IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAWN McGARVEY,

Plaintiff,

ORDER

04-C-269-C

v.

THOMAS BORGAN,
ANDREW BATH and
LT. DOMMISSE,

Defendants.

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For the third time in this action, plaintiff has moved for appointment of counsel. Both of plaintiff's earlier motions were denied as premature. When he filed the first motion, plaintiff had not made the threshold showing that he made reasonable efforts to retain counsel and was unsuccessful. He subsequently made the showing, but at the time he filed his second motion, the court was considering defendants' motion to dismiss plaintiff's case on the ground that plaintiff failed to exhaust his administrative remedies. On October 22, 2004, I granted defendants' motion to dismiss plaintiff's retaliation claims, but denied the motion to dismiss with respect to plaintiff's claim that the defendants violated his Eighth Amendment right to medical care by cancelling his scheduled appointments with a physician

and discontinuing his prescribed treatment for a work injury.

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir.1993)(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. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not, however, 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 mediation 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. (At this early stage of the proceedings, there is no evidence in the record that plaintiff suffered any injury as a result of defendants' alleged cancellation of his medical appointments or "prescribed treatments." However, the documentation of plaintiff's exhaustion efforts suggests that plaintiff may have missed physical therapy for a work-related shoulder injury that was prescribed by a doctor on August 22, 2003.) 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 argues that he needs a lawyer to help him with his case because "the issues . . . are complex and may require investigation, which plaintiff cannot do while in prison." In addition, plaintiff states that he has "limited skill" in presenting his claim and that the inmate who was helping him with his case has been transferred.

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.

Although plaintiff suggests that he cannot investigate the facts of his case while he is in prison, I see no reason why this would be true. He does not allege any impairments, such as an inability to read or write. Indeed, in his recent motions, which he has presumably filed without the assistance of another inmate, he reveals that he is at least as capable as the average pro se litigant to present his claims. His written submissions are clear and reflect his ability to understand what this court has said in its previous orders and to respond appropriately.

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 scheduled for November 23, 2004. In addition, plaintiff has personal knowledge of the treatment and medical appointments he has alleged were cancelled and he should be able to obtain access to his own medical records to corroborate this information. His medical records should show how long he was deprived of continued treatment and what injury resulted, if any. 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 motion for appointment of counsel is DENIED.

Entered this 3rd day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge