

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

KURTIS L. KING,

Plaintiff,

v.

MATTHEW FRANK in his official capacity;
GARY R. McCAUGHTRY, in his official
and individual capacities;
CURTIS JANSSEN, in his official
and individual capacities;
STEVEN SCHUELER, in his official
and individual capacities;
KEVIN FRITZ; TODD RUSSELL; MATT ROBINSON;
CLINT SCHLIEVE; and JENNIFER OPPERMAN,

Defendants.

ORDER

04-C-338-C

Plaintiff Kurtis King is proceeding in this action on claims that during his confinement in the Health and Segregation Complex at the Waupun Correctional Institution, he was subjected to restricted telephone usage and constant night lighting, denied publications and visitation privileges, and denied adequate mental health care. On February 14, 2005, plaintiff was transferred to the Wisconsin Resource Center, mooting his claims for declaratory and injunctive relief.

On February 18, 2005, defendants moved for summary judgment. In support of their motion, defendants have submitted evidence explaining the type of lighting to which plaintiff was subjected at night, the mental health treatment he received, and the step program that includes varying levels of restrictions on access to telephones, publications and visitation. Plaintiff's response to the motion is due to be served and filed no later than March 21, 2005. Now plaintiff has moved for appointment of counsel. The motion is supported by evidence that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful in that effort.

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 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 similar to the challenges faced by other pro se litigants claiming deliberate indifference to a serious medical or mental health care need, or conditions of confinement that are alleged cruel and unusual. Like the plaintiff in Hudson, plaintiff will have to prove defendants' state of mind and the causation for his mental health injuries, if there is one. Such proof may well be difficult to come by. But the fact that matters of state of mind and 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 or mental health care.

Plaintiff says that he needs a lawyer to help him with his case because he has a serious

mental illness. However, the psychological evaluations he has submitted in support of this assertion reveal that he suffers from an anxiety disorder, depression and post-traumatic stress syndrome, the latter of which began in 1998 when his cell mate committed suicide. These evaluations reveal as well that plaintiff's disorders are controlled with medications.

Plaintiff states that he has a high school education but no legal education. Nevertheless, the record shows that he has done an above-average job of presenting the claims in his complaint and conducting discovery. He communicates very well. He has shown the capacity to follow court procedures. To the extent that plaintiff may have found it difficult to obtain evidence to prove his claims, it appears more likely that the evidence is lacking and not plaintiff's ability to uncover it.

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 4th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge