

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

LEONARD A. CROSS,

Plaintiff,

v.

THOMAS KARLEN, Warden, Jackson
Correctional Institution; and DENTAL
STAFF at Jackson — unknown at this
time,

Defendants.

ORDER

03-C-142-C

In an order entered in this case on May 28, 2003, I allowed plaintiff to proceed in forma pauperis on his claim that defendants were deliberately indifferent to his serious dental needs in violation of the Eighth Amendment prohibition against cruel and unusual punishment. In the same order, I denied plaintiff's motion for appointment of counsel without prejudice to his renewing the motion at a later date. Now plaintiff has filed a second motion for appointed counsel, together with a showing that he has asked four different lawyers to assist him and has been unsuccessful in obtaining the agreement of any one of them to do so.

Plaintiff's second motion for appointment of counsel will be denied. As I advised plaintiff when I considered his first motion, the decision to appoint counsel requires consideration of plaintiff's competency to represent himself given the complexity of the case and if I determine that he lacks competency, whether the presence of counsel would make a difference in the outcome of his lawsuit. See Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)).

Plaintiff's filings to date reveal his ability to read, express his thoughts clearly in writing and follow directions generally. Moreover, the issue raised in his case is not legally complex. The law governing Eighth Amendment claims relating to medical or dental treatment of prisoners is well settled. The question to be resolved is whether defendants were deliberately indifferent to plaintiff's serious dental needs. See Estelle v. Gamble, 429 U.S. 97 (1976); Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996). Resolution of this question will rest entirely upon the factual evidence the parties produce on a motion for summary judgment or at trial, if the case reaches that stage.

Before the merits of plaintiff's claim need be developed fully, the case will have to survive defendants' motion to dismiss the lawsuit for plaintiff's failure to exhaust his administrative remedies. Plaintiff is competent to oppose this motion. He should have ready access to copies of his own administrative complaints and appeals relating to the claims raised in this lawsuit.

Finally, plaintiff's case is the kind of case that would ordinarily generate interest among members of the bar. However, if the case proceeds to a decision on the merits, plaintiff will need to obtain the testimony of a dental expert. Because the cost of medical and dental experts is so great, most individuals suing for medical or dental mistreatment of the serious nature required to state a claim under the Eighth Amendment seek out a lawyer that 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 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 result in a damage award large enough to recoup the expense of prosecuting the case.

It is difficult for lawyers to decline to take a case when the court asks them to do so. Therefore, in an ordinary dental care case such as this one, it is inappropriate for a court to select a lawyer to take the case without regard for the lawyer's 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 or dental malpractice or Eighth Amendment cases.

ORDER

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

Entered this 24th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge