lawyer will be paid for his or her time and expenses in pursuing the case. The contingent fee system serves as a reality check for litigants. If no lawyer with a background in medical malpractice or mistreatment cases is willing to take plaintiff's case, chances are high that the case is one the lawyers have assessed either as not likely to succeed or as not likely to reap a damage award large enough to recoup the expense of prosecuting the case.

As noted earlier, plaintiff has not asked any lawyer to take his case. Once he begins this process, he will either find a lawyer willing to take the case or he will discover that no lawyer is willing to do so. It is difficult for lawyers to decline to take a case when the court asks them to do so. Therefore, it is inappropriate for a court to select a lawyer to take the case without regard for his or her assessment of the risks of incurring the expense of the lawsuit against the probability of succeeding on the merits of the case. If plaintiff is to be represented by counsel, he will have to find counsel on his own. If he wishes, he may contact the Wisconsin State Bar Lawyer Referral and Information Service at P.O. Box 7158, Madison, Wisconsin, 53707, 1-

800-362-8096, to obtain the names and phone numbers or addresses of lawyers whose practices include medical malpractice cases or claims of deprivation of medical care under the Eighth Amendment.

I conclude that this is not a case in which the appointment of counsel is warranted. Plaintiff appears to be competent to represent himself given the straightforward nature of the case. Furthermore, I conclude that if plaintiff is unable to find a lawyer willing to take his case on a contingent fee basis, then that will serve as a strong indication that his case is not likely to succeed whether or not he has appointed counsel.

Motion to Amend Complaint

As noted earlier, plaintiff has moved to amend his complaint to reinstate the Department of Corrections, Bureau of Health Services, and Green Bay Correctional Institution as defendants in this action. In the proposed amended complaint accompanying the motion, he contends that "as a matter of policy," the Department of Corrections and Green Bay Correctional Institution confiscate prescribed medical products from inmates entering the institution. Further, he contends that "as a matter of policy," the Bureau of Health Services "fails to adequately train, discipline or otherwise direct its staff . . . ."

I have twice before denied plaintiff's request for leave to proceed in forma pauperis

against proposed defendants Department of Corrections and Bureau of Health Services. In an order entered August 9, 2000, I noted that in order for plaintiff to recover on his claim against the defendants, he would have to prove each defendant's personal involvement in the alleged denial of his Eighth Amendment rights. Because it appeared that he was suing the Department of Corrections and Bureau of Health Services on a theory of *respondeat superior*, a theory not allowed in actions such as this one brought as under 42 U.S.C. § 1983, I did not allow him to proceed against these proposed defendants. Subsequently, I denied plaintiff's motion for reconsideration of the August 9 order, finding that he had not shown that the denial of leave to proceed in forma pauperis against the Department of Corrections or Bureau of Health Services was legal error. Now plaintiff attempts to cure his failure to allege personal involvement by making conclusory allegations that his rights were violated by policies initiated by the Department of Corrections, Bureau of Health Services and Green Bay Correctional Institution.

Plaintiff's reference to the Department of Corrections' and Green Bay Correctional Institution's policy of confiscating prescribed medical products from inmates entering the institution is nothing more than a resurrection of his earlier claim that defendants' refusal to provide him with an egg crate mattress violates his rights under the Eighth Amendment. As I advised plaintiff in the order entered in this case on July 17, 2000, the refusal to provide him

with an egg create mattress, by itself, does not rise to the level of constitutional harm because it does not constitute an excessive risk to his health and safety.

Furthermore, plaintiff's contention that as a matter of policy the Bureau of Health Services fails to adequately train, discipline or otherwise direct its staff is the same thing as a claim that the Bureau of Health Services should be held liable for the constitutional wrongdoing of its employees. This is precisely the kind of claim a litigant would raise under a theory of *respondeat superior* liability, which is a theory of liability unavailable to plaintiff in this case. Moreover, none of the proposed defendants are "persons" within the meaning of § 1983. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989) (states and state agencies are not persons under § 1983 and therefore are not subject to suit for the alleged violation of a plaintiff's civil rights). Accordingly, plaintiff's motion to amend his complaint will be denied.

Motion for Preliminary Injunction

Plaintiff seeks an injunction directing defendants to provide him with proper treatment and medication for his painful back condition and preventing them from retaliating against him. Plaintiff did not allege any factual allegations in his complaint that could be construed as a claim of retaliation for the exercise of a constitutional right. Therefore, it is not appropriate for him to raise such a claim in the context of a motion for preliminary injunction in this case.

With respect to plaintiff's request for an injunction regarding his medical treatment, the motion will be denied without prejudice to plaintiff's refiling it with affidavits or other evidentiary matter showing that (1) he has no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits of his case; and (4) the injunction would not frustrate the public interest. Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985). In addition, if plaintiff refiles his motion, the parties must follow this court's procedures for preliminary injunctive relief, a copy of which is enclosed with this order.

ORDER

IT IS ORDERED that

1) plaintiff's motion for appointment of counsel is DENIED;

2) plaintiff's motion to amend his complaint is DENIED; and

3) plaintiff's motion for a preliminary injunction is DENIED with prejudice with respect to his retaliation claim, and without prejudice to his refiling the motion regarding his medical care with proper support.

Entered this 20th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge